CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
THE CONSTITUTION

OF THE

COMMITTEE ON
THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110

BILLS PROPOSING A CONSTITUTIONAL AMENDMENT WITH RESPECT TO ABORTION

OCTOBER 5, 14, 19, NOVEMBER 4, 5, 12, 16,
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CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

MONDAY, OCTOBER 5, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators DeConcini and Leahy.

Also present: Senator Packwood.

Staff present: Stephen Markman, general counsel; Peter Ormsby, professional staff assistant; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. This marks the first in a series of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution regarding abortion.

There are currently four constitutional proposals on this subject before the subcommittee—Senate Joint Resolution 17, introduced by Senator Garn; Senate Joint Resolution 18, introduced by Senator Grassley; Senate Joint Resolution 19, introduced by Senator Helms; and Senate Joint Resolution 110, which I introduced recently.

These hearings represent the first report by the Senate in more than 6 years to address all of these questions, although hearings were held earlier this year in the Subcommittee on the Separation of Powers on the subject of S. 158, a statutory measure designed to restrict abortions.

Given the continuing controversy in this land on the abortion issue and the divisions that the issue has created, I believe that the time is long overdue to take another look at the propriety of legislative action.

During these hearings we hope to hear from witnesses with a broad variety of perspectives on the abortion issue. Given the inevitable constraints of time, as well as our intention to engage in substantial dialog with most of our witnesses, this subcommittee will not be able to hear from everyone who can contribute to our deliberations on this issue.

We will do our best however to insure fair and thorough hearings and would very much welcome written statements by those whom we are unable to accommodate.

Whatever their respective views on the issue of abortion, what has become increasingly clear to most people since January 22, 1973, is that the passions generated by the Supreme Court's decisions that day—*Roe* v. *Wade* and *Doe* v. *Bolton*—are not going to gently subside and disappear.

The social consensus that frequently develops around even controversial decisions of the High Court has simply never emerged. Rather, the intensity of the early response to these decisions has endured. This intensity has increasingly been reflected in bitter and divisive congressional debate.

While I will leave it to our highly capable witnesses today to expound upon these decisions and their offspring, what they did, in summary, was to read into the Constitution a previously unrecognized right in a woman to terminate her pregnancy.

During the first trimester of pregnancy this right was absolute and could not be restricted by society. During the second trimester this right remained inviolable except that the State could require that an abortion be performed in a hospital and by a licensed doctor. During approximately the final trimester this right could be restricted except to the extent that the mother's health would be jeopardized.

As a result of these decisions State laws in virtually every State of the country were rendered unconstitutional. Prior to the abortion cases 31 States had enacted virtually total prohibitions on abortion, with no State having enacted anything as permissive of abortion as required by *Roe* and *Doe*.

As a result of these decisions there are those who would argue that in this country today there is effective abortion on demand throughout the entire term of a pregnancy. Others would dispute this description. I would look forward to this issue being addressed by our witnesses today and in the future.

In any event, I believe that it is fair to say that there are few societies that have more permissive abortion laws than in the United States today. Quite apart from the merits or demerits of this abortion right, much of the controversy that has been generated about it has stemmed from the manner in which it has been achieved.

It has emerged, not through the representative, legislative processes, not through a newly developing social consensus, not through an amendment to the Constitution, and not in response to any revolution in moral and ethical principles that might have been reflected through evolving Federal and State policies.

Rather, it emerged through a decision of the Supreme Court based, many feel, more upon the personal policy preferences of the Justices than upon the dictates of the document that they purported to interpret.

There is no shortage of serious criticism of the jurisprudence of the abortion cases from legal and constitutional scholars who are entirely unmoved by the abortion issue itself.

The Constitution has been amended before in response to Supreme Court decisions. The 11th amendment, the 14th amendment, the 16th amendment, and the 26th amendment all were ratified in order to overturn Court decisions that were believed erroneous or that were disapproved for other reasons by the people.

Before we proceed, I would briefly like to summarize my own views on the abortion controversy. By and large, they have not been a secret to anyone in the past. Quite simply, I believe that abortion under virtually all circumstances is wrong because it involves the taking of a human life. This is my own moral, ethical, and—dare I say it—religious perspective. I believe also that, from a medical and a legal perspective, a similar conclusion results.

Whatever ambiguity or uncertainty there may be about the existence of this human life—and I do not believe there is any, personally—I believe that such ambiguity or uncertainty ought to be resolved in behalf of extending legal protections.

Further, because I believe that it is human life that we are talking about, I personally have no reservations about elevating this protection into the Constitution. Where doubts about the "personhood" of blacks once justified a constitutional resolution, I believe that similar doubts about the "personhood" of the human fetus may appropriately be resolved through the Constitution.

We are fortunate enough on this day to have two of the Nation's foremost legal and constitutional scholars with us to address our subject.

For our first day of hearings we will focus on the matter of the constitutional and legal background of the abortion right. I very much look forward to the testimony and at this time will turn to Senator Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

If there is one quality of the U.S. Constitution that distinguishes it from every other written constitution on Earth it is the durability of the document. It has endured in its original text for nearly 200 years. It has been amended very, very sparingly.

The 16 amendments adopted since the adoption of the Bill of Rights have covered a very wide range of moral and political concerns. One issue has accompanied every proposal to amend the Constitution, and it is with us today—namely, the appropriateness of amending the Constitution to settle a matter that deeply divides the Nation.

The hearings we begin this morning will ideally do at least two things: They will raise every possible point of view on the status of abortion in America, ranging from an historical and legal review, religious and moral viewpoints, and a discussion of several proposals to amend the Constitution to change the law relating to abortion.

But underlying these concerns will be a second point of the hearings—exploring the issue of implementing a national abortion policy by means of a constitutional amendment.

Amendments to the Constitution have generally reflected the outcome of issues resolved by the American people, sometimes after generations of debate and deep divisions of opinion.

The adoption process is difficult and is purposely designed to prevent amendments that do not reflect the sound and durable consensus of a pluralistic society.

The amendments that have embodied such a consensus have endured, and they are a living part of the Constitution, but where we amended the Constitution without a national meeting of the minds we were forced to retract the amendment and only after devastating effects on society.

Today in the United States there is no consensus on the issue of abortion. I have a great concern that the proponents of the amendments we will consider in the next weeks believe that a constitutional amendment will provide consensus and thereby end the shrill and divisive debate about abortion, privacy, the nature of human life, sound medical practice, and an almost endless list of related issues.

Constitutional amendments memorialize consensus, but they do not create it. In normal times I would say that my concerns about improvident constitutional amendments are adequately dealt with by the adoption process which requires a two-thirds vote by the Congress and ratification by three-fourths of the States, but it is even possible for this process to produce unwise results if the atmosphere of deliberation gives way to one of passion and pressure.

I do not expect the coming debate to be an unemotional one. In fact, on such an issue I do not think anybody should claim that it should be. But I do hope that as Senators we can evaluate the testimony we are about to receive from a legal, an historical, and a moral point of view, and whatever our conclusion—whatever our conclusion—then go on to debate the wisdom and appropriateness of a constitutional amendment.

Maybe for this issue it is asking the impossible. But if there is a body in the Nation that should be able to be passionate and concerned as people and fair and dispassionate as makers of law, it should be the U.S. Senate.

It must be obvious to all by now that these hearings are not unrelated to a great deal of political change that has occurred outside of these Chambers in the last few years.

The conservative mood in the country is a matter of record, and the flowering of that new mood or any other mood is what political liberty is all about.

New conservatism or old liberalism are simple labels, and they really do not concern me at all, but I am deeply concerned about what I might call the new positivism—the conviction that one's views have the quality of revealed truth and that all opposition is perversity.

A tremendous amount of national energy is now being devoted to the effort to amend the Constitution. I am afraid that in the wash of that energy anyone who says he or she is a strong personal opponent of abortion but who does not support efforts to impose that opinion on everyone in nearly all circumstances is said to give lip service only.

I oppose abortion. I oppose it for moral and ethical reasons. I would like to see the need for abortion decline through a responsible but thorough education of our young people through counseling and through more effective birth control programs.

I question whether my personal views on abortion should be imposed on others. I question whether the views of this committee or the Congress or of any government authority seeking to impose uniform rules of conduct where people are deeply divided on a matter of individual conscience can work.

Those are the issues. Those are the issues that we must face here.

I agree that the issue of human life is the most important issue of our time or any time. It is an issue that hangs in the balance as we seek to put behind us the specter of nuclear holocaust. It is an issue as we dare to raise our heads and look into the bulging eyes of starving children in the homes of one-third of the world. It is an issue as we decide if we will stop poisoning the air and the ocean. The human life issue goes across all things, not just the one that we face here in this committee.

There are few easy solutions to any of these problems, and no lasting solution comes from one sweep of a pen. This is a good time in history for all of us, especially those of us in Congress, to recognize our limitations and our fallibility.

In the next weeks we will hear from witnesses whose convictions and expertise are undoubted. We are thankful to them. Mr. Chairman, as all other members of this subcommittee, I will listen carefully.

I would also note for the chairman that, as he knows, we have—as often happens in these matters—before the Intelligence Committee a matter of very significant importance at 10:30 this morning which will require the attendance of any of us who are also members of the Intelligence Committee.

Senator HATCH. We understand. We know how busy all Senators are.

We are happy to have the ranking minority member on the Constitution Subcommittee here, Senator DeConcini.

[The bills introduced follow:]

97th CONGRESS
1st Session

S. J. RES. 17

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

IN THE SENATE OF THE UNITED STATES

January 22 (legislative day, January 5), 1981

Mr. Garn (for himself, Mr. Abdnor, Mr. D'Amato, Mr. Danforth, Mr. DeConcini, Mr. Denton, Mr. Eagleton, Mr. East, Mr. Ford, Mr. Goldwater, Mr. Grassley, Mr. Hatch, Mr. Hatfield, Mrs. Hawkins, Mr. Helms, Mr. Huddleston, Mr. Humphrey, Mr. Jepsen, Mr. Lugar, Mr. McClure, Mr. Nickles, Mr. Pressler, Mr. Proxmire, Mr. Randolph, Mr. Symms, Mr. Zorinsky, Mr. Andrews, and Mr. Kasten) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

"SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

"SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.".

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97TH CONGRESS
1ST SESSION

S. J. RES. 18

Proposing an amendment to the Constitution of the United States with respect to the right to life.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 5), 1981

Mr. GRASSLEY introduced the following joint resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to the right to life.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

“ARTICLE —

“SECTION 1. With respect to the right to life, the word ‘person’ as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

“SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

“SECTION 3. The Congress and the several States shall have power to enforce this article by appropriate legislation.”.

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97TH CONGRESS
1ST SESSION

S. J. RES. 19

Proposing an amendment to the Constitution of the United States guaranteeing the right of life.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 5), 1981

Mr. HELMS introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States guaranteeing the right of life.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE XXVII

"The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency.".

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II

97TH CONGRESS
1ST SESSION

S. J. RES. 110

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21 (legislative day, SEPTEMBER 9), 1981

Mr. HATCH introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“Article—

“A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern.”.

○

[From the Congressional Record, Sept. 21, 1981]

By Mr. HATCH: S.J. Res. 110. Joint resolution to amend the Constitution to establish legislative authority in Congress and the States with respect to abortion; to the Committee in the Judiciary.

HUMAN LIFE FEDERALISM AMENDMENT

Mr. HATCH. Mr. President, I am proposing an amendment to the Constitution today—the human life federalism amendment—that would overturn the infamous decision of the U.S. Supreme Court in *Roe* v. *Wade* 410 U.S. 113 (1973). This amendment would restore to the representative branches of Government the authority to legislate with respect to the practice of abortion.

ROE AGAINST WADE

In Roe against Wade, the Court found that the due process clause of the 14th amendment contained a guarantee of a "right to privacy" that was broad enough to encompass a woman's decision "whether or not to terminate pregnancy." Id. at 153. Because the right to personal privacy was a "fundamental right," it could be limited only by some "compelling State interest." Id. at 153. While such an interest could not be based upon the inclusion of unborn human life in the term "person" in the 14th amendment—with respect to which there may be no deprivation of life without due process of law—the Court nevertheless found some meausre of State interest in protecting maternal health and in preserving the "potential life" of the fetus. Id. at 148.

In seeking to give expression to these interests, as well as protecting the newly discovered right to terminate one's pregnancy, the Court summarized its holding in the following manner:

(a) For the stage prior to approximately the end of the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. 410 U.S. at 164-165.

The scope of the abortion right set forth by the Court in Roe against Wade on January 22, 1973, was broader than that existing at the time in every one of the 50 States in the Union.

Prior to Roe against Wade, 31 States had statutes on their books that totally protected life from conception. Of the 19 that permitted abortion under certain circumstances, all 19 permitted abortions where necessary to save the life of the mother, 6 permitted abortions in cases of rape, 5 in cases of incest, and 4 in cases where there was likelihood that a child would be born with a substantial deformity. In only four States was abortion on demand permitted and in each of these, there were temporal limits to such a right. The most liberal provision existed in the State of Massachusetts which permitted abortions without restrictions until the sixth month of pregnancy.

Whatever one's perceptions about abortion, it is difficult to argue with the proposition that Roe against Wade has created a regime of abortion on demand, a national policy of abortion without restrictions of any significant kind. It is this status quo that would be overturned by the proposed human life federalism amendment.

During the first trimester of the pregnancy, the plenary right to abortion is express. During that period, there is absolutely no governmental authority to intervene in the woman's decision to abort. During the second trimester, a Government interest in abortion does arise—the interest in protecting and preserving maternal health. This interest may be expressed through governmental requirements that such abortions be performed within hospitals, clinics, or other facilities licensed to perform abortions.

There remains an absence of governmental authority, however, to do anything more than insure the safeness of the procedures of abortion. There are no protections whatsoever for the unborn fetus during this stage of the pregnancy.

During the final trimester of abortion—or approximately at that point at which the fetus reaches "viability"—a potential interest arises in protecting the fetus. The Government, finally, was in a position to protect the life of the fetus.

The Court, however, limited even this authority with an exception—and it was an exception that consumed the rule. During even the third trimester of the pregnancy, the right to abortion existed where necessary to protect the life or health of the mother. The critical element here was the health of the mother.

According to the Court in the companion case of *Doe* v. *Bolton* 410 U.S. 179 (1973), whether or not the health of the mother necessitated an abortion was a medical judgment to be made "in the light of all factors—physical, emotional, psychological, and the woman's age—relevant to her well-being." Id. at 192.

In other words, to quote Prof. John Noonan of the University of California Law School, the absolute right to abortion was curbed during the final trimester only by "the necessity of a physician's finding that she needed an abortion." Noonan, "A Private Choice" (New York: MacMillan, 1979), 12. It would be a rare physician who would be incapable of defending an abortion decision on the grounds that, in his best medical judgment, the "well-being" of the mother demanded it.

The abortion right then is a virtually unrestricted right under Roe and Doe. Any significant restrictions on this right are illusory. To quote Professor Noonan again:

> For the nine months of life within the womb the child was at the gravida's (pregnant woman's) disposal—with two restrictions: She must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion. *Id.* at 12.

No substantial barriers of any kind exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy.

JURISPRUDENCE OF ROE

Apart from the national policy of abortion that it spawned, the Roe decision has been criticized broadly as an exercise in jurisprudence by observers of varying political persuasions and varying perspectives on abortion. In dissent in the Roe and Doe cases, Justice White observed:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing State abortion statutes. 410 U.S. at 221.

Justice Rehnquist added in an accompanying dissent:

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. . . . To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. 410 U.S. at 174.

Prof. Archibald Cox, the former Solicitor General of the United States, remarked of the Roe decision:

> The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. . . . Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution. Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976), 113–114.

Prof. John Hart Ely of the Harvard Law School, while taking care to divorce himself from critics of the substantive policy expressed in Roe, concluded:

> It is, nevertheless, a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be. Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade* 82, Yale Law Journal 920, 947 (1973).

Alexander Bickel, professor at the Yale Law School, described the decision as akin to a "model statute" and expressed bewilderment at how such a responsibility had come to be vested in the Court:

> One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject . . . *Roe* is derived not from Herbert Spencer's Social Statics, but from fashionable notions of progress . . . this will not do. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 28.

Prof. Charles Rice of the Notre Dame School described the decision as "the most outrageous decision ever handed down by the Court in its entire history"; Prof. Richard Epstein of the University of Chicago Law School referred to Roe as "comprehensive legislation," without "principled grounds"; Prof. Robert Byrn of the Fordham Law School attacked the decision as resting upon "multiple and profound misapprehension of law and history"; Dean Harry Wellington of the Yale Law School viewed Roe as "Pickwickian" and "without mandate"; and Prof. Joseph Witherspoon of the University of Texas Law School described the decision as "unquestionably the most erroneous decision in the history of constitutional adjudication by the Supreme Court." Professor Noonan concluded his analysis of the abortion cases by stating:

> The liberty established has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitmate and unprincipled, the imposition of the personal beliefs of fifty States. The continuation of the liberty is a continuing affront to constitutional government in this country. Noonan at 189.

OVERTURNING SUPREME COURT

Justice White in his Roe dissent aptly characterized the majority decision when he observed:

> The upshot is that the people and the legislatures of the fifty States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other hand.

It is this result that the proposed human life Federalism amendment is intended to overcome. The proposed amendment would restore to the States—as well as invest in Congress—the authority to legislate with respect to abortion. While I would personally favor an amendment that would personally favor an amendment that would impose a duty upon the States to prohibit virtually all abortions. I must stress that this is not the objective of the present amendment. It is not necessary that there be this duty in order to overcome the Roe and Doe decisions. It is necessary only that the representative branches of the Government no longer be totally limited in their ability to act in restricting or regulating or prohibiting abortion because of some presumed constitutional right to abortion.

There is no such constitutional right to abortion, in my view. It has never existed and there is nothing in the proposed measure that would concede that such a right has ever existed. I recognize, however, that, under our structure of Government, it is the duty of the Court to "say what the law is," *Marbury* v. *Madison* 1 Cranch 137 (1803). For better or worse, the Court has spoken on the issue of abortion in Roe and Doe; it has articulated a constitutional right to abortion emanating from the 14th amendment. There is no alternative now that a constitutional amendment to overcome this result—except to wait for the slim possibility that the Court may some day admit its error and overturn on its own the abortion cases.

There is certainly ample precedent for such a response to a Supreme Court decision. The 11th amendment to the Constitution, prohibiting the Federal judicial power to be exercised in suits by citizens of a State against another State, came in direct response to an action of the Supreme Court in accepting jurisdiction over such a case. *Chisholm* v. *Georgia,* 2 U.S. 419 (1793).

The 14th amendment, in circumstances not dissimilar from the present case, was proposed to the Constitution following the infamous decision of the Supreme Court in the *Dred Scott* case finding that black individuals were nonpersons under the Constitution. 60 U.S. 393 (1857).

The 16th amendment, permitting the imposition of a Federal income tax, was later enacted in response to a Supreme Court decision finding an unapportioned—by State—tax to be in violation of article I of the Constitution. *Pollock* v. *Farmer's Loan and Trust Co.,* 157 U.S. 429 (1895); 158 U.S. 601 (1895).

Finally, the 26th amendment, according 18-year-olds the right to vote in Federal and State elections, was proposed following the Court's decision that the Congress lacked authority to impose such an obligation statutorily upon the States. *Oregon* v. *Mitchell* 400 U.S. 112 (1970).

In addition, serious efforts at constitutional amendment were made in response to Court decisions on the subjects of child labor laws. *Hammer* v. *Dagenhart,* 247 U.S 251 (1918), later overruled in *United States* v. *Darby,* 312 U.S. 100 (1941); and State legislative apportionment requirements, *Baker* v. *Carr,* 369 U.S. (1962).

PROGENY OF ROE

It is not simply the abortion right that was created in Roe and Doe that is the object of my proposed amendment. However indefensible these decisions as matters of policy and jurisprudence, they have been distroted further by a series of subsequent decisions clarifying the scope of this right. Each of them have come in response to post-Roe efforts by the State to accord some measure of protection to unbron human life, or to establish some procedure to insure that the abortion decision was a deliberate, carefully considered one. In virtually every instance, the Supreme Court has struck down these exercises.

In *Planned Parenthood* v. *Danfoth* 428 U.S. 52 (1976), the Supreme Court held that spousal consent statutes, which required the consent to an abortion by the father of a fetus, were unconstitutional. See also *Coe* v. *Gerstein* 376 F. Supp. 695 (S.D. Fla. 1974), affirmed 428 U.S. 901 (1976). The Court in Danforth also held that so-called informed consent statutes, which required a physician to obtain the written consent of a woman after apprising her of the dangers of abortion and possible alternative, were constitutional only if the requirements were closely related to meternal health and not unnecessarily burdensome upon the abortion right. See also *Freiman* v. *Ashcroft* 584 F. 2d 247, affirmed 99 S. Ct 1416 (1979).

In *Belotti* v. *Baird* 443 U.S. 622 (1979), the Court held that, while parental consent statutes requiring monors to obtain the consent of their parents prior to having an abortion were not unconstitutional per se, the State must also provide alternative procedures for obtaining an abortion in the event that parental consent is not forthcoming or if the minor does not want to request such consent.

See also *Planned Parenthood* v. *Danforth* 428 U.S. 52 (1976). In *H.L.* v. *Matheson* Docket No. 79-5903 (1981), however, the Court upheld a Utah State statute prohibiting physicians, under narrowly defined circumstances, from perfoming an abortion of unemancipated minors without parental notification. The statute was drawn extremely narrowly to require such notification "if possible" and to apply if the minor is living with and dependent upon her parents and has made no showing or claim of unusual maturity.

In *Colautti* v. *Franklin*, 439 U.S. 379 (1979), the Court ruled that fetal protection statutes were generally unconstitutional by reason of being vague and overy broad. Such statutes, in one manner or another, impose an obligation upon a performing doctor to make reasonable efforts to save the life of an aborted fetus. In Colautti, the Court found that such statutes were permissable only with respect to viable fetuses—who by definition were least in need of such protection—and that they must contain precise standards for determining such viability. See also *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

Thus, even at the latest stages of pregnancy, the Court refused to find a significant interest in the life of the fetus that could be balanced against the apparently unrestricted right of the woman to terminate her pregnancy at will. It is the progeny of Roe and Doe, as much as Roe and Doe themselves, toward which my proposed amendment is directed. It is these cases which make clear the lengths to which some on the Court are prepared to go in defense of the abortion right.

FEDERALISM AMENDMENT

The proposed amendment would read in its entirety:

The right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions; *Provided*, That a law of a State more re-restrictive than a law of Congress shall govern.

It is language that I hope will be scrutinized by my colleagues, by the public, and by participants in the hearing process that will begin next month in the Subcommittee on the Constitution.

In removing the abortion controversy from the Federal judicial branch, the proposed amendment would place the debate within those institutions of Government far better equipped to deal with the issue. By its very nature, the judiciary is the wrong forum to resolve the enormously difficult problem of abortion. Because they cannot control the specific types of cases that come before them, and because they are limited in their ability to fashion compromise solutions to difficult issues, the courts are entirely the wrong place within which to argue about abortion.

The "all or nothing" legalization, of abortion-on-demand of Roe and Doe has done nothing but exacerbate the tensions already created by the abortion controversy. Unlike most legislative solutions in which some element of deference is paid to major political or social or occupational groupings, the abortion decisions involved a small group of seven individuals who totally ignored the passionately held views of a large number of the American people. They did this not in response to the unequivocal demands of the operative document of our Nation, but in the course of a decision whose jurisprudence and whose textual and historical foundation in the Constitution is at least as suspect as the policies that it fostered.

Let me be clear about what I am saying. I personally believe that abortion is an "all or nothing" issue. I am irreconciliably opposed to abortion. I believe that abortion involves the taking of a human life. It is morally, ethically, and—I believe—constitutionally wrong. Should my amendment become part of the Constitution, I would be among those seeking the most restrictive State and Federal laws with respect to abortion. When a greater consensus exists in this country on the repugnance of abortion—which consensus I believe will be promoted by this amendment—I will be among those seeking a direct constitutional prohibition on abortion.

That consensus, unfortunately, does not exist yet today. The abortion issue, if it is to be elevated into an issue of constitutional proportions, should be elevated only through the normal consensus-building procedure of the article V amendment process rather than through the process of judicial reinterpretation.

For the present, I believe that it is important to reenfranchise all the people in fashioning a solution to the abortion controversy. That can only be done by placing this issue back within the representative branches of Government where it should have remained all along. I would expect that the result would be difficult legislative compromises, bitter sessions of negotiation and give-and-take, and solutions not entirely satisfactory to any single group or individual, including myself.

Although I would expect to continue personal efforts to secure a total abolition of abortion in this country, I know that I would be able to tolerate a regime that permitted some abortions much better if it were the result of the clear will of the citizenry speaking through their representatives than where it has been the result of a small elite imposing their own personal views through the pretext of constitutional interpretation.

LEGISLATIVE OPTIONS

Because the proposed amendment would only provide authority to the State legislatures and Congress to act on the issue of abortion—without dictating particular legislative outcomes or policies—I would hope that all of my colleagues who can distinguish between abortion and run-of-the-mill medical operations would consider supporting it. Nothing is mandated by this amendment. It does not get involved with any issues relating to "when human life begins." It does not read in "rape" or "incest" or "medical necessity" exceptions into the Constitution. It does not require any particular treatment of contraceptives—which would not be covered by the amendment—or abortifacients or IUD's. No questions of tort law or criminal law or insurance law are inadvertently raised.

All that the proposed amendment would do is to "deconstitutionalize" the issue of abortion. There would no longer be a constitutional right or guarantee of abortion. Congress and the States, it is true, could act under the proposed amendment to totally prohibit abortion. They could prohibit abortions in all but narrowly limited or defined circumstances. I would personally support this. But, if they chose, they could undertake far less extensive reforms. They could, for example—

First. Choose only to limit the circumstances of late pregnancies alone;

Second. Choose only to impose obligations upon physicians to save the lives of fetuses capable of surviving an abortion;

Third. Place limitations upon the experimental and medical research use of fetuses;

Fourth. Require that women contemplating abortion be fully apprised of the risks of abortion and alternatives to abortion;

Fifth. Require some form of parental consent to abortions performed upon minors;

Sixth. Require some form of spousal consent to abortions performed upon a woman;

Seventh. Establish some minimum waiting period before and abortion could occur or require some form of professional consultation prior to an abortion;

Eighth. Establish rights of refusal to perform abortions in physicians or nurses, or in entire hospitals;

Ninth. Limit the commerce in abortifacient devices;

Tenth. Limit public advertising by abortion clinics and by abortion services.

The Congress and the States, if they chose, could further decide to do nothing about abortion. That, too, would be within their discretion under the proposed amendment.

MISCELLANEOUS ASPECTS

Let me briefly summarize some of the technical aspects of the proposed amendment that I have tried to consider carefully. I will, of course, look forward to hearing testimony on these and other aspects of the amendment during the upcoming Subcommittee on the Constitution hearings:

The "right to abortion" referred to in the first sentence is a right that apparently was derived in Roe from the due process clause of the 14th amendment. There is some suggestion even in Roe, though, that the right may be derived from the ninth amendment. Roe at 153. There is some confusion on this point. The purpose of the proposed amendment is to abrogate this "right" whatever its alleged constitutional basis.

There is some disagreement as for as whether or not each of the individual sentences of the amendment standing alone would effectively overturn Roe. I believe that they probably would, but have chosen to clarify this issue by proposing that each be placed into the Constitution. Together, it should be explicit that there is no constitutionally based right to abortion emanating from any provision of the Constitution that might potentially restrict the ability of Congress or the States to legislate with respect to the subject.

The right to legislate with respect to abortion would, of course, be restricted by other provisions of the Constitution not relating to a right to abortion. It would be a clear violation of the equal protection clause of the 14th amendment, for example, for a State to distinguish between women on the basis of race in permitting or restricting abortions.

The concept of "concurrent" power to legislate with respect to abortions is not dissimilar to the concept of "concurrent" power given Congress and the States to enforce the 18th amendment relating to the manufacture, sale, or transportation of intoxicating beverages. There would be separate and independent—not joint—power in Congress and the States to exercise their territorial limits. *National Prohibition Cases* 253 U.S. 350 (1920).

The question of whether a Federal law enacted under the proposed amendment would conflict with a State law is largely one of statutory construction that cannot be approached mechanically. Similarly, what is more or less "restrictive" in the way of placing limits upon abortion is a matter that cannot be summarized through formulas.

The basic premise of the amendment, however, is this. The Congress would be empowered to establish minimum national standards with respect to abortion, if it chose. Under the supremacy clause of the Constitution, a Federal enactment would take precedence over a State enactment in the case of irreconcilable conflict. See for example, *State* v. *Gauthier* 118 A. 380 (1922); *State* v. *Ligaarden* 30 N.W. 729 (1930); *State v. Lucia* 157 A. 61 (1931).

The latter clause of the second sentence, however, would alter this general rule of preemption to the extent that a State enactment was more restrictive of abortion than a congressional enactment.

In some respect, the differences between the more traditional constitutional amendments relating to abortion and the immediate amendment are not as great as appears at first glance. Even a proposed amendment that directly prohibited abortion would not be selfenforcing. It would require Federal and State enabling legislation. Given that the judiciary would—properly—be reluctant to force a coequal legislative branch of government to pass legislation, there would likely be a major element of discretion deposed in the legislative branches of Government under even a direct human life amendment.

Finally, I would note that, because it is a Constitution that we are amending, not a legal code, I have placed a priority on making clear the principle that is being pursued, not on insuring that each and every opportunity for possible circumvention is forestalled. I am not sure that this is possible. In this respect, I quote again from Professor Noonan:

> The Constitution is not addressed to persons of bad will, but to persons—judges, legislators, officeholders, citizens—who want to abide by its provisions. Therefore, it is neither necessary nor desirable to draft with an eye to silly, sophistical, or evasive interpretations. No language can be made foolproof. There is no language that cannot be distorted by evil men or inverted by clever men. It is not hard to show the vulnerability of any form of words to ingenious and insympathetic interpretation. As the Constitution is not addressed to the wicked or the foolish, so it is not addressed to the sophistical. The Constitution, and any amendment to it, speak to the understanding of those who with good will seek to comprehend the purposes of its framers. *Noonan* at 182.

CONCLUSION

Let me conclude by saying to those who would argue that this amendment represents a concession to, or a compromise with, a morally indefensible policy. I do not believe that this is true. Not only would the proposed amendment overturn Roe against Wade, but it would, arguably, go further by clarifying that Congress, as well as the States, possesses authority with respect to abortion. It would restore the status quo prior to the Roe decision—and then some.

While I would personally prefer that we go further, there can be absolutely no doubt in anyone's mind that there is not currently the kind of consensus for this action—either in the country or in Congress—that would permit this to be done. Nor is such a consensus imminent. The longer that abortion on demand continues, the more acceptable that it becomes, the more that it becomes institutionalized. I do not believe that we can permit this to happen.

Once, however, we can establish in the Constitution the principle that abortion is not an ordinary, routine medical operation, I believe that we can begin to reeducate all the American people to the cruel realities of abortion. Acceptance of this principle in the organic law of our land will better enable us to carry on education and information efforts.

The longer that the status quo—unrestricted abortion—continues to be the law of the land, the greater the number of citizens who will grow up in this country oblivious to any other reality, the greater the number of citizens who will forget that there was a time at which abortion was condemned unanimously by the States. Not during the Middle Ages, not during the era of the Founding Fathers, not during the industrial revolution, but during the entirety of our Nation's history through the 1950's and the 1960's and up until January 22, 1973.

The law is, in fact, a teacher. We must give it that opportunity before it is too late, before the lesson goes permanently unlearned.

I urge the support of my colleagues for the proposed amendment—not only those who share the full extent of my concern about abortion, but those as well who are uneasy at any aspect of the structure that has been erected by the Supreme Court, those who are hesitant at the process by which the abortion revolution has been wrought, and those who recognize the social divisions that have been caused this country by a Court that ignored the strengths of the democratic, representative processes of government in resolving differences among citizens.

I ask unanimous consent that the full text of the joint resolution appear at this point in the RECORD:

There being no objection, the joint resolution was ordered to be printed in the record, as follows:

S.J. RES. 110

Resolved by the Senate and House of Representatives of the United States in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided,* That a law of a State which is more restrictive than a law of Congress shall govern.".

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much. I will be brief.

Having looked at the witness list and knowing the intensity of feeling on this issue I think we have ahead of us a most educational and thought-provoking process. It is a foremost issue of our times. The constitutional process has been outlined by both you and the distinguished Senator from Vermont.

I think it is time that Congress address this issue forthrightly, and I commend the chairman for having the time and the courage to put forth these hearings and to move swiftly in this process.

It is not going to be easy. Historically constitutional amendments have not just been popped in and approved by Congress.

The debate today and in the days following, I am sure, will be emotional, as the Senator from Vermont indicated, but I think we can rise above the emotionalism and touch the real issue of human life.

Are we going to continue in the manner which the Supreme Court set forth in 1973, or is it going to be a position of this Nation that life is a cherished, delicate thing that we cannot dismiss and we cannot permit for the Government or anyone else to freely make the decision on whether that life should continue?

With the carnage that has been counted on an annual basis, it seems to me that we are long overdue on such comprehensive hearings.

The human life legislation, S. 158, recently the subject of hearings by the Separation of Powers Subcommittee of the committee is disturbing to me because of the ease with which the bill would have Congress change the legislative standards by which we judge when human life begins.

The Constitution is there. It is there for a purpose. Amending the Constitution need not be a divisive act provided that the proper process is followed. I compliment the chairman for initiating that process.

I too, Mr. Chairman, have to be at the Criminal Laws Subcommittee this morning, but I will return here after my testimony on the exclusionary rule before that subcommittee. I look forward to the debate, to the testimony, and to hearing from the distinguished Senator from Oregon.

Senator HATCH. Thank you, Senator DeConcini.

For those who are here, today's hearing is devoted to the constitutional and legal background of the abortion right.

We anticipate on October 14 and 19, and November 4, a hearing on the myths and realities of abortion in America; on November 6 we will discuss the abortion right—the moral dimension; on November 12 and 16 pending constitutional proposals and their legal impact—that will be the first session on that. Then we will have organizational testimony in two sessions.

We will try to cover this issue as thoroughly as it has ever been covered by a congressional committee. In the process we intend to have both sides fully represented. We think that is the only way to cover the matter.

We are very pleased to have with us this morning the distinguished Senator from Oregon, Robert Packwood.

Senator Packwood, we will turn the time over to you.

STATEMENT OF HON. ROBERT PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman and members of the subcommittee, let me congratulate you on that schedule that you have just announced. There will be differences of opinion on this subject, but I think at the end of these hearings few will be able to claim that their position has not been heard.

No matter what decision is made by this subcommittee, eventually the committee, and perhaps the full Congress, it is imperative that no one feel shut out. You have accomplished that or will accomplish it with this schedule, and I congratulate you.

Senator **Hatch**. Thank you.

Senator **Packwood**. Mr. Chairman, to my mind there is one very simple issue concerned here, and it is the issue of freedom. In this case, it is the issue of the freedom of a woman to choose whether or not she wants an abortion.

No one is trying to compel anyone to have an abortion. For those who morally object to it, they should not have one. For those who morally do not object to it, they should not be prohibited from having one.

The history of freedom and liberty is the history of the restraint of government. Most of the freedoms we guarantee in this country were copied after protections of freedom in England, and the English experience was that government would abuse the liberties of its citizens and that government had to be restrained.

England's early experience was that it was the King who would abuse the liberties of the citizens, and therefore it was assumed necessary to strengthen the powers of Parliament vis-a-vis the King because the Parliament would protect the citizenry from the King because, allegedly, the Parliament was made up of the citizenry. Therefore, many of the early restraints were placed on the King's interference with Parliament, and we copied most of those protections in our Constitution.

For example, very early Parliament passed a statute that said, "It is accorded that a parliament shall be holden every year once or more often if necessary." In our Constitution we simply said, "The Congress shall assemble at least once every year."

When the King tried to imprison members of Parliament for what they said in Parliament, in the English bill of rights they simply said that, "the freedom of speech and debate through proceedings in Parliament ought not to be impeached or questioned in any other court or place out of Parliament." In our Constitution we said it more simply: "Senators and Representatives for any speech or debate in either House shall not be questioned in any other place"

Lastly, the King, seeing that he could not stop Parliament from meeting or could not arrest its members for what it said, simply tried to keep the citizens from the Parliament and to punish them if they approached the Parliament. So in the English bill of rights England said that, "it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegal." In our Bill of Rights we said, "Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances."

Mr. Chairman, as I said, the early English experience was that it was the King who would abuse your liberties and the Parliament who would protect them. But all of that changed with the Cromwellian experience in England.

You will recall that during the 1630's and then into the 1640's there was a great moral tug in England between the independents, the Puritans, the Church of England, and the King. Finally, in the

1640's the Puritans gained control of Parliament. These were the kith and kin of the Puritans who had only 20 years earlier settled in Massachusetts. They were moral, and they knew that their morality was not only just but right, and they were determined to impose it on the rest of the country.

Oliver Cromwell was their leader. He organized a new and very efficient military called the New Model Army. Finally, even the Puritans fell to squabbling among themselves, and the faction of the Puritans led by Cromwell won out. One day Colonel Pride stood at the door of Parliament and turned away all but those that Cromwell agreed with, and 53 were left in Parliament to govern England.

Finally, Cromwell could not even agree with the 53, and he dismissed Parliament altogether and ruled solely and alone with the New Model Army as his instrument of terror.

It was at this stage that the entire whole of England turned against Cromwell. It is not said any better than in Winston Churchill's "History of the English Speaking Peoples" when he says, "The story of the second civil war is short and simple: The King, lords and commons, landlords and merchants, the city and the countryside, the church, the Scottish army, the Welsh people, and the English fleet all now turned against the New Model Army. The army beat the lot. And at its head was Cromwell. It was the triumph of some 20,000 resolute, ruthless, disciplined, military fanatics over all that England has ever willed or ever wished."

Cromwell ruled harshly, but effectively, until his death in 1658, and so joyous were the English at the death of Cromwell that in 1660 they restored the monarchy that they had overthrown and installed as King the son of the King that they had beheaded. And from this period onward the documents of English history have run not just against the King but against the government generally, be it royal or common.

Trial by jury: "No free man shall be seized, or imprisoned, or stripped of his rights or possessions, or outlawed, or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, nor send others to do so except by the lawful judgment of his equals or by the law of the land."

How did we say it in the Bill of Rights? "No person shall be deprived of life, liberty, or property without due process."

In the English bill of rights they said that, "Excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We copied it word for word in our Constitution.

The English said, "To no one will we delay right or justice."We said, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial."

As far as double jeopardy is concerned the common law in England by court decision determined that you could not be tried twice. In the plea of autre foi acquit and autre foi convict the court said, "A man shall not be brought into danger for one and the same offense more than once." How did we say it in the fifth amendment? "No person shall be subject to the same offense to be twice put in jeopardy of life or limb."

That particular decision, Mr. Chairman, is very important, because it was proof that the courts, as well as the Parliament, had the right to extend liberty and to protect individual freedom.

As far as self-incrimination is concerned, England said, "In future, no official shall place a man on trial upon his own unsupported statement." In our Bill of Rights we say, "No person shall be compelled in any criminal case to be a witness against himself."

Mr. Chairman, I could go on with cite after cite after cite. It took the English the better part of 500 years—roughly from Magna Carta in 1215 to their bill of rights in 1689—to nail down their basic liberties. Most of them were acts of Parliament.—Simple majority acts based upon experience, and that experience was that government will try to take away your liberties and that all governments must be restrained.

As far as the right to an abortion was concerned, it is very, very important to note what the right to abortion was at common law.

I read Professor Noonan's testimony in which he says, "Since the beginning of the Republic, abortion has been a crime at common law." I turned to him, and I said, "I want to make sure, Professor, I understand your use of the word. It was not a felony." "That is correct," he said, "It was barely a misdemeanor, if that." And I think he will indicate that is correct.

From one decision about abortion comes the term, "a great misprision," which was a term unusual in the common law and especially at a time when the word "misdemeanor" was in common use. Be that as it may, whether or not abortion even rose to the level of a misdemeanor—and that is questionable—at common law, any woman who had an abortion prior to quickening—which is roughly what we might call viability—was not punished, nor was the person producing the abortion punished at common law.

At the time we wrote our Constitution our Founding Fathers saw no need to write into the Constitution a prohibition on abortion. Nor did any of the States at that time by statute prohibit abortion.

So when people talk about returning to the morality and the law of our forefathers, I am one who would be happy to say, "Yes." I am satisfied to live with their concept of morality and their concept of law as far as it concerns the right of a woman to choose whether or not she wanted an abortion.

Mr. Chairman, as I indicated, we took the British experience concerning liberties and we wrote it into our Constitution and Bill of Rights. In addition, we added two very essential liberties that Britain did not have—freedom of religion and freedom of speech and press.

We did this because our experience as a colony indicated that we did not want a State church, be it Christian, Moslem, Jewish, or otherwise. We did not want any government or the citizens thereunder imposing their religious or moral views on the rest of us. In addition, we wanted to secure freedom of speech and freedom of the press because England had tried to limit those when we were a colony. We wanted no government prohibiting those rights.

From 1791 to date we, like the English, have expanded the liberties of our citizens. Sometimes those liberties were expanded by additional amendments to the Constitution such as those amendments prohibiting slavery and extending the right to vote to women.

Sometimes those liberties were expanded by courts, as the Supreme Court did in *Brown* v. *The Board of Education,* when it reversed *Plessy* v. *Ferguson* and said that henceforth, despite the fact that the Court had ruled otherwise before, Government-imposed racial segregation was no longer constitutional; or in *Roe* v. *Wade,* in which the Court for the first time found that Government prohibition of the right of a woman to choose whether or not she wanted an abortion was unconstitutional.

But always, Mr. Chairman—always—from Magna Carta, through the English bill of rights, through our Bill of Rights, through the Civil War amendments, and to date, the history of liberty has been the continued expansion of personal liberty and freedom and the continued limitation on the powers of government.

Mr. Chairman, the Constitution and the amendments thereto occupy equal stature, some are not greater and some lesser. In George Orwell's "Animal Farm" is expressed the theory that, "all animals are created equal—but some are created more equal than others." That is not true of the Constitution.

The right of a woman to choose for herself whether or not she wants an abortion is a right entitled to as much protection and sanctity as any other provision of the Constitution.

Let me read the amendment that you, Mr. Chairman, have proposed: "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent powers to restrict and prohibit abortion, provided that a law of a State which is more restrictive than a law of Congress shall govern."

Mr. Chairman, let me slightly paraphrase that amendment as follows: "Freedom of speech is not secured by this Constitution. The Congress and the several States shall have the concurrent powers to restrict and prohibit free speech, provided that a law of a State which is more restrictive than a law of the Congress shall govern."

Would this Congress or our people agree to such an amendment? I hope not. But there are some who regard freedom of speech as an impediment to an otherwise orderly government and they, indeed, would change it.

Similarly, there are those who regard a woman's right to choose whether or not she wants an abortion as an impediment to an otherwise moral government. These people, Mr. Chairman, are not in the majority any more than Cromwell's Puritans were in the majority.

It is very clear that the public, by any measure of any opinion poll, supports the Supreme Court's decision, but these modern-day Puritans are convinced that they are right, as convinced as Cromwell, and they are prepared to impose upon us, if they can, their view of God's will. It is a dangerous and a pernicious theology, and those who hold it—if they are successful in this effort—will not stop until they have imposed upon us a restriction of all of our liberties with which they do not agree.

Let me ask three questions: Do those who want to inhibit a woman's right to choose have the might to amend the Constitution? Do they have the right to amend the Constitution? And is it wise to amend the Constitution?

Mr. Chairman, to the extent that we have a representative form of Government, the ultimate sovereign power resides in the people. We exercise it at the ballot box. And to the extent that the people have the power to do what they want, then they have the might to amend the Constitution. If you adopt the philosophy that might alone makes right, then they have the right to amend the Constitution.

Mr. Chairman, is it wise to do so? In my mind the answer is clearly no. Rather than restraining liberty, we should continue to expand it. Rather than some of us attempting to impose our moral views on others, we should instead be fostering a decent respect for diversity.

Mr. Chairman, the liberties of the least of us in the last analysis will be the liberties of all of us. Take away the liberties of a few and you take away the liberties of all. Let a minority impose upon this country, if it can by sheer might alone, regardless of whether it represents a majority in this country, its moral views, and we are asking not just for opposition but ridicule. If those minority moral views continue to be the law, we ask for more than ridicule; we ask for rebellion.

With all my heart, Mr. Chairman, despite the fact that you and I may personally differ on this particular subject, I would hope you would exercise wisdom and restraint so that those who would restrain our liberties today do not in another era find others who would restrain their liberties.

Mr. Chairman, a few years ago we celebrated our 200th anniversary as a nation. We should remember that we celebrated not just 200 years of American liberty but in addition almost 800 years of Anglo-Saxon history during which men and women have been tortured and imprisoned, and have fought and died so that we today can say what we want, do what we want, and be what we want.

In short, they have given us the blessings of liberty. It is the greatest blessing that anyone could ever give us. All I ask is that you cherish it, preserve it, protect it, and pass it on to our children a bit more secure than we received it.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Packwood.

Senator Leahy, do you have any questions?

Senator LEAHY. No, I do not, Mr. Chairman.

Senator HATCH. Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I do not have any questions.

It was a fine statement, Senator Packwood, and I appreciate the obvious depth to which you have researched our basic freedoms.

My only comment is that I see some hard distinctions between your analogies of the British consideration—whether it is Cromwell or other areas—and the process which we are going through.

It seem to me that our Constitution has this amendment process built into it. Giving it the safest protection. Whether or not our Constitution is amended with the human life amendment will not be totally decided by those of us on this subcommittee, the full committee, or on the floor of the Senate or the House. The process at least in this Senator's view—gives us the greatest opportunity to get as close as we can to what the people want or do not want.

So I can foresee that some day, as in the past, this committee and this Senate might vote out a constitutional amendment, either on this issue or on another issue, and yet the people in the States elect not to ratify it.

I see a distinction that ought to be pointed out and applauded and one that gives great safeguards so that one single moral view in this country does not pervade. While you may be correct that mine is a minority view—although others will disagree with that characterization—it will have ample hearing, not just among 3 members of this subcommittee today, but ultimately 18 or 19 members of the Judiciary Committee, and I would hope 100 members of the Senate.

Senator PACKWOOD. Are you suggesting, Senator DeConcini—if I follow your line of argument—that this is not a decision only Congress should make, but that we should have a greater collective judgment on it, and perhaps the best way to do that is to send it out to the State legislatures?

Senator DECONCINI. I think that is a part of the process, and I do not believe the decision will solely be made here. That is my point.

Senator PACKWOOD. I would hope that you would not share that philosophy as far as it might extend to freedom of the press, freedom of speech, or the right to assemble—that if a group wants to amend the Constitution and prohibit it we ought to send it out to the legislatures.

Senator DECONCINI. I do not see a movement in this country to restrain freedom of the press or any other freedoms. This is an issue of the freedom to live and that is a freedom that I think should be protected.

So I think the processes that our forefathers put in the Constitution were deliberately put there to make sure that we would not fall into the same problems into which Great Britain fell.

I am pleased that the chairman is willing to go through this process. It is far easier to just look at a poll and say, "Well, the poll shows opposition to this." I have seen the polls on either side. I do not think the polls should be the determining factor.

I think the Supreme Court made a decision and that it is one that ought to be seriously considered. That is what I think we are doing.

Senator PACKWOOD. Senator DeConcini, I do not see today any movement to restrict freedom of speech. I do see some who would like to restrict freedom of the press.

Be that as it may, if you look at the history of our country you will see that we have gone through moments of passion and prejudice where the popular opinion was to abridge basic liberties.

We can start with the Alien and Sedition Acts. Fortunately, they expired. They would have been clearly unconstitutional, but because of the passion of the moment we passed them.

Look at Andrew Jackson's efforts to prohibit the mailing of abolitionists' tracts into the South. You can look at Franklin Roosevelt issuing the order to put into concentration camps native-born Americans of Japanese ancestry because the prejudices and the passion of the moment swept us away.

I am not saying today there is that movement as far as freedom of speech and freedom of the press are concerned, but that may come, and I would hope at that stage we would not say, "Well, it appears to be a popular movement at the moment, and therefore let's send it to the State legislatures for their approval."

Senator DECONCINI. My only response would be that when women's suffrage was debated in this country my observations show that it was not by any means a popular thing at the time and that change took a long period of time and a great deal of debate.

I think our system provides for protection. I am not certain that this amendment is going to pass out of this committee as it has been introduced by the chairman, but I think your point is we have to be cautious after seeing what happened with Cromwell. Although I agree that caution is necessary, I see a great distinction in today's modern America and our Constitution versus what occurred in the 1600's in England.

Senator PACKWOOD. It is interesting. I find the parallels very apt. I see local groups wanting to ban books. We do not see too much at the Federal level yet, but there are all kinds of cases that finally wend their way to the Supreme Court where local governments or local actions have attempted to abridge liberties because it was the popular thing to do at the moment in that area.

Fortunately they were prohibited from doing it. Hopefully they will continue to be prohibited from doing it. But to say that it does not exist in this country, to say that on occasion minorities, or in some cases majorities, would not override our liberties, I think belies both a knowledge of history and current events.

Senator DECONCINI. My only point, again, Senator Packwood, is that that is what this body is all about. You and I have that responsibility. We may differ on this issue, but I think we do agree that there is no great movement to change many of our liberties.

I think it is a matter of what is a freedom and a liberty. Is the right to live a freedom or liberty that ought to be a part of the Constitution? I think this question is the focus of the debate.

Maybe the right to live is not a freedom or liberty. Maybe it is not something that ought to be protected by the Constitution. On that point is where I think the arguments in opposition to this amendment will carry a great deal of weight. That is all I have to say.

Thank you, Mr. Chairman.

Senator HATCH. I enjoy your remarks on the subject of abortion. I have listened very carefully. I probably listen more closely than anybody else.

What is your viewpoint with regard to the willful killing of harp seals. You do not like that, do you? I do not like that either.

Senator PACKWOOD. No, as a matter of fact I do not. No.

Senator HATCH. Do you feel we should restrict that?

Senator PACKWOOD. If you do not send this amendment out, you will not have to listen to my speeches on this issue. [Laughter.]

Senator HATCH. As a matter of fact, I think that I will always have to listen to your speeches unless we do get this amendment out and let the representatives of the people make this decision.

I think you ought to reexamine the constitutional amendment we have filed. It may be the only way of literally ever resolving this question through achievement of a consensus. I think it has got more merit than you have.

Let me make a couple of points. I have a lot of admiration for you as a colleague. There is no question about your brilliance as a Senator. There is no question you care very deeply about this issue; you are, in my opinion, one of the most eloquent spokesmen for the abortion right in America. I know you are sincere in your belief, and there are many good people who support your particular beliefs in this area—people who are sincere, dedicated, religious people.

I think you have to acknowledge there are many sincere, dedicated, religious people on the other side of this issue, as well.

You have equated the right of abortion to freedom of speech. I think you are talking about oranges and apples. There are few in America who that want to repeal the first amendment.

Senator **Packwood**. I have a number who live in a number of towns I speak in from time to time.

Senator **Hatch**. I see. There are always going to be some people who disagree with elements of our Constitution or disagree with its values.

There is no consensus—not even the most slight consensus—to do away with the first amendment in this country, but there is argubly a substantial consensus out there to protect what they call innocent human life. I do not think the analogy is a relevant analogy.

Let me just say this: You seem to be articulating a libertarian viewpoint here with regard to individual rights. I have sympathy for that viewpoint, with concerns.

Should women have the right to choose to smoke marihuana, or to take heroin, or cocaine whatever the impact upon themselves or their children?

Who makes these decisions for society? Unelected Federal judges or elected representatives? Was *Roe* a wise decision from a jurisprudential standpoint?

Senator **Packwood**. Mr. Chairman, the Supreme Court will make many decisions I will disagree with. They have in the past; they will in the future. We all live with those decisions, whether we like them or not.

When you say you see no particular mood to change our liberties on freedom of the press and freedom of speech, I will take you back again, and I for the life of me have read and reread the decision, and apart from popular passion I do not know how the Court could find constitutional the imprisonment of native-born Americans during World War II——

Senator **Hatch**. I do not either.

Senator **Packwood**. Interestingly, native-born Americans of only Asian ancestry, not Italian ancestry, not German ancestry; but they did.

Senator **Hatch**. Or finding that a black was not a person, as in *Dred Scott*.

Senator **Packwood**. All I am saying is that popular passion can obscure judgment on occasion, and the Constitution is deliberately written to make that popular passion very hard to write into law.

Senator HATCH. I agree with that constitutional approach, but we have had 8 years of extensive debate on this issue. This is not a spur of the moment issue of temporary passion. I think we have had a lot more heat than light in many ways, and one reason we have is that we are limited from effectively debating this issue in public arenas.

My amendment is one way perhaps of resolving this issue through elected representatives through consensus and negotiation and compromise rather than by arbitrary lawmaking by unelected judges.

I think you ought to look at that issue, because if your position is correct, and justifiable in a free and open public debate, then why be afraid to have a public debate in the Congress and in the States and resolve this among the people's representatives where they can make the determination?

Senator PACKWOOD. Mr. Chairman, again I would go to any of our liberties. If you want to skip freedom of the press and freedom of speech, forget that. You and I know full well that there is a fairly substantial support in this country—maybe not majority, but a fairly substantial support—for in some way changing the right of self-incrimination—the thought that somehow criminals are getting away with something when they can plead the fifth amendment.

Senator HATCH. But who wants to do away with the fifth amendment?

Senator PACKWOOD. All I am saying is that passions come and go, and that is one you and I have both heard, especially when some criminal who has been let loose because there was not sufficient evidence to convict beyond a reasonable doubt and yet the public was convinced that that person was indeed the culprit and did not take the stand. The public thought something was wrong that allowed that, and given the opportunity they would change that protection.

Senator HATCH. I think that is a good point, but I do not think it is relevant to this. I would also suggest to my friend from Oregon that many believe, including myself, that it was the Court itself that amended the Constitution in 1973.

All I am saying is, "Let's see if your side has the votes. Let's see if our side has the votes. Let's see who wins this." Right now, debate is totally restricted because of what I think many constitutional authorities would call a dubious set of Supreme Court decisions.

Senator PACKWOOD. I think what you are saying, Mr. Chairman—and I guess you and I fundamentally disagree—is that at any time in our history or any time in the future when a serious majority questions one or more of the liberties in the Constitution, then it is the obligation of Congress to send out a constitutional amendment for full and free debate in the legislatures.

Senator HATCH. No; I am saying that where the Court makes a jurisprudentially questionable decision, overturning longstanding laws in 50 States, and where bitter controversy over such decision continues for a sustained period of time, perhaps another look ought to be taken at establishing an alternative rule of policy.

Senator PACKWOOD. Mr. Chairman, I will recount a story—and it is not the reason. I had introduced legislation legalizing abortion nationwide prior to the Supreme Court decision. There was then no right-to-life movement—I use that generically, not Right to Life in the individual organization sense. I introduced an amendment to legalize it nationwide. I also had an amendment to legalize it in the District of Columbia, because the argument was made that we did not have the power to do it nationwide. They did not then have home rule. Some would question whether they have it now.

In any event, the argument of those who did not want to cosponsor my nationwide amendment was, "That's a local issue." Then when I would give them the District of Columbia amendment, they did not want to sponsor that either, even though we did have the power. I could not get a hearing.

One of those who was religiously opposed to my position was in my office one day, and I said, "Look, all I want is a chance to debate this, and I want a hearing." And the fellow said to me, "Senator, the law is on our side; we don't want any hearing." I could not resist—in about 1974 or 1975, when the movement for the amendments was taking place, and this fellow was in my office again pleading for a hearing—saying, "Gosh, I don't want a hearing; the law's on my side."

I do not share that view, but indeed I found his position hypocritical. I have no objection to the hearing, but I think we finally, after hearings—as we do with all legislation—exercise judgment and not just pass through to the public, as if we were a nonthinking conduit, whatever it is they want to debate, whatever it is they want to hear, and give up any judgment of our own as to whether or not it is a wise decision we are passing on to them.

Senator DECONCINI. Mr. Chairman, would you yield?

Senator HATCH. Surely.

Senator DECONCINI. Bob, the point has got to be made: I do not think anyone is professing that we not debate the issue or that we do not exercise our responsibility as elected officials.

I think the Senator from Utah is merely pointing out that the process was built this way for just this kind of question. I think—and maybe you do not—this is such an important issue that it ought to go through this process.

If the amendment does not make it all the way through, then I will have made a misjudgment. The elected responsible people in this body are going to decide first. I think that is a very good sign.

I find no problem with going through that process on an issue involving life. Maybe there will be other such important issues. I thought the issue of the equal rights amendment was proper. I was not here when that was debated, but I thought it was proper that it go through that process. The consensus here was, "Yes, let's report it out." It appears, obviously now, that the consensus in the country is opposed to it. I can accept those judgments.

Senator PACKWOOD. The country is opposed to it?

Senator DECONCINI. Apparently so because the State legislatures are three short of passage. What can you say but, "Well, we lose that one, and we will try again."

Senator PACKWOOD. It is hard to tell whether the country is opposed. All we can go on are public opinion polls, and they change from time to time. At the moment public opinion polls seem to indicate that the bulk of the public supports the equal rights amendment by roughly two-thirds. Be that as it may, I will be intrigued because that is a very strong support.

I do not find that kind of support for overturning a woman's right to choose whether or not she wants an abortion.

But if unfortunately the equal rights amendment fails—even though there is at least a clear consensus of those who would like to have it—then I would be intrigued with the votes of many people in this Congress who are proposing this amendment as to whether they will vote to again send an equal rights amendment to the States because there is a consensus that wants to discuss it.

Senator DECONCINI. I agree with you. I think the equal rights amendment was important, and I voted for the extension because I thought the people ought to have an opportunity to express their views. I do not find, by doing that, that I abrogated any responsibility as an elected representative from my State.

Senator PACKWOOD. I will make you this bet, and we will have no way to prove it until we get there: Many of the people who will vote to send this amendment out, if they get a chance, will vote against sending out an equal rights amendment.

Senator HATCH. Is that not already decided? The extension was granted. It will expire on June 30, 1982, or it will be ratified by then. How is that relevant?

Senator DECONCINI. It seems to me—if the Senator would yield—that if that bet had been made 2 years ago you would have lost. I do not know whether we will have an opportunity again or not.

Senator PACKWOOD. My hunch is this: If unfortunately the three States do not ratify it so that the time limit holds, and the amendment is not adopted, as we have had with other amendments it will be put forth again in this Congress at some stage after a decent interval of time. It will be put forth again, and I will just be curious to see what the votes are in this Congress of those who argue consensus as a reason for putting this forth—as to whether they will argue consensus as a reason for putting that forth.

Senator HATCH. You are not arguing, Bob, that the equal rights amendment is directly related to abortion?

Senator PACKWOOD. I am talking about procedures.

Senator DECONCINI. We are talking about procedures, Mr. Chairman.

I think it is a very good thing that this country went through that whole process on the equal rights amendment. I wish it had passed because I believe in it. But I do not see any criticism of this Congress or the Congress that passed it, for going ahead and referring it to the people. I think the process is a good thing.

If this Congress decides to go through the amendment process on the issue that we are debating today, I think it will be a good thing. If it is turned down, I will be able to live by that judgment. If it is passed, then I think that is the judgment we live by until we want to go through the process again. Ours is not going to be a snap decision, either in this committee or by this country. The decision on the equal rights amendment has not been and neither was our decision on women's suffrage.

Anyway, I appreciate your scholarly presentation today. I thought it was excellent.

Senator **Packwood**. Thank you very much.

Senator **Hatch**. Let me close, Bob, with this: I agree with you in part, because I think we both agree that fundamental liberties ought to be inviolable by a majority vote. We simply have differing views on what these fundamental liberties really are.

I see the inviolable right, as the right of the unborn to life. You see the right differently.

I think the reason I filed that amendment was to try to get us off this problem. Let us at least try to reach an accommodation democratically. I think that is all that amendment would do.

Senator **Packwood**. Does the same philosophy hold of the right of a "born" to life?

Senator **Hatch**. The right of a what?

Senator **Packwood**. A "born," as opposed to the unborn. Does the State have any right to take the life of somebody who has been born?

Senator **Hatch**. There is indeed a right in the "born," except those who have committed the most heinous crimes, not to be denied their life by other individuals.

I suppose one of the difficulties I have always had is that many of those who support abortion rights work themselves into a terrific frenzy over the harp seal, the whales, and all kinds of animals, and yet have absolutely no consideration for the right of the life of the human unborn. I find that just a little ironic.

Senator **Packwood**. I would close in saying this, Mr. Chairman: Although it is not an argument I use for the right of a woman to choose, through our history and throughout the history of this country we have on many occasions justified the taking of innocent human life. We have justified it on the basis of what we thought was an overwhelming public necessity. Sometimes we have executed innocent people. Sometimes we have gone to war and killed hundreds of thousands of innocent people, but we justified it.

I do not use that argument, but for anyone to say we have got to protect unborn life but say we can take born life I find an inconsistent argument.

Senator **Hatch**. I do see the distinction between innocent life, and the life of a mass murderer as more than one of trivial nuance.

Senator **Packwood**. But when we drop a firebomb on Dresden and kill several hundred thousand in two nights, many of them innocent civilians—they were innocent human life.

Senator **Hatch**. Well, I think we probably lost considerably fewer lives in Dresden than we do in an average year in this country—1.3 million innocent human lives. The differences are much more significant, however.

Senator **Packwood**. Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator Packwood.

Our next two witnesses are two eminent constitutional authorities with different perspectives on these issues: Professor John Noonan who teaches jurisprudence and family law at the University of California Law School at Berkeley at Boalt Hall in Berkeley, Calif.

An opponent of the Court's *Roe* decision, Professor Noonan is one of the Nation's leading experts on the abortion right in the United States. He has spoken and written widely on this subject. He is the author of two important books on the subject at hand: "The Morality of Abortion" and "A Private Choice, Abortion in America in the Seventies."

It is the subcommittee's privilege and also a personal privilege to have Professor John Noonan with us today.

Professor Laurence Tribe teaches constitutional law at Harvard Law School in Cambridge, Mass. He is a supporter of the *Roe* decision and one of the Nation's foremost authorities on the abortion right in the United States.

He has written a number of scholarly articles on the *Roe* decision, among others, and is the author of one of the most widely used casebooks on constitutional law and eminently celebrated.

We welcome you again, Larry, to our subcommittee as well.

It is my recollection that almost exactly 7 years ago both of you professors testified before this subcommittee on earlier hearings on this subject. While I was not privileged to have been there at the time, I am looking forward to picking up where you left off then. I am not sure who had the last word at that time, but let us begin with Professor Noonan first and then Professor Tribe second.

Professor Noonan?

STATEMENT OF JOHN NOONAN, PROFESSOR OF LAW, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIF.

Mr. NOONAN. Thank you, Mr. Chairman.

I should like to congratulate you on holding these hearings. As you have indicated, they are due and overdue. I hope that Professor Tribe and I will not grow old attending hearings that go on into the eighties and nineties with this subject still unresolved.

I am submitting a written statement, of which I will only select highlights now. In that written statement I have ventured to make a few suggestions as to the actual text of the amendment that you have submitted.

This morning, in summarizing this written statement, I want to address just three points: The right to abortion as it existed before January 22, 1973; the radical right that was established on that date; and the social dimensions of the right.

THE RIGHT TO ABORTION BEFORE "ROE V. WADE"

Before January 22, 1973, no right to an abortion existed in the Constitution. Everyone knows that it is not there in the explicit text, and there was nothing in the traditions of the American people that made it a constitutional right.

As Senator Packwood conceded, since the beginning of the Republic abortion was a crime, and if we are to return to the state of our forefathers, as he also conceded, we would find that it was customarily characterized as a crime against the person.

In the great repository of the common law—Blackstone—you can find it dealt with at some length. You can go back as far as the father of the common law—Bracton—and find abortion is a crime.

If we went back to those early days, we would even find that if the aborted child was born alive and then died the crime was murder.

I doubt that all of the proponents of the abortion right would care to go back to those early days, but Senator Packwood said he would be willing to.

Of course when the 14th amendment was adopted there were by then statutes banning abortion. A considerable misconception has existed because in the early days the crime was banned by common law, although that was the way most or many crimes were banned. It was not customary to have statutory codes for all crimes.

By the time statutory regulation of criminal matters had become common the States began adopting abortion statutes, and all of the States who voted to ratify the 14th amendment had in force strict statutes against abortion.

That was the law, and as far as Supreme Court precedent went there was not a single case before 1971 that, as far as I can see, even dealt with the issue. In 1971 the Supreme Court sustained as constitutional the District of Columbia's abortion law.

The only faint vestige of anything having to do with abortion was the statement in *Griswold* v. *Connecticut* about the right to privacy—and that right, in the words of its inventor, Justice Douglas, was "confined to the marital bedroom." Privacy was something that had to do with supporting marriage.

Literally thousands of cases had interpreted the Constitution before *Roe* v. *Wade* was argued. There was nothing to indicate—except in a dictum given almost simultaneously with *Roe* v. *Wade*, that the right to bear children had a constitutional dimension—to support the right enunciated in *Roe* v. *Wade*.

When the right was created in 1973 it was without support in law, tradition, Supreme Court precedent; it was a right created by fiat. It was an amendment of the Constitution.

Justice Byron White called it an act of raw judicial power. I think you could drop the "judicial"—we know it was done by judges—it was an act of raw power.

In effect, it repealed a part of the Constitution—the protection of life. It amended the Constitution. It wrote in a new provision.

If Senator Packwood and those who feel that this is a basic American liberty are correct, they should put up--if they want to do it in an up-front manner—a constitutional amendment ratifying this decision of the Court in 1973 and see what kind of vote that would get in the legislatures of this country.

Senator HATCH. What kind of a vote do you think that would get, Professor Noonan?

Mr. NOONAN. I doubt if it would get a single State vote.

Senator HATCH. Do you think it would get a majority of votes in the Congress?

Mr. NOONAN. No, I do not think it would pass the Congress.

THE RIGHT CREATED BY "ROE V. WADE"

Taking up the second point—the extent of the right created—it seems to me particularly important to elucidate that because it has been obscured largely by the way it has been reported in the media and the polls. I think what Senator Packwood had to say about the polls shows that.

The popular polls—the Harris poll and the Gallup poll—have always asked, Will you support the right to abortion for 3 months, as secured by the Supreme Court in *Roe* v. *Wade*?

On that kind of question there has been a majority in the affirmative, but that of course has been a serious misrepresentation of the decision. The only scientific polls—conducted by Judith Blake, the demographer at the University of California—have shown a very substantial majority of Americans opposed to the full right of abortion as it now exists in constitutional law.

Well over 70 percent of Americans and an even larger number of American women are opposed to the abortion right as it has been established.

As it has been established, the right runs for the full 9 months. There are no practical restrictions on abortion by a licensed physician in the first 3 months; up to viability—which is reckoned at 7 months—they can be restricted to a hospital or a licensed facility, but with no particular protection for the unborn child; and for those first 7 months an unborn child has got less protection than kittens, dogs, or cattle.

There is not a State where you can put a kitten, dog, or calf to death painfully. There are statutes protecting from painful death these animals. But we put to painful death—shockingly painful death—thousands of human unborn children every week.

For the last 2 months in the womb the Supreme Court permitted protection of the unborn subject to the health of the mother. The Court then defines "health" in a most expansive way to mean emotional well-being. There is not an abortion in the world, I suppose, that does not have in some way the emotional well-being of the mother in mind.

As a result, for practical purposes, abortion is a right that goes for 9 months of life in the womb. To read the press and the polls you would never suppose that there was such a right, yet around the country, popping up time and again, there are cases involving late abortions.

The famous cases you know. There is the *Edelin* prosecution in Massachusetts, the *Floyd* prosecution in South Carolina, and the *Wardell* prosecution in California. Those are just the tip of the iceberg. They arise from pregnancies where the child was in fact not aborted but born alive and then, according to the prosecutors, died as a result of injuries inflicted during the abortion.

We would not have those cases if abortion could be restricted to 3 months or even to 6 or 7 months, as the media have indicated.

The right is about as radical as a right could be. There are minor qualifications, but I do not know any country in the civilized world that has such a radical right as this right created by the Court's amendment of the Constitution.

THE SOCIAL DIMENSIONS OF THE RIGHT

I come to my third point—the social consequence. We all know the slogans—a right to choice, a right to privacy, a right to the exercise of a private choice. I do not suppose there has ever been a right less exactly described or that there has ever been coined a more misleading slogan.

For most of us what is private is what can be done alone, at home, or with anyone's family. Here is a right that is exercised by the help of a trained professional, which depends on a medical staff, which depends on medical schools to select the right students who want to perform these things. Here is a right that has required over 100 decisions by Federal district courts and 15 decisions of the U.S. Supreme Court since it was first enunciated. Here is a private right which its champions have consistently said cannot be exercised without public funding.

It would strike most people as bizarre—that something so private depends on and cannot be effected without public funding. Yet that is the announced position of the supporters of abortion.

The abortion right has led to serious encroachments on our Constitution. It led to a single Federal judge in Brooklyn forcing an appropriation for 4 years from the Federal Treasury to pay for abortion, until finally and belatedly the Supreme Court held him to be in error.

Quite apart from the public law impact there has been an impact on the structure of the family. The family structure has been seriously attacked by Supreme Court decisions supporting the abortion right. The family structure has been attacked first by the final Court giving final authority over a decision which will seriously affect the physical, psychological, and moral health of a child, not to the father and mother but to a judge who can decide whether it is in the best interests of a child to have an abortion.

Then the Supreme Court has attacked the basic family structure by denying that a father, who has procreated a child jointly, has any responsibilities to exercise in the decision as to whether to annihilate that child.

The greatest social consequence of course has been the taking of human life. No one, I believe, doubts that we have here the unique chromosomal code of human beings, that every genetic feature of human beings is there, that we are talking about what can rightly be called human boys and human girls. These human boys and human girls in the womb are having their lives taken at the rate of over 1 million a year.

I am not surprised that Senator Packwood finds his analogies in war. This is a kind of war.

Heartbreaking as the cases are which the advocates of abortion have carefully selected, much as one's heart goes out to the people caught in them, those tragedies cannot compare to the tragedies that are being enacted now in this massive killing of the unborn.

That kind of choice cannot be a private choice. That kind of choice cannot be a liberty. A liberty to take someone else's life—someone else who is not your property, not your body—that kind of liberty is pernicious and destructive.

We can all agree that sexuality is private and reproduction is private, but when it comes to taking the life of the unborn we are no longer in the domain of the private. We are dealing with a social act—what is now a social act amounting to an American atrocity.

Senator HATCH. Thank you, Professor Noonan.

[The prepared statement of Professor Noonan and additional material follow:]

PREPARED STATEMENT OF JOHN T. NOONAN, JR.

RESTORING THE PROTECTION OF LIFE TO THE CONSTITUTION

I propose to address three topics:

1. The right to an abortion as it existed in the Constitution, American traditions, and judicial precedent before Roe v. Wade.
2. The radical right to abortion established by Roe v. Wade.
3. The social dimensions of this right.

In conclusion, I shall say something about the Amendment before you.

I. THE CONSTITUTIONAL RIGHT TO AN ABORTION BEFORE JANUARY 22, 1973

Before January 22, 1973, the date of the decision of Roe v. Wade, no right to an abortion existed in the Constitution.

The explicit text of the Constitution, as everyone knows, does not mention abortion. The Ninth Amendment, reserving unenumerated rights by the Constitution to the people, appeared to guarantee to the people the right to protect life, and in fact the fifty states did protect life outside the womb and within the womb. The Fourteen Amendment expressly declaring that no state shall "deprive any person of life" without due process of law appeared to guarantee the protection of all human beings. The Supreme Court in a stirring dictum had declared that "one's right to life" depends on "the outcome of no election." [1] The right to life, put beyond electoral caprice, appeared to be secured by the due process clause. No student of language, no one faithful and attentive to the words of the Constitution, could have supposed that the very clauses which seemed to secure life could be turned inside out to mandate destruction of the states' life-protective measures.

Nothing in the traditions of the American people suggested that abortion was a constitutional right. Since the beginning of the republic, abortion had been a crime at common law. In the nineteenth century it became a crime by statute. [2] The congressmen who proposed and ratified the Fourteenth Amendment approved legislation banning abortion in the federal territories. [3] The State legislatures which ratified the Fourteenth Amendment enacted or left in force strict statutes against abortion. [4] How amazed these congressmen and legislatures would have been to have told that the Amendment they adopted could be read to eradicate the criminal laws safeguarding life! From the date of the adoption of the Fourteenth Amendment in 1868 until January 22, 1973 the traditions of the American people assured the protection of life in the womb by criminal statutes.

No precedents of the Supreme Court indicated that there was any constitutional right to abortion. The Digest of Supreme Court Cases is bare of citation to abortion cases before 1971. In that year the Court sustained the constitutionality of the District of Columbia abortion law. [5] The right to privacy as a constitutional right had only been discovered or created in 1965 in Griswold v. Connecticut, and in the language of its discoverer or creator, Justice Douglas, was a right based on the immunity of "the sacred precicts of the marital bedroom." [6] The right to privacy as enunciated in 1965 supported the sanctity of marriage; it did not subvert it. Thousands of cases interpreted the Constitution before Roe v. Wade was argued. Not a single precedent in the Supreme Court held that there was any such thing as the right to abortion in the Constitution. Only, in the year Roe v. Wade was argued, the Court in Eisenstadt v. Baird stood the right of privacy on its head to include the rights of the unmarried and to hint in a dictum that the decision "to bear" children fell within its ambit. 7/ But Eisenstadt v. Baird was decided with Roe v. Wade in view. It was a bit of bootstrapping by the Court, creating a half-precedent for a decision it was ready to make. In terms of almost two centuries of constitutional adjudication, the right to abortion proclaimed in 1973 was a right created out of the air by the will of a majority of the Court in 1973. It was without basis in the text of the Constitution, without basis in the traditions of the American people, and without basis in judicial precedent. Its creation was by fiat. Its creation was, in the words of Justice Byron White, an act of "raw judicial power." 8/ By the power of the Court's majority the constitutional protection of life was, in effect, repealed; the Constitution was, in effect, amended; and a new constitutional provision was, in effect, written: "The right to abortion is conferred by this Constitution."

II. THE EXTENT OF THE RIGHT TO ABORTION

How extensive was the right to abortion created in 1973? The media have so consistently palliated and disguised the character of the right that it is necessary to be particularly exact in answering this question. The proper answer is that the right was the most radical in the civilized world.

The Court said that for the first three months of pregnancy no governmental authority of any kind could intervene in the decision to obtain an abortion from a licensed physician. [9] In the second stage of pregnancy, the state was permitted to require abortions to be performed within hospitals or other licensed facilities in order to safeguard the health of the pregnant woman; no protection was permitted during this period for the unborn child. [10] No recognition of the existence of the unborn child was accorded by the Court during the first two phases of pregnancy.

In the third and final phase of pregnancy, reached at viability (reckoned by Justice Blackmun to occur ordinarily at seven months), the zero which the unborn child was in the Court's eyes graduated to recognition as "potential life." At this stage, the state was permitted to protect the life of the child, subject however to a remarkable exception. [11] The exception was that no law could restrict an abortion performed for the health of the mother; and health was defined by the Court in the companion case of Doe v. Bolton in terms of "all factors -- physical, emotional, psychological, and the woman's age -- relevant to well-being." [12]

That definition and the health exception effectively negated the state's power to protect life in the womb after viability. There is not, I should suppose, a single abortion performed that cannot claim justification in terms of the emotional and psychological well-being of the person requesting the abortion. When the Constitution, as effectively amended and interpreted by the Court, declares that it is a person's constitutional right to be free of the restraint of any law interfering with emotional or psychological well-being when abortion is in question, there is no way that a state can effectively legislate to prevent abortion. Abortion on demand -- although Chief Justice Burger in a concurring opinion made a valiant attempt to deny it [13] -- is in reality the law of the land. Liberty of abortion, as a constitutional right, is, for practical purposes, virtually unlimited.

Because almost no governmental restriction on abortion is permitted in the first months of pregnancy, gross abuses have developed of the kind investigated by the Chicago Sun Times and reported in its issues of November 1978: fashionable, modern abortion clinics in the heart of the Chicago shopping district where "dozens of abortions" were performed on persons who were not pregnant; where abortions were performed on screaming women without anesthesia; where one successful operator billed Medicaid in a single year for $720,000; and where "an alarming number of women" suffered severe and permanent damage to their reproductive organs. These thoroughly legal clinics were the beneficiaries of the nearly absolute right to abortion created by the Court. [14]

Because no governmental restriction on abortion is effective in the late stages of pregnancy, there has been a rash of cases around the country involving the death of children after their abortion has failed. To cite three well-known examples, California prosecuted Dr. Wardell, Massachusetts prosecuted Dr. Edelin, South Carolina prosecuted Dr. Floyd, each for the post-abortion death of a child whose abortion the doctor had attempted; in each case the intersection of the constitutional right to abortion with the facts of the case resulted in the doctor's acquittal. [15] That these cases involving children born alive should occur at all is symptomatic of a situation in which late abortions are permitted and not unfrequently occur.

Unregulated early abortion, late abortion risking infanticide, abortion for any reason related to the emotional well-being of the abortion seeker, these are the practices which fall within the scope and demonstrate the extent of the court-created, radical, constitutional right to abortion.

III. THE SOCIAL CONSEQUENCES OF THE CONSTITUTIONAL RIGHT TO ABORTION

The right to abortion was said by the Court to be part of the right to privacy; and the exercise of the right is said to be a private choice. Was there ever a right less exactly described? Was there ever a slogan more misleading? What is private is what can be done alone, or at home, or within one's family. The right to abortion is exercised with the help of a trained professional, a doctor, and often with the participation of a clinical or hospital staff. Its existence does not depend on personal volition but on pushing physicians to perform abortions and on pushing hospitals to make them available and on pushing medical schools to select students willing to perform them. The enforcement of this right of privacy has required constant litigation and the judicial overruling of dozens of municipal ordinances and state laws. A favorite contention of champions of this private right has been that its exercise cannot be effective without public funding! And this bizarre conclusion was enforced by a federal district judge for four years and is still the law of California and Massachusetts. The development of this form of privacy has led to the most deliberate and most serious intrusions by the state into the truly private realms of marriage and the family. It has resulted in an abortion epidemic of enormous proportions. Few constitutional rights in our country's history have had such massive social consequences as this offshoot of the right to privacy.

The right to abortion has resulted in the threat of malpractice suits against doctors that have not wished to perform or advise abortion. 16/ It has resulted in litigation against hospitals that have declined to provide abortion. 17/ It has led to the screening out of medical school candidates with conscientious objection against abortion. [18] It has led the judiciary to strike down legislation intended to avoid by zoning the ugly urban blight of abortion clinics; [19] to strike down legislation attempting to protect the child in a late abortion who might be born alive; [20] to strike down legislation attempting to afford a minimal amount of information and a minimal time of deliberation to the abortion-seeker. [21] It has been the banner under which almost the entire federal judiciary has enlisted with a zeal for social engineering and the re-shaping of state law that would do them credit as crusaders. I do not stop to dwell on the grievous error, now corrected, by which a single federal judge in Brooklyn, in contravention of the Article I of the Constitution, arrogated to himself the power to appropriate money from the Treasury which the Constitution allocates to Congress and ordered the payment of millions of dollars in the federal funding of abortion -- an order that stayed in effect for four years until finally held invalid. [22]

Most significantly of all, the constitutional right to abortion has permitted the courts to invade the family sphere and to hold, first, that parents have no final authority over their minor children in this matter which so deeply involves the physical and psychological and moral health of the child; [23] and to hold, second, that a father -- although he has a constitutional right to share in procreating, per Skinner v. Oklahoma [24] -- has no right whatsoever to protect the unborn child he has joined in procreating. [25] No greater intrusion could be introduced into the legal structure of the family than these changes which allow the minor child to be autonomous in the abortion decision and the female progenitor to be solely responsible for the decision whether unborn offspring shall live or die.

The greatest social consequence of all has been the destruction of human life that has followed on the establishment of the constitutional right. No one doubts that the life in the womb -- conceived by two human beings, possessed of the human chromosomal code, possessed of every genetic feature of human beings -- is a human boy or a human girl. These lives are now being taken at the rate of over one million a year. This is a massive increase in abortion in America. This is an epidemic. Proponents of abortion are fond of bringing up tragic cases where abortion would resolve a heartbreaking situation. There are such tragic cases, and everyone sympathizes with persons caught in them. But these tragic cases cannot compare in number or in tragedy with the terrible social fact that Americans are now killing their own offspring on a scale exceeding that of any war.

A choice cannot be private whih affects another's life. The child in the womb has blood and brains, a respiratory system, a circulatory system, a urinary system that is not those of his or her mother. The child in the womb is not the property of her or his parent. The body of the child in the womb is not that of her or his parent. Sexuality may be private, reproduction may be private, but the taking of the life of the unborn cannot be private. It is a social act. Multiplied one million times a year, it is a social act amounting to atrocity.

IV. THE PROPOSED AMENDMENT

The Amendment before you is extraordinarly simple and extraordinarily direct. It denies that the Constitution contains the kind of right which fiat created nine years ago. At one stroke it demolishes Roe v. Wade and the unhappy sequelae of Roe v. Wade. With a few words it performs surgery by which the judicial amendment to the Constitution made nine years ago is excised. It restores to Congress and to the States the power to protect life.

The Amendment does not make abortion into murder -- that would be untraditional in both morals and in law. The Amendment does not confer any power over contraception. A favorite red herring of the supporters of abortion is the pretense that contraceptive rights are involved in what is done with abortion. It is time to call this confusion of contraception wit abortion what it is -- a lie. The Amendment uses the term traditionally used by criminal statutes "abortion." The Amendment uses the term as it was employed in Roe v. Wade to mean the taking of life at any time in the womb; and the Amendment denies the right to take such unborn life.

The Amendment does not attempt to solve, magically as it were, every problem associated with abortion by language frozen into the Constitution. There are those who believe that only language affirming the personhood of the unborn will suffice to staunch the wound Roe v. Wade created. But any language about "persons" is likely to involve the due process clause, a clause whose meaning has shifted again and again with judicial opinion. The life of a person cannot be taken without due process of law; but due process of law, as interpreted by the judiciary, is not a firm foundation on which to rely. Moreover, any attempt to provide in the Constitution against private action taking the life of the unborn must allow for the traditional exception by which abortion is permitted where the mother's life is at stake. There is grave danger that any exception to save life or to prevent death will be interpreted judicially to permit abortion for health reasons; and abortion for health reasons is easily turned into the equivalent of abortion on demand. [26/] We cannot risk a constitutional exception that gives such latitude to the courts.

The Amendment puts power to protect life where it had been from the inception of the Republic until January 22, 1973, and it makes one change. Because the Supreme Court acted nationally to legalize abortion, the Amendment gives Congress the power to establish a national standard of protection for unborn life. At the same time the Amendment recognizes the historic role and historic primacy of the States in the protection of life and commands that the more protective state laws shall prevail over the federal minimum.

After nine years of experience in attempting to draft language corrective of Roe v. Wade and in participating in the drafting efforts of others, I am convinced that there is no magic formula, no perfect form of Amendment, that is immune from misinterpretation or criticism. The Amendment before you is a very good Amendment. It accomplishes what must be accomplished. I offer by way of suggestion only the following changes in the draft:

> Sec. 1 No right to abortion is conferred by this Constitution.
>
> Sec. 2. Congress and the several States shall have power to restrict or prohibit abortion; provided that the more protective law shall prevail.

"No" instead of "the," so that the right is comprehensively denied. "Conferred" instead of "secured," because "secured" has too benign a flavor. "Abortion" in the singular, because it is a general evil, like slavery. "Protective," because it has a more positive flavor than "restrictive."

Whatever technical corrections are made in the Amendment, I urge you to accept it in substance. About it the lovers of life can unite. With its enactment the great goal of restoring the protection of life in the United States will have been achieved.

NOTES

1. West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943) at 638.

2. Louisell and Noonan, "Constitutional Balance," in Noonan, ed., The Morality of Abortion (Cambridge: Harvard University Press, 1970) 225.

3. E.g., The Compiled Laws of Wyoming (1876), chapter xxxv, sec. 25; see also Noonan, A Private Choice (New York: The Free Press, 1979) 5-6.

4. E.g., Laws of Vermont (1867) Public Act, no. 57.

5. United States v. Vuitch 402 U.S. 62 (1971); see Digest of United States Supreme Court Reports (1969) at "Abortion."

6. Griswold v. Connecticut 381 U.S. 479 (1965) at 486.

7. Eisenstadt v. Baird 405 U.S. 438 (1972) at 453.

8. Roe v. Wade 410 U.S. at 222 (dissenting opinion).

9. Roe v. Wade at 163; cf. Connecticut v. Menillo 423 U.S. 9 (1975).

10. Roe v. Wade at 164.

11. Roe v. Wade at 163-164.

12. Doe v. Bolton 410 U.S. 179 at 192.

13. Roe v. Wade at 208 (concurring opinion).

14. The Chicago *Sun Times* November 12 - November 18, 1978; see also Noonan, *A Private Choice* 164-165.

15. See, e.g., *Commonwealth v. Edelin* (Mass.) 359 N.E. 2d 4 (1976).

16. See Noonan, *A Private Choice* 84.

17. E.g., *Doe v. Charleston Area Medical Center Inc.* 529 F.d 638 (4th Cir. 1975).

18. See Noonan, *A Private Choice* 86.

19. *Framingham Clinic Inc. v. Board of Selectmen of Southborough* (Mass.) 367 N.E. 2d 606 (1977).

20. *Colautti v. Franklin* 439 U.S. 379 (1979).

21. E.g., *Women's Services, P.C. v. Thorne* 483 F. Supp. 1022 at 1049 (D. Neb. 1979).

22. *Harris v. McCrae* 448 U.S. 297 (1980).

23. *Bellotti v. Baird* 443 U.S. 622 (1979) (plurality opinion at 644).

24. *Skinner v. Oklahoma* 315 U.S. 535 (1942).

25. *Planned Parenthood v. Danforth* 428 U.S. 52 (1976).

26. See *United States v. Vuitch* 402 U.S. 62 (1971).

A Private Choice

Abortion in America
in the Seventies

John T. Noonan, Jr.

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Inquiry 4

On the Jurisprudence of the Liberty

By jurisprudence is commonly meant those larger principles and assumptions that undergird a legal system and are the postulates of reasoning on any specific problem within it. Where the Constitution is concerned, jurisprudence and constitutional law overlap, for the fundamental concepts of the latter have the breadth of jurisprudential notions. It is worth, however, isolating the most basic views of legal power and responsibility in the American system from those which are constitutional law for the time being because they have been adopted by the Supreme Court.

Those most basic views constitute a paradigm or model of what the government is and of those it serves. In the American paradigm, the government is men and women acting according to laws they have made to serve the community and its members. The government is not an absolute sovereign with a will above the law. The government is not a mythic state, whose fiat creates rights and duties. Human beings exist before the government exists and are the reason why the government exists.

These observations are so obvious that they might not need to be made were it not for the existence of a competing viewpoint, whose most prominent modern exponent was the Austrian jurisprudent Hans Kelsen. In Kelsen's view, the legal order is the source of all legal rights, and a "person" is merely the personification of such legal rights.[1] In his words, "The physical (natural) person is, thus, no natural reality but a construction of juristic thinking."[2] If the legal order does not recognize any rights in a human being, such a human being is not a person. As Kelsen put it, "That a slave is legally no person, or has no legal personality, means that there are no legal norms qualifying any behaviour of this individual as a duty or as a right."[3] To have no rights is to be a nonperson, and the legal order is to determine if you have rights and are or are not a person.

Kelsen did not go so far as to say that whether you were a human being or not depended on the legal order. But he went almost that far by stating, "There is no kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right."[4] If there is no kind of human behaviour which cannot be made into a legal duty, it can be made law to disregard the humanity of certain classes of human beings. This doctrine, strangely prophetic of what the Nazi regime was to do, was framed by a fierce opponent of Nazism who thought that he put the law beyond politics by postulating a self-contained legal order.

In the United States Kelsen had been anticipated in only one important area: the law of slavery. Implicitly, not explicitly, it was assumed by the founders of the American Republic that the law could ignore the biological character of blacks as human beings and treat them as things.[5] That blacks were persons like whites was rarely put directly to the Supreme Court, so that the jurisprudence underlying this monstrous division was not articulated. Two famous cases, however, illustrated the practice.

In *The Antelope,* 281 Africans, rescued from an illegal slave ship, were claimed as property by representatives of Spanish and Portuguese slave-traders. The United States argued for their freedom, and Francis Scott Key on their behalf told the Court he represented "persons" who could not be treated as property under the American law against the slave trade.[6] But Chief Justice Marshall upheld the ability of the law to turn free men into slaves.[7] In *Dred Scott* v. *Sanford,* Chief Justice Taney treated the issue as one not of "personhood" but "citizenship" and held that the descendant of black slaves could never be a citizen of the United States.[8] In Taney's decision, as in Marshall's, there was an implicit Kelsenian jurisprudence: the law, not nature, determined who would count in the American constitutional scheme. In general, however, slavery aside, such a viewpoint was aberrant.

Before abortion became an issue, the Supreme Court had been strongly committed to the position that certain rights relating to marriage, procreation and education were prior to the state. In *Meyer* v. *Nebraska* in 1922 the issue had been posed whether the state could prohibit the teaching of languages other than English in elementary private schools. The Court ruled such a prohibition invalid as interfering with rights of teachers, students, and parents which did not depend upon the state for their existence.[9] Writing for the Court, Justice McReynolds recalled Plato's ideal republic where children were to be taken from their parents for upbringing. He observed, "It hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." [10] Three years later, in *Pierce* v. *Society of Sisters,* the Court held unconstitutional an Oregon law requiring children be sent to the public schools.[11] "The child," Justice McReynolds summed up, "is not the mere creature of the State." [12] The child's parents had the right, within broad limits, to determine the child's education, and that right was not a mere concession or creation of the state.

In the 1940s, in clear response to the association of compulsory sterilization with the Nazi regime in Germany, the Court in *Skinner* v. *Oklahoma* invalidated on equal protection grounds an Oklahoma law requiring the sterilization of habitual criminals.[13] Justice Douglas for the Court observed, "There is no redemption for the individual whom the law touches." [14] Justice Jackson, concurring, observed, "There are limits to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority." [15] The individual's procreative powers were not held by license of the state. The "natural powers" of persons were a check on fiats by the state.

In *Griswold* v. *Connecticut* in 1965 the Court held a law banning the use of contraceptives unconstitutional because it "invaded the sacred precincts of the marital bedroom." [16] For the Court, Justice Douglas wrote, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." [17] Two years later, in *Loving* v. *Virginia,* the Court held invalid a statute prohibiting the marriage of persons of different races. Chief Justice Warren for the Court declared, "Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State." [18] In both cases the power of the state was measured by the nature of marriage and the rights of persons anterior to the state and not dependent on it.

Meyer, Pierce, Skinner, Griswold, and *Loving* are the most famous cases of the Court treating the marital and family rights of persons as superior to the state. There are, of course, a host of cases where the rights of individuals to speak, to publish, to worship, and to defend themselves against the state have been vindicated. None of them are easily comprehensible if the state always had a fundamental power to decide who a person is. The ground of all these cases is that persons have certain rights and liberties. How easily the ground could have been removed by definition if that fundamental power to abolish personhood belonged to the state to exercise! How readily each case could have been won by a state claiming the capacity to determine for itself who was a person!

When the New York legislature in 1970 permitted abortion on demand for the first six months of pregnancy, Robert Byrn obtained appointment as guardian ad litem of unborn children who might be aborted under the statute, and he won a court order restraining the New York municipal hospitals from performing abortions except to save the life of the mother. The court appointing him treated the New York law as an unconstitutional infringement of the right to life of the unborn.[19] On appeal, the highest court of the state saw the question as turning on whether or not the unborn were persons; it held that they were not.

Speaking for the majority, Judge Charles Breitel granted that the unborn in the womb were "human" and "unquestionably alive." [20] But, he continued, "It is not true that the legal order corresponds to the natural order." Who was a legal person was "for the law, including, of course, the Constitution, to say." Kelsen was invoked by name to justify the conclusion that it was "a policy determination whether legal personality should attach and not a question of biological or 'natural correspondence'." [21]

In dissent, Judge Adrian Burke rejected the view that the state had the option to determine who was a person. He invoked the Declaration of Independence, "the basic instrument which gave birth to our democracy." The Declaration proclaimed that all men were "created equal" and were "endowed by their Creator with certain inalienable rights." These inalienable liberties preceded the state and arose from a source superior to the state, and the state could not deny them by classifying "a group of living human beings as fit subjects for annihilation." [22] Calling on the Declaration of Independence, Burke sought to give concreteness to what was a much larger idea, the "higher law" above the Constitution.[23]

In the clash between Breitel and Burke, two different jurisprudences were in conflict. It was that of Breitel and Kelsen which Justice Blackmun followed, up to a point, in *The Abortion Cases*

(*Roe* v. *Wade* and *Doe* v. *Bolton*). But while Breitel had left the making and unmaking of persons to the legislature with a reservation as to what the Constitution might say, Justice Blackmun, speaking as the Constitution, described the unborn as less than "persons in the whole sense"—a reduction which in fact treated them as less than human.[24] The biological evidence that they were human he ignored. Less candid than Breitel, he did not concede their humanity, nor did he cite Kelsen. He merely acted as a Kelsenite might feel free to act. The law created persons, and any human conduct might be given valid legal form.

The paradox of Justice Blackmun's opinion was this: To invalidate the state abortion statutes it was necessary for him not only to ignore the unborn child but to recognize a liberty anterior to the state in the carrier of the child. The invocation of liberty which was the very heart of his opinion was the invocation of a standard superior to enacted law. His radical use of "higher law" was only disguised by his claim that something in the Constitution supplied the standard by which the state laws on abortion were invalid. The ultimate basis of his decision was nothing in the Constitution but rather his reading of the natural law liberties of an individual.

The Abortion Cases themselves thus left the two jurisprudences in conflict. The negation of the unborn was inexplicable if the legal order had to bear some correspondence to the real order. The exaltation of individual liberty over a state statute was unintelligible unless the individual had rights not dependent on the state.

Only a sequel to *The Abortion Cases* showed how completely the courts were willing to accept the separation of the legal and natural orders to carry out the cases' basic thrust. In reaction to *Roe* v. *Wade*, Rhode Island enacted a law declaring that within its borders the unborn were persons. The constitutionality of the statute was promptly challenged in the federal court by lawyers for the Planned Parenthood Federation and the American Civil Liberties Union. In response, the State of Rhode Island offered witnesses to testify to the human character of the unborn.[25]

Sitting by himself and applying a rule that permitted him to declare unconstitutional by himself only "frivolous" legislative acts, Federal Judge Pettine refused to hear the state's witnesses. He invalidated the statute as "frivolous." "To me," he wrote, "the United States Supreme Court made it unmistakably clear that the question of when life begins needed no resolution by the judiciary as it was not a question of fact. . . . I find it irrelevant to all the issues presented for adjudication."[26] Once the Supreme Court had denied personhood to the unborn, there appeared to be no evidence on earth that would be permitted into the judicial system to persuade it that it had been wrong.[27] Personhood was a question not of fact but of fiat, and only the Court's fiat counted.

It sometimes makes debating points in the perennial quarrel between "positivists" and "natural law lawyers" that one or the other view of the law has led to, or justified, the worst consequences. One version of the natural law was once used to defend laissez-faire capitalism. On the other hand, the Nazi system of justice appears as a purely positivist monstrosity. It is clear that any jurisprudence may be misused, and that the worst consequences are not all to be laid at the foot of a legal philosophy.

Nonetheless, there is a difference between the two approaches in capacity for self-correction. From the eighteenth century on, from Blackstone onward, the legal system of slavery was attacked in the name of humanity and natural liberties; natural law was used to correct the mistaken claim that slavery was natural.[28] But if a pure positivist view of the law prevails, there appears to be no outside criterion to which to appeal if some human beings are excluded from the system. A revolution may overturn the system, but there is no vehicle for rational criticism of what the will of the judges has determined the Constitution to be.

This consequence is of special importance to our constitutional system. We have set up an elaborate protection of constitutional rights, especially for those who in Justice Harlan F. Stone's phrase constitute "discrete and insular minorities."[29] Such minorities can enjoy the liberties of the Bill of Rights secure in the knowledge that the Supreme Court will defend them against any infringements by the majority.

But all rights in our constitutional jurisprudence are premised on humanity. Your rights flow from your human character. None of them have security if it rests with a group of nine men, or a majority of them, to define you out of the human race. No discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman. If the legal order is a universe which can be developed without reference to the natural order, only the will of the makers of the legal order controls the recognition of legal existence. In the jurisprudence of Hans Kelsen, now officially that of the Supreme Court for the purposes of law on abortion, any human conduct can be made legally valid, and any human being can be expunged from the legal order and left without protection.

Such is the jurisprudential significance of *The Abortion Cases.* Their full legal significance, however, can be measured only in the more particular terms used by the scholars of constitutional law. The judgment from this perspective is no more reassuring.

Inquiry 5

On the Constitutional Foundation of the Liberty

If the full-dimensioned liberty is to be found neither in the Constitution nor in a jurisprudence of the natural rights of the person underlying the Constitution, is there a basis somewhere in American legal theory for what the Supreme Court did? Was the creation of the liberty an exercise of a discretion constitutionally entrusted to the Court? Or was its creation an act of usurpation, a fiat of "raw judicial power," as one dissenting justice suggested that it was? On these questions the persons in the best position to answer are the scholars whose profession is to study the Constitution and the Court.

Three principal elaborations and justifications of *The Abortion Cases* have been offered. Philip B. Heymann, professor of law at Harvard Law School, and Douglas E. Barzelay, a recent Harvard graduate, explain the decisions as continuing a long line of cases protecting "fundamental rights" from state interference—specifically, such private rights as the right to marry, the right to procreate, and the right to educate one's children.[1] They invoke the great cases that have built a bulwark around the family, including the cases protecting the rights of parents, *Meyer*[2] and *Pierce*.[3] They cite the assertion of the right to procreate in *Skinner*.[4] They point to the protection of rights centered in marriage in *Griswold*[5] and *Loving*.[6] They add one further case, decided in 1972, *Eisenstadt* v. *Baird*, which held that the state unconstitutionally violated the privacy of the individual by forbidding the distribution of contraceptives to the unmarried.[7] Taken together, Heymann and Barzelay say, the cases "delineate a sphere of interests—which the Court now groups and denominates 'privacy'." That privacy is implicit in the "liberty" protected by the

Fourteenth Amendment. At the core of this "sphere," subject only to limited social restrictions, is the right of the individual to make "the fundamental decisions that shape family life: whom to marry; whether and when to have children; and with what values to rear those children." The cases that created this protected zone are justified because "our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. . . . [T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it." [8]

Heymann and Barzelay are far more articulate than the Court. They make an impressive case for the rationality of *Roe* v. *Wade*. Constructing a consistent rationale for each decided case in the line they cite, they make the line speak for *Roe* v. *Wade*. In doing so they turn *Roe* v. *Wade* itself into a vindication of the family. What they do not notice or care to acknowledge is that *Roe* v. *Wade* was profoundly hostile to the family. The family unit which they say is "an integral part" of our constitutional system was rejected by *The Abortion Cases* and destroyed by their logical sequelae.[9]

The only case these scholars invoke which bears on the Court's true rationale is *Eisenstadt* v. *Baird*. That case followed by seven years *Griswold* v. *Connecticut*'s upholding of the right of the married to use contraceptives. *Griswold v. Connecticut* was based on the immunity of "the sacred precincts of the marital bedroom." [10] Invoking *Griswold, Eisenstadt* turned the liberty on its head. What had been founded on marriage was now said to be the liberty of the unmarried. For the Court, Justice William Brennan, Jr., wrote, italicizing the key word, "If the right of privacy means anything, it is the right of an *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [11] In those words a liberty that had been based on the special position of the married was made universal in a way that repudiated the legally privileged status of marriage.

Eisenstadt—decided after *Roe* v. *Wade* had been argued to the Court, so that its revolutionary rationale was probably invented with *Roe* v. *Wade* in view—was in fact *Roe* v. *Wade's* only true precedent. Each was premised on precisely the society that Heymann and Barzelay claim does not exist in America—a society of isolated individuals. Each rejected what Heymann and Barzelay say is integral to our constitutional system—the family unit. Each was a massive departure from the long line of cases that Heymann and Barzelay correctly portray as a vindication of the family. The attempt to show that *The Abortion Cases* were rooted in precedent ends in what is in effect a counter-proof. Except for a single case decided by the same judges at almost the same time, *The Abortion Cases* floated without mooring in the Constitution or in any decided case; indeed they denied the premises of the line of cases that put the person and the family beyond the power of the state.

Heymann and Brazelay came to the defense of *Roe* v. *Wade* in the spring of 1973. By the fall a new theory had matured. It was fashioned by another professor at Harvard Law School, Laurence H. Tribe. His thesis was that *Roe* v. *Wade* was an instance of the constitutional prohibition against establishment of religion. The Constitution, he noted, forbade the establishment of religion. Laws regulating abortion, he claimed, were an establishment of religion. Therefore, he concluded, they were unconstitutional.

To be sure, no one before Tribe had ever considered laws on killing to bear this kind of religious stamp. Tribe, however, argued that "whenever the views of organized religious groups have come to play a persuasive role in an entire subject's legislative consideration for reasons intrinsic to the subject matter as then understood," then the legislature cannot act without favoring a particular religious doctrine and thereby "establishing" a religion. A controversy, he contended, "may be so structured in a particular social and historical context that no attempt to resolve it in a public forum can avoid explicit confrontation with the religious differences that divide the disputants." Abortion was such a controversy and, as he put it, "triggered" the constitutional barrier to legislation.[13]

Tribe's explanation, like Heymann and Barzeley's, suffered from the disadvantage of not having been formulated by the Court. But as a rationalization of *The Abortion Cases* it was more plausible, as it was contradicted by nothing that the Court had said. It had the additional merit of describing the abortion battle as an advocate of abortion might view it: the sheer imposition of religious views on a dissident minority. But there were also serious problems with Tribe's account.

First, as stated by him, it scarcely applied to statutes that, when they were adopted, were not the subject of religious controversy. The abortion statutes in question were of that character. It was not at all evident what "organized religious groups" had led the Texas legislature to adopt its abortion statute in 1911 or even what "organized religious groups" had prevailed when Georgia had adopted the American Law Institute model in 1970. What Tribe had to mean in order to sustain the Court was that if, after a legislature had passed a law, a minority contended that the law was "intrinsically religious," then the Court should invalidate the law. This position seemed to suggest that any group that could point to "intrinsic" religious postulates behind legislation should be able to obtain the invalidation of the legislation. The law on marriage, for example, rested on religious belief. By Tribe's criteria, it was open to any group—polygamists, say, or mere believers in free cohabitation—to attack the intrinsic religious character of the law and procure its invalidation.

Even more serious was the way Tribe was forced to use his theory one-sidedly. His basic contention was that abortion was a subject of a religious nature because it involved "a decision as to what characteristics should be regarded as defining a human being," and that that decision "depended on a statement of religious faith upon which people will invariably differ." [13] If his contention were accepted, *any* decision as to who is human would be a religious decision. Why was his decision, then, to be preferred to someone else's? Why was it unconstitutional for the legislature, making what he called a religious decision, to treat the unborn as human, and constitutional for the legislature, making the same kind of decision, to treat the unborn as nonhuman? Tribe did not address these fundamental questions. However, "on reflection," as he put it five years later, Tribe rejected his own argument.[14]

A third and by far the most candid effort to defend *The Abortion Cases* was made by Michael J. Perry. Perry, an assistant professor of law at Ohio State, boldly made the claim that the phrase "due process of law" in the Fourteenth Amendment meant more than "process." It had a "substantive" content, and the states were bound to observe that substance. Not only were the states bound not to violate that substance; they were under a positive duty to enact only laws which "involved" it.[15] Perry identified this decisive "substance" with "the public welfare." And what defined the public welfare? To that crucial question, Perry answered forthrightly, "The scope of the 'public welfare' is a function of social conventions." Or, as he put it alternatively, "The basic determinants of the public welfare are the conventional attitudes of the sociopolitical culture." [16] The Court was assigned the task of making the states conform to the conventions of the day.

For the Supreme Court to determine public welfare in this way, Perry argued, the Court had to exercise "an ethical function." [17] In fulfilling this function, the Court propounded "general, fundamental ethical principles for the moral education and guidance of the political process." [18] Perry did not disguise or regret the teaching role he gave the Court. The Court was in a better position than any legislature to say what public morals should be, for it was "insulated from the bartering and pressures of a legislature process" and could "look beyond the demands of self-interested minority lobbies in an effort to discern the attitudes characteristic of the moral culture at large." [19] In an era of shifting sexual morality, the Court could act as "a jury." As "a matter of political reality" the Court was a jury that "generally will reflect and mediate the temper of the dominant political and moral culture." Acting as a juryman, "each Justice must ask whether particularized claims about that culture resonate with him or her." [20] In the vernacular, the "vibes" felt by the Justices were to guide their exposition of the Constitution.

Perry's defense of *Roe* v. *Wade* was bold, clear, consistent—consistent with the decision and internally coherent. Despite his own doubt as to "whether individual Justices are even aware of what they are doing," it sounded very much like what Justice Blackmun and his colleagues had been doing. His defense had the ring of realism and the innocence of the child who noted the emperor's absence of clothes. If there was any rebuttal to it on its own terms, the rebuttal could come only from the political process, showing that "the jury" had misread "the sociopolitical culture." But this kind of rebuttal depended principally on the political process; it escaped the confines of scholarly debate where Perry's candor enthroned the flat assertions that substantive due process had been employed by the Court and that substantive due process, reflecting the ethics of the nation as interpreted by the Justices, was a good thing.

Perry's defense, nonetheless, had a deficiency. It ran against the meaning of "liberty" that for seventy years had been accepted as valid by the best minds which had struggled to understand the Constitution. It gave a latitude to judicial lawmaking which generations of scholars had perceived as subversive of the limits of the American Constitution and destructive of American democracy and the distribution of organic powers by the Constitution.

For almost a century the nature of the liberty litigated in *The Abortion Cases* had been explored in another context by the Supreme Court and by scholars evaluating the Court's work. The context was the social legislation of the industrial states and the challenge to that legislation in the name of the constitutional liberty that the Fourteenth Amendment said could be taken only by due process of law. In that context, a theory of constitutional meaning and the limits of the judicial role had been worked out with a comprehensiveness and universality of principle that could not be confined to the cases decided but seemed to stand as general criteria which the Court could defy only at enormous cost. The criteria were summed up in Justice Holmes's dissent in the landmark case of *Lochner* v. *New York*.[21]

The New York legislature had passed a statute making it a crime for a baker to employ workers for more than sixty hours a week or ten hours a day in a biscuit, bread, or cake bakery. No general limitation on hours of work existed at the time or could have passed the legislature, and any "labor law" was regarded with suspicion by the courts. A sixty-hour work week was bold innovation. But the highest court of New York sustained the regulation on the ground that the law was intended to guard the health of the public by protecting it from the products of overworked men, exhausted by fatigue and thus likely to be careless in their baking, and on the additional ground that it was intended to protect the health of the workers themselves, subject as they were to the inhalation of particles affecting their lungs.[22] The decision was challenged in the Supreme Court by Joseph Lochner, a baker convicted in the Oneida County Court of a misdemeanor for permitting an employee to work more than sixty hours.

The Supreme Court held for Lochner. "The right to purchase or to sell labor," the Court declared, "is part of the liberty" protected by the Fourteenth Amendment. The state could not regulate Lochner's right to buy labor on his own terms. To be sure, the liberty was not absolute. The state in extreme cases could abridge the liberty in order to protect health; it could, for example, limit employment in underground mines to eight hours a day. But the state had no business protecting the health of bakers, even if "very likely, physicians would not recommend the exercise of that or of any other trade as a remedy for ill health." Statutes "of the nature of that under review are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed . . . upon the subject of the health of the individual whose rights are interfered with." Work in any department "carried with it the seeds of unhealthiness." That did not make state intervention lawful.[23]

Interpreting the moral conventions of their day and reading them into the meaning of "liberty," the Justices found that the

Constitution had created a virtually complete barrier to laws regulating the conditions of labor. Viewing the law not as a health measure but "as a labor law, pure and simple," the Court said that the constitutional answer might be given "in a few words." The "liberty of person" and the liberty of contract of the baker and his workers could not be interfered with. The Fourteenth Amendment was an absolute barrier to state regulation of the hours of work.[24]

Four Justices disagreed, and Justice Holmes wrote the dissent, which became classic. He repudiated the role of Platonic guardian. He would not read his view of a controverted matter into the meaning of liberty in the Constitution. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and longer before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Holmes then set out what was to be the touchstone for constitutional interpretation where an issue was one of political controversy and the legislature of a state had resolved it. The Court was not to see itself as possessed of resources or rationality superior to the political process:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[25]

Every law restricts a liberty. Unless a "rational and fair man" would "necessarily" admit that a state statute infringed "fundamental principles," the Court perverted the Constitution when it invoked "liberty" to invalidate a law. If a law took sides on an issue on which rational and fair men disagreed as to the fundamental principles at stake, the Court was not to take sides too. The Court was not to substitute its theory for the legislature's. As Holmes put it again near the end of his life, the Court's "own discretion" was not the criterion. The Fourteenth Amendment, he wrote, had not given the Justices "*carte blanche* to embody our economic or moral beliefs in its prohibitions."[26] The measure for constitutionality was provided not by the preferences of the Justices or by abstract theorizing about society, but by fundamental principles as they had been comprehended by Americans and set out in American tradition and law.

The criterion of Holmes became the watchword of great judges and scholars of the Court. It undergirded the dissent of Justice Brandeis in *Adams* v. *Tanner* a decade after *Lochner,* when the Supreme Court read "liberty" to mean that the state of Washington, attempting to regulate private employment agencies, had violated such agencies' liberty to do business as they chose.[27] And Holmes joined Brandeis's dissent in 1924 when, again on behalf of bakers, the Supreme Court held their liberty to be violated by a statute prescribing specific weights for loaves of bread. The Court, said Brandeis, engages in "an exercise of the powers of a super-legislature —not the performance of the constitutional function of judicial review."[28] Such a redistribution of organic powers originally distributed in a different way by the Constitution was seen as a gross deformation of the Constitution.

Laissez-faire economics masquerading as the voice of the Constitution were what Holmes and Brandeis fought, and they fought men too unself-conscious and too unself-critical to realize that what they put forth as the pure voice of the Constitution were only the clichés of one side of a debated question. Self-conscious and self-critical themselves, they could not but see the folly of their brothers deluding themselves that they were more reasonable than the legislators and that Justices in the shelter of their chambers had the special wisdom needed to be super-legislators. Why would anyone suppose that nine men picked by politicians to be designated "Justice" acquire by virtue of their office an insight superior to all other mortals in the country?

The evil Holmes and Brandeis protested was succinctly summarized by Felix Frankfurter, while he was still a scholar off the bench. Celebrating "Mr. Justice Brandeis and the Constitution," Frankfurter wrote:

> The veto power of the Supreme Court over the social-economic legislation of the States, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The most destructive, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely, the tests of trial and error.

> The least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal authority of the Constitution.[29]

Destructive, irresponsible centralization and fallible judgment put forward as Constitutional mandate—these were the evils of "due process" when the Justices acted as though they were specially inspired in giving a substantive content to "liberty" which no legislature had the ability to perceive.

The criticisms of Holmes, Brandeis, and Frankfurter carried the day in the world of legal education. In time the Supreme Court came to make their criteria its own. In 1963, upholding a state statute regulating debt collectors, Justice Black stated for a unanimous Court, "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." That doctrine "has long since been discarded. . . . We refuse to sit as 'a super-legislature to weigh the wisdom of legislation'." [30] The dissents of Holmes and Brandeis were now the accepted rule of the Court. It was not for the Justices to decide what social philosophy a legislature must follow to enact constitutional legislation.

Three years before *The Abortion Cases,* Justice Stewart (later to be part of the *Roe* and *Doe* majority) declared that once "the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought' . . . That era long ago passed into history." [31] To quote from Justice Stewart may only demonstrate that the memory of judges is short, that judges like other men are fallible, and that when a judge wants very much to achieve a result he may use the discredited techniques of his predecessors. Yet unless ideas mean nothing, unless great constitutional principles are produced ad hoc as flummery to rationalize the desires of the moment, everything that Holmes, Brandeis, and Frankfurter held to be true was disregarded by *The Abortion Cases.* No matter could have been said to fall less "within the special competence of the judges." No decisions ever sheltered more behind "the impersonal authority of the Constitution." No opinions were so clearly the work of fallible individuals acting as a super-legislature drafting rules for the nation.

The incompatibility of *The Abortion Cases* with the criteria of Holmes and Brandeis was quickly remarked by modern scholars who were, in many cases, not unsympathetic to abortion on moral grounds but who would not abandon their most cherished view of constitutional government in order to accommodate or rationalize a personal preference. For example, Archibald Cox, the former Solicitor General, the hero of the Watergate prosecution and the present Williston Professor of Law at Harvard Law School, wrote, "The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. . . . Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution." [32] Cox could not discover the principle that led Blackmun to act as a superlegislator for the nation

Alexander Bickel, Sterling Professor of Law at Yale and *The New York Times*'s counsel in the *Pentagon Papers Case,* described Justice Blackmun's opinion in *The Abortion Cases* as a "model statute" of the kind usually drafted by the Commissioners of Uniform State Laws. How did the model statute become the mandate of the Constitution? A great constitutional lawyer, Bickel was puzzled: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject." [33] The Court, in Bickel's view, was "not excused in transgressing all limits, in refusing its own prior discipline." The Court, he reminded the Justices, was in the end subject to "the discipline of the political process," and that discipline was "subsequent." [34] The answers the Court was attempting to give today were "derived, not from Spencer's Social Statics, but from fashionable notions of progress." It may take time, Bickel observed magisterially, "before the realization comes that this will not do." [35]

Richard Epstein, professor of law at Chicago, evaluated *The Abortion Cases* in the journal professionally devoted to commentary on the Court's work, *The Supreme Court Review.* He began by observing that Janet Roe, the pseudonymous plaintiff in *Roe* v. *Wade* had presented a case which was moot—that is, by the time the Court came to decide her liberty of obtaining an abortion, she was no longer pregnant. Applying the usual rules, the Court would have dismissed her action; in its eagerness to resolve the issues it leaped over its own procedural standards and pressed on to decide her case.[36] There was a second, telltale stain: The plaintiff had claimed that the Texas statute was adopted when abortions were surgically unsafe and was intended to protect the mother's health. This rationale was a piece of fancy appealing to Justice Blackmun; [37] but even as fancy it had no relevance, because the Texas law at bar had been reenacted in 1911 when surgical abortions were safe.[38] Justice Blackmun did not notice how late the law had been legislated, and he swallowed the plaintiff's theory whole.

Epstein moved to a frontal attack upon *The Abortion Cases.* "In the case of the Supreme Court," he noted, "only principled grounds for decision stand between it and the charge of arbitrary decision based upon its naked political preferences." [39] Epstein could not find in the Constitution the "principled grounds" of Justice Blackmun. He had produced "comprehensive legislation," which he had "enacted in the name of the Due Process Clause of the Constitution." How had the Justice determined that the unborn child was not a person within the meaning of the Constitution? He had not said. He had claimed that there was substantial disagreement as to when life began, and that the Court need not resolve the disagreement, but he had in fact resolved the disagreement—to the detriment of the unborn.[40] He had decided that life did not begin before birth. Even in doing this, he was inconsistent. He had spoken of "potential life" in the third trimester. "But is there not," Epstein asked, "potential life in the unborn child from the moment of conception?" [41] How would Justice Blackmun describe the child from conception to viability? His principles and his standards were "invisible." [42]

Harry Wellington, professor, and later dean, of the Yale Law School, observed, "The Court would have put it better had it been candid enough to quote *Lochner:* 'Statutes of the nature of that under review are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed . . . upon the subject of the health of the individual whose rights are interfered with'." [43] By *Lochner,* Wellington meant the majority opinion in *Lochner,* and he found the parallel to it exact in *Doe* v. *Bolton,* where Justice Blackmun had held invalid the requirement of Georgia law that *two* physicians concur in the need for an abortion. Such a cautious restraint on physicians, "most" of whom, Justice Blackmun thought, were "good men," had been found to run afoul of the Constitution. The Court, Wellington remarked, "treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association." [44] Even if only the health of the pregnant woman were to be considered, Wellington continued, Justice Blackmun had not explained why the state could not regulate early abortion with an eye to her health, unless liberty meant "instantaneous gratification." Even the First Amendment, he added, "grants no such right."[45]

But more than the carrier's health was at issue. To justify the taking of fetal life, the Court had invoked precedents on the privacy of the marital bed. The Court's use of privacy, Wellington declared, was "Pickwickian."[46] Abortions were performed not in marital beds but in hospitals. As far as Wellington could determine, "conventional morality" in America justified some kinds of abortion, but not all. Conventional morality was "the outer limit of the Court's legitimate authority." The Court had no "mandate" to create new morality "when elaborating the concept of liberty in the Fourteenth Amendment."[47] The Court had acted as though it had such a mandate and imposed the ethical preferences of the Justices on the people.

John Hart Ely, a professor of law at Yale and then at Harvard Law School, made a close comparison between *Lochner* and *The Abortion Cases* and concluded that they, like it, answered questions the Constitution had not made the Court's business. The decision was "a bad decision." It was bad for one basic reason: It did not explain how its elaborate regulations were constitutional law.[48] Like the other constitutional law scholars, Ely could find no principle or standard which had guided Justice Blackmun in his extraordinary interpretation of the Constitution.

Ely did observe that the result was congruent with the judicial philosophy of Richard Nixon (who had appointed Justice Blackmun and two of the other judges making up the majority in *The Abortion Cases.*) Nixon had enunciated a result-oriented view of the Court's function. "That this sort of invitation, to get in there and Lochner for the right goals, can contribute to opinions like *Roe* is obvious. In terms of process it is just what the President ordered."[49] Political pragmatism, not constitutional principle, appeared to be the *raison d'être* of *The Abortion Cases.*

Critics did exist who condemned *The Abortion Cases* by asserting that the Court could not add to the written Constitution.[50] Critics did exist who were as outraged by what the Court had done to the unborn as by what it had done to the Constitution. Bickel, Cox, Ely, Epstein, and Wellington, however, were five critics who were neither fundamentalists in constitutional theory nor champions of the cause of the unborn. They accepted constitutional development by judicial interpretation as necessary, ranging in their views on this point from the pure Frankfurtian position of Bickel to Wellington's acceptance of "conventional morality" as a guide. They showed no special commitment to the anti-abortion side. In their cool professional judgment, *The Abortion Cases* were indefensible because they had a basis neither in the Constitution nor in a principled interpretation of the Constitution.

There is a tendency for any layman to rate one expert in a field as good as another. But to the experienced in any field, experts are not fungible. In the field of constitutional law, persons of experience would probably conclude that Barzelay, Heymann, Perry, and Tribe were outweighed by Bickel, Cox, Ely, Epstein, and Wellington. The balance of expert opinion viewed the liberty as a disaster. As the critics successfully evoked Holmes, Brandeis, and Frankfurter, the weight of their judgment was overwhelming.[51]

The judgment was remarkably harsh: without principle, a failure; a refusal of the Court's own discipline, a transgression of all limits, something that will not do; naked political preference, comprehensive legislation, invisible standards; a replay of *Lochner,* an advertising agent's view of doctors, Pickwickian, beyond the outer limit of legitimate authority; none of its business, a bad decision, an out-Lochnering of *Lochner* in the result-oriented style of a result-oriented Nixon.

Scholarly authority judged the liberty to lack constitutional basis. Its establishment, as Justice White had said, was an act of raw judicial power.[52] If the liberty did not have a foundation in the Constitution or in constitutional principle, its basis had to lie in politics.

Senator HATCH. Professor Tribe?

STATEMENT OF LAURENCE TRIBE, PROFESSOR OF LAW, SCHOOL OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

Mr. TRIBE. Thank you, Mr. Chairman and members of the subcommittee.

I am honored to be here to address this subcommittee on what I think is one of the most profound, difficult, and troubling issues of our day. I join Senator Packwood in congratulating the chairman for having confronted head-on what is a terribly troublesome issue.

Let me ask permission to have my prepared statement made part of the record.

Senator HATCH. We will make all prepared statements a part of the record as though fully read, without objection.

Mr. TRIBE. What I want to do then is talk more or less extemporaneously about the issue and suggest what I think are the crucial questions before this subcommittee.

The Constitution has been amended 4 times to overturn decisions of the Supreme Court and 22 times for other reasons. I think it is noteworthy that not 1 of those 26 amendments denied or rolled back what anyone could describe as a civil right.

Thus, I believe Senator Packwood is correct in describing the history of the Republic, and certainly the history of the Constitution from 1787 to the present, as a history of expanding liberty.

Senator Hatch, speaking of the equal rights amendment, once said, "Amending the Constitution is a means of last resort, an act of desperation." I think it is all the more true that it is an act of desperation—something we ought to resist unless there is a showing of clear and compelling necessity—when we undertake to amend the Constitution, to undo what has become a basic right of women and their families, a right to choose, independent of majority vote either in this Congress or in any State of the Union, whether to terminate a pregnancy—a right independent of the vicissitudes of democracy.

I disagree profoundly with anyone who says, as Mr. Noonan did, that this right is a mere slogan. For those whose lives it affects the right is truly indispensable.

I fully understand that there are those who believe equally conscientiously that there is a profound right on the other side—the right of the unborn to life. I want therefore first to address the question—I might even call it the myth—that somehow *Roe* v. *Wade* denied the right to life, or repealed—as Mr. Noonan puts it—the Constitution's protection of the living, and created a novel, unsupported, unprecedented kind of liberty.

I think it is flatly false to understand *Roe* v. *Wade* as denying the protectability of life or creating an unprecedented liberty. Let me say something to this subcommittee as to why that is so.

The issue is not how the common law did or did not treat abortion. I think Mr. Noonan misunderstands Senator Packwood on the point, but I do not want to get into that. That is not the point—whether it was a crime at common law or by statute. The issue rather is how this Nation has confronted the problem of Government power over life and liberty—Government intrusion into spheres of choice.

What I would like to explain briefly is how *Roe* v. *Wade* emerged, not as the creation of a novel liberty but as the recognition and extension of traditional and well established limits on the power of the State—on the power of Government.

It is noteworthy—despite the fact that some proponents of choice have urged that there be public funding, as Mr. Noonan says—that the Supreme Court of the United States has unequivocally held, in 1977 and again in 1980, that the Government is entirely free to protect life and to protect the unborn by denying public funds even for therapeutic abortion.

There are those who thought that an unwise decision—who thought that it discriminated against the poor. But it reflected the Supreme Court's recognition that what it was protecting was not freedom for abortion on demand, and particularly at public expense, but liberty from undue governmental intrusion into private life.

Indeed, even Justice Rehnquist, who dissented in *Roe* v. *Wade* and is no supporter of any constitutional right of abortion, said in no unmistakable terms that in his view the Constitution imposes substantive limits on Government interference through restrictive abortion laws with the life of a woman.

He said that, when a woman's life is at stake, it would not be permissible to ban abortion. And I remind the subcommittee that, because the risk of death from pregnancy or childbirth is between 6 and 7 times as high (and in some cases 40 times as high) as the risk of death in first trimester abortions, it is not a mistake to suppose that a concern with life is involved in every case.

But the problem goes deeper than risk to life. The woman's body is at stake; her future is at stake. Of course those who want to protect the life of the unborn are prepared to interfere with that future by coercing continued pregnancy.

The issue that *Roe* v. *Wade* confronted was whether traditional limits on governmental power are surpassed when the Government tells someone, "You must serve as the involuntary host for this life."

You speak, Senator Hatch, about the lives of seals and whales, for which I have great sympathy. I have greater sympathy for the life of a human fetus. But no woman has ever been forced to incubate a seal or a whale.

The issue confronted by the Supreme Court in *Roe* v. *Wade* was not whether there is some special and novel liberty of abortion. The issue was whether the undisputed liberty to control one's body, one's life, and one's future is transgressed when the Government imposes this kind of severe coercion.

Senator Hatch, in a statement that you introduced accompanying your amendment on September 21, you said—and I think quite rightly—that there can be absolutely no doubt in anyone's mind that there is not currently a "consensus" in this country on the "repugnance of abortion." Were there such a consensus, I suppose you would have favored a stronger amendment.

But let me point out what the Supreme Court in *Roe* v. *Wade* was concerned to infer from the absence of that kind of consensus.

There is no doubt that restrictive abortion laws, particularly in early pregnancy—and some 91 percent of abortions are performed in the first trimester—interfere importantly with the life and liberty of the woman.

In American constitutional history that kind of liberty can be overridden only when there is a clear national consensus on some overriding value on the other side. It has been our constitutional tradition that, when there is an absence of such consensus, we do not simply leave it to the States or to Congress to have a vote up or down. What we do when fundamental liberties are involved and there is no genuine consensus the other way is err on the side of liberty and insist that liberty be protected.

Senator HATCH. Could I interrupt you on that?

Mr. TRIBE. Certainly.

Senator HATCH. Do you not feel, Professor Tribe, that one reason there is no national consensus is that there has not been the opportunity of developing such a consensus as a result of *Roe* v. *Wade?*

If we allowed this to be open to the democratic processes, we might develop a consensus one way or the other.

Mr. TRIBE. Senator Hatch, I respect your view, but I respectfully disagree with it completely. Let me tell you why.

First of all, the Supreme Court has not prevented public debate on this issue. No issue has been more thoroughly debated over the last 8 years, as you and I both know.

What the Supreme Court has said is that when we are in agreement that a basic liberty is involved—and we have since *Marbury* v. *Madison* entrusted the Court to define basic liberties—then, even if the majority in any given State develops something of a consensus that it would be wise to override that liberty, the American Constitution takes such power from Government.

By submitting this matter to the States we would create an opportunity in every State to vote down the woman's liberty by a bare majority, but it seems to me that that is not what the Constitution's protection of liberty has ever meant.

Senator HATCH. But the point I am making is that I do not think there is any consensus in this country today about the nature of the fundamental liberty in the first place—the liberty that you are seeking to "balance."

Mr. TRIBE. But we do not arrive at liberty, Senator, through consensus.

Justice Jackson in *West Virginia* v. *Barnette* said——

Senator HATCH. Liberty can be identified on both sides of this question.

Mr. TRIBE. If I could just continue for a moment——

Senator HATCH. I get so wrapped up in some of these concepts.

Mr. TRIBE. I am afraid I do too.

Senator HATCH. I have noticed. That is good. Go ahead.

Mr. TRIBE. In *West Virginia* v. *Barnette* Justice Jackson said that the whole point of the Bill of Rights was to remove certain liberties, which we entrust life-tenured judges to define from the vicissitudes of a shifting political majority.

When there is deep disagreement on whether there is some overriding value—the right to life, for example—that justifies intruding upon a liberty, it has not been our tradition to submit the matter to public referendum. Democracy has always been limited by judicially defined protections for liberty, and the enterprise in which I am engaged is to ask whether the Court in *Roe* v. *Wade* was really creating a liberty out of whole cloth or just recognizing the implications of long-established limits on Government power.

The Government has not in this country been allowed to tell you or me how we must use our bodies, even to save another life, let alone to save something that some people do not regard as a human being.

Senator HATCH. That is an eloquent defense of judicial supremacy, but we do have three separated powers, and the Congress representing the people as elected representatives may also have some desire to participate in the process of defining what is fundamental "liberty."

Mr. TRIBE. I think Congress should have that right, and all I am saying is that, in exercising it, Congress should not be misled by the myth that *Roe* v. *Wade* was made from whole cloth. I am only trying to describe the antecedents.

Senator HATCH. We all agree it was made from new cloth—that is the point.

Mr. TRIBE. Whole cloth—w-h-o-l-e.

Senator HATCH. Oh, "whole" you are saying. I am sorry; I thought you were saying "old cloth."

Mr. TRIBE. No—"whole cloth." It is settled that the Government should not have power to intrude in the bedroom and in the family. It may be that the Supreme Court's decisions protecting the right of an individual and of a couple to decide whether to have children—decisions in the area of contraception—are not themselves the target of this amendment.

Yet it should be understood that *Roe* v. *Wade* the Supreme Court's abortion decision—emerged in part from a recognition that, if Government does not have the power to enter the bedroom and control the behavior of people as to the initial stage of conception, then it is very difficult to give it the power to forbid abortion in the earliest stages.

Conception is not a moment; it is a process. We know that there are difficult line-drawing problems. You would want to leave them, I think, to the States. But the Supreme Court entered the picture partly out of a recognition that, if people have a right to prevent conception—if that is truly private—then the early period of an hour or so during which that initial cell divides must also be beyond the power of Government.

It is true that the Constitution does not say anything about abortion. It does not say anything about freedom of thought either. It does not mention freedom of belief. It does not mention the rights of family or of marital integrity. But the 9th amendment to the Constitution makes it clear that it is the function of the judiciary to identify rights that the framers might not happen to have mentioned.

Senator HATCH. Could I interrupt you on that point?

Mr. TRIBE. Certainly.

Senator HATCH. You have raised a very provocative point, and this may be the better place to raise this question rather than waiting for you to complete your statement. I do not mean to be discourteous to you.

One thing that has always perplexed me about the abortion issue is how a right that is supposedly granted growing from a right to privacy has been so deeply involved in controversies that have nothing to do with privacy in a reasonable definition of the term.

For example, there are the issues: whether or not taxpayers should have to pay for this right, whether or not doctors or nurses should be compelled to perform operations relating to this right, whether or not taxpayer supported hospitals should be required to implement this right, et cetera, et cetera, et cetera.

I can at least understand how the issue of contraceptive use in the *Griswold* case relates to this right. I can at least understand the argument that what happens in the marital bedroom is protected by this right. But what, however, does all of the rest of this have to do with abortion?

Mr. TRIBE. Senator, I hate to say I am glad you asked me that question.

Senator HATCH. It is kind of a home-run ball pitch.

Mr. TRIBE. The Supreme Court has said, in the very list of examples you gave, that its restrictions on government intrusion do not prevent government from doing the very things you say—do not prevent government from closing public hospitals to elective abortions; and do not prevent government from selectively using its funding powers to pay out of the public purse for childbirth, for adoption services, and for other medical procedures, but not for abortion, even therapeutic abortion.

The connection between the abortion right and privacy itself is made visible precisely in those decisions. The court has not said there is a right to have an abortion. It has said there is a right to get government off your back on certain matters, and when government coercively intrudes on a matter on which the Nation is so deeply divided, a matter that touches such intimate human dimensions as the dimension of deciding whether to be a childbearer—whether to have a child—then privacy is very much involved. It is no less involved 13 seconds after conception than 13 seconds before conception. I think that was a good bit of what the Supreme Court had in mind in *Roe* v. *Wade*.

It seems to me also that there are other limits on government power that are involved here and that we do not really focus on when we talk purely in terms of the liberty of abortion.

One of those limits is the limit on government by discretion—government by whim. I think a great deal of what is behind the current deregulation movement is the sense that being subject to the whim of a bureaucrat, or a sovereign, or even a prosecutor is incompatible with a government of laws.

Chief Justice Burger, who is himself in many ways a conservative man, joined the majority opinion in *Roe* v. *Wade*, saying that what particularly troubled him was that, however absolutely they might be written, abortion laws in all likelihood were going to be riddled with exceptions in their actual administration—that for such cases as the 13-year-old girl who had been subjected to rape or incest, exceptions would be made.

He said that, under a government of laws, the kind of prosecutorial discretion to which people are therefore subject when abortion is restricted by a society that is inevitably unwilling to live with the most draconian versions of those restrictions is incompatible with fundamental rights and liberties.

In other decisions entirely independent of any novel liberty of abortion the Supreme Court has insisted on avoiding treacherously ambiguous and vague criminal prohibitions which interfered with the autonomy of the medical profession—again not because of a special liberty of abortion, but because of a tradition in this country that criminal laws should be clear and not hopelessly difficult to comply with.

The bottom line of all of this is that the liberty recognized in *Roe* v. *Wade*, although not mentioned in the Constitution, was anything but novel.

Let me return to the ninth amendment to which I referred earlier. Professor Noonan's book "A Private Choice" finds it bizarre that the Supreme Court should have been able to rely on the ninth amendment in *Roe* v. *Wade* because he says—and I quote him—"The ninth amendment declared that all powers not expressly conferred upon the national government belonged to the people."

If it really did say that all powers not expressly conferred belonged to the people it would indeed be an odd basis for the *Roe* decision. But that is not what it says. The ninth amendment says that the enumeration of certain rights in the Constitution shall not be construed to disparage the existence of other rights that are not mentioned.

The Supreme Court several times before the abortion decision, and at least once since in a decision upholding the right of the press and the public to be present at a criminal trial—another right not mentioned in the Constitution—has reminded us that the existence of a liberty is not to depend on whether the Constitution framers ever got around to specifically naming it.

So the burden of my point is that *Roe* v. *Wade*, far from creating some novel and unprecedented liberty, simply recognized and extended some deeply felt and well established principles about the limits of governmental power.

The challenge that the Supreme Court faced in that case, therefore, was one that I think it met with a reasoned and a defensible decision.

In amplifying the meaning of that decision briefly, I want to say something about what I think are the hidden constitutional costs that are associated with trying to undo it—by any method.

First of all—and I think obviously flowing from the restrictions on government that I have already described—there is the risk of major, even if unintended, expansion of government power over individual and family life.

There is the risk, in addition, of expanding national power at the expense of the States. The amendment that you have introduced, Senator Hatch, would of course not simply toss the matter back to the States but would also empower Congress, through a law more restrictive than that in a particular State, to make the will of this body prevail.

As you said in discussing the equal rights amendment, traditionally the States have regulated family life, including the care and custody of children. I would think that giving the national legislature new power in this realm of traditional local responsibility is not something one would do lightly.

Mr. Noonan, in his book, says, "Although abortion is evil, the Federal system should not be distorted to overcome it." I think that giving the National Government more power is not simply restoring the status quo prior to *Roe* v. *Wade*, but it is going a good bit further.

One reason that one is impelled to go a good bit further is that, when we as a nation have come to recognize that a woman has an important liberty interest at stake in her body, her own life, and her own future, we are understandably unwilling to override that interest simply on the basis of this or that majority vote. It can be overriden only on the basis of a consensus that what is inside her body must be protected even if it means forcing her to remain pregnant.

Until that consensus exists nationally, I think there is a basic feeling, by many who are familiar with constitutional traditions, that it is an extraordinary thing to impose a duty to remain pregnant just because one or another State happens to favor doing so.

For that reason I think it is natural that one pushes the amendment further and says that Congress should be able to establish a nationwide floor. But in doing that one crosses a barrier of Federal-State relations that I think you in the past have been reluctant to cross.

So a first risk of undoing *Roe* v. *Wade*—a first hidden cost—is the cost of major new power for government in general and the National Government in particular. A second risk is the risk of a major setback in the status and equality of women.

During Senator Packwood's testimony this morning there was reference to the equal rights amendment. That amendment was very much alive and well in 1973 when *Roe* v. *Wade* was decided. It is not dead yet, but I think a realist would have to say it is in some trouble.

Consider for a moment what would be the combined impact, No. 1, of a foundering or a defeated equal rights amendment; and, No. 2, of an amendment reintroducing the legal power to impose involuntary pregnancy in this country. The combined impact on the advances of women and on women's equality would not be inconsiderable; it would be profound.

Whatever one might say of the sanctity of fetal life, the unmistakable uniqueness of a restriction on abortion—unlike many other protections of life—is that such a restriction tells half the people that they, and they alone, can be forced to use their bodies to sustain other lives. That kind of setback, in the wake of difficulty for the equal rights amendment, would represent a second major, if hidden, constitutional cost of undoing *Roe* v. *Wade* by any proposed amendment.

Let me say a word finally about the compromise that has been in fact struck by the Supreme Court's abortion decisions. The Court has confronted the difficult question of how to avoid involuntary pregnancy while allowing government in various ways to protect unborn life.

The current compromise reflected in constitutional doctrine, and I think reflected well in your question about how there is a difference between privacy and public funding, is that government can place no coercive obstacles in the path of a woman, through a criminal prohibition, until the fetus is viable—that is, so long as keeping the fetus alive means using the woman's body against her will.

But, until that point, methods of protecting the unborn short of coercion have been authorized and approved by the Court—the right to refuse to participate in an abortion in 1973, the right to exclude elective abortion from public facilities in 1977, the right on the part of the States or Congress to fund only alternatives such as childbirth and to refuse funding even for therapeutic abortion in 1977 and 1980.

Let me add that there is another major life-protecting option left open by the abortion decisions, and that is the right to protect the fetus from elective abortion after viability. That is, once protecting the fetus no longer requires coercing continued pregnancy, there is much broader State power of prohibition.

What does that really mean? It means, as the Court has stressed in several decisions, that a society that wants to protect unborn life can invest resources in accelerating, through medical research and development, the ability to protect the fetus outside the woman's body.

Several years ago the cutoff statistically for viability was probably close to 28 or 29 weeks. Now in many places it is closer to 25.

I hope no one is suggesting that a woman should be forced to remain pregnant simply because, someplace in the country, there is an incubator that could save her fetus.

What is being suggested is that if the society wants to protect unborn life in a truly equal way and not simply by imposing a burden on pregnant women that others in the society never have to bear, it can do that through medical research by advancing the options for saving the fetus at earlier and earlier stages of pregnancy without forcing the woman to serve as an involuntary incubator.

What all of this means is that it is simply false—utterly and completely false—to say, as Mr. Noonan did, that *Roe* v. *Wade* repealed the protection of life. What *Roe* v. *Wade* did was recognize the protection of liberty and the limits of government powers.

Contrast the compromise that the Court has struck in these cases—where the woman cannot be coerced by criminal law but where public policy can encourage protection of life—with what any amendment to undo *Roe* v. *Wade* would really mean.

I submit that any amendment to undo *Roe* v. *Wade* would mean the coercive domination of one group by another.

The point really is that, unlike the issue of slavery on which reasonable people just cannot differ, reasonable people of good moral conscience—as you yourself recognize—differ profoundly on the question of whether the nature of the fetus is such that it is justifiable to force women to remain pregnant against their wills.

As long as there is that difference—and I think we know that this difference will remain even after years of national debate—the traditions of our Constitution have been to find some accommodation—some compromise—not to have the view of one group—the group that says, "Fetal life above all"—vanquish the view of the other group—the group that says, "Leave it up to the person who is most intimately, even if tragically, involved."

Justice Holmes, dissenting in *Lochner* v. *New York* in 1905, made an important observation about why our Constitution has lasted: "It has lasted because it has been made for people of fundamentally differing views. It has not attempted to impose one philosophy to the total vanquishment of others."

I do not think that *Roe* v. *Wade* and the decisions following it impose a single philosophy. Given the options left open to protect fetal life without coercion of the woman—options that are certainly not as dramatic as some would want but options that represent a genuine, conscientious accommodation of values—it would fly in the face of a constitutional tradition of accommodation and comprise to insist that one view be written into the Constitution just because a large enough majority favors and fosters it.

Senator HATCH. If I could add: The principle purpose of course of congressional authority in the amendment I have filed is to allow Congress to reinforce any consensus that has emerged in the States and to insure that such consensus is not violated by one or two States serving as effective abortion havens.

This provision would insure that the will of let us say 40 to 45 States is not circumvented merely because 1 or 2 States are abortion havens. That is the reason for that provision in the amendment. I think it is a good amendment.

Mr. TRIBE. It is very ingenious, Senator, and I congratulate you for it, but calling them abortion havens——

Senator HATCH. I expect a brilliant man like you to not only see that it is ingenious but to see it is a wonderful way to try and solve this problem in a democratic way. More than seven judges deserve a voice on this issue.

Mr. TRIBE. First of all, they were the seven people that have the authority under our Constitution to make decisions about fundamental liberties.

Senator HATCH. They are, but that does not mean that the people cannot, through the article V constitutional process, overturn them.

Mr. TRIBE. You certainly have the power; we are talking just about the question of wisdom.

For those who feel any uncertainty in this tragic realm, the constitutional upheaval that I have described undoing *Roe* v. *Wade* as causing could in itself constitute a fairly convincing reason to protect life by methods short of an amendment, not simply to remit things back to the States, and especially not to override the views of the majorities in the five States in your hypothetical illustration, that think the liberty of the woman absolutely deserves and requires protection.

But I believe that even someone quite single-mindedly committed to a prolife position might well pause long before inviting the States or the Congress to install a regime in which pregnant women can be compelled to dedicate their bodies, their futures, and sometimes their very lives, to the survival of the unborn.

That pregnancy in an ideal world would never be unwelcome and no child would ever be unwanted states a dream, but it is not yet a reality. I do not believe that rewriting the Constitution, even through many years of public debate, could make that dream come true.

Thank you.

Senator HATCH. Thank you, Professor Tribe.

Professor Noonan, Professor Tribe has given a very provocative statement, as you have. What comments do you have to make concerning the liberties that Professor Tribe would like to preserve, as he defines them, as contrasted to the liberties that you would like to preserve, as you define them? Feel free to comment on anything else you would care to. Then I will ask more questions of you both.

Mr. NOONAN. I would like to start with Holmes' words in *Lockner* v. *New York:* "I think the word 'liberty' in the 14th amendment is perverted unless a rational and fair man necessarily would admit that the proposed statute would infringe on fundamental principles as understood by the traditions of our people and our laws."

That, to my mind, is a good standard of constitutional adjudication. I doubt if even Professor Tribe would say that a rational and fair man necessarily would admit that the abortion statutes that were in force on January 22, 1973, infringed on fundamental principles as understood by the traditions of our people and our laws. Our traditions and our laws supported those statutes.

By the Holmesian standard the word "liberty" was perverted when the Supreme Court decided *Roe* v. *Wade.*

To use that perversion of a constitutional term and equate it with a great constitutional right seems to me sheer sophistry. It is, I suppose, the privilege of an advocate to engage in sophistry at times, but on a serious constitutional matter sophistry does not take us very far.

To pretend that we have here something like the first amendment guarantees of religion or free speech is, I think, straining the credulity of all of us.

Senator HATCH. You are not disagreeing with my eminent colleague, are you, who testified earlier?

Mr. NOONAN. Well, I think I might be disagreeing.

Senator HATCH. I kind of interpreted it that way.

Mr. NOONAN. I was startled, I must admit, to have Professor Tribe describe the present situation as a compromise. I think that is—I will not say a Pickwickian description of a compromise, but certainly an unusual one where a million-plus lives can be taken but it is a kind of working out of competing values.

When I look at the Supreme Court decision in *Colautti* v. *Franklin,* where the State of Pennsylvania did try to design a statute to protect the late-born fetus and the Court invalidated it on grounds that very few people can understand, I see that the Court has no desire to protect even the late-born child.

I have begun to suspect incidentally, Mr. Chairman, that we have hope for a consensus. We have both Mr. Tribe speaking of early abortion and your colleague Senator Packwood speaking about the 18th century regime. I begin to suspect we have a consensus that would be against all late abortion. But it would be impossible under the present Supreme Court amendment to the Constitution to design protection for the child in the later stage of pregnancy.

Again—and I give quite a lot of latitude to advocacy. It must say that it seems to me to border on the disrespectful to say that those of us who believe in the sanctity of unborn life are people who want to create involuntary pregnancy, as Professor Tribe has said.

We do not want to create involuntary pregnancies. We have no interest in this, other than the defense of innocent unborn life. I do not think that such an attitude should be imputed to us with the kind of wild rhetoric that sometimes is engaged in in street debate.

It has been suggested that this amendment would extend the power of the Government over the family. I do not know anything that equals the expansion of destructive power over the family that has taken place in the last decade under the aegis of the Supreme Court and principally in promotion of the abortion decision.

I do not think Professor Tribe has touched on this, but we have major encroachments on both the marital and parental relations, and that is about as large an encroachment as has ever happened in Western history.

Professor Tribe suggested that this was different from the slavery debate, and he also said that this was different from other amendments because no other amendment could have been reasonably described as a curtailment of liberty. But I think that represents—if I may say so—an impoverishment of historical imagination.

There were millions of people of good will in the 19th century who believed slavery was a liberty—a fundamental liberty to hold property as they chose. They were just as rational as you and I.

In fact, the only way I can understand how decent and honorable people like your colleague and Mr. Tribe defend the abortion liberty is to analogize them to the very honorable people who were once defenders of slavery.

It did not seem outrageous to hold other human beings in bondage to very good 19th century people, as it does not to many good Americans today to put the unborn to death.

Nonetheless, the fundamental liberty, as they saw it, to hold their property and take their property where they chose was denied by the 13th and 14th amendments. There was a curtailment of liberty, and it is the same kind of curtailment of liberty to do things with other people—the kind of people who were spoken of in the ninth amendment as well as in the due process clause.

Senator HATCH. Of course Professor Tribe's argument is that by not giving the woman the right to free choice you are curtailing liberty; that analogy could go either way.

Mr. NOONAN. It could of course, but I think it is certainly a reasonable analogy to say that the alleged liberty over one's body is quite comparable to the alleged liberty over property that was defended in the 1850's.

As I see it, Senator, we have this perverted use of liberty—an excrescence on the Constitution. I will not go further on the terms of this amendment, except to say that the reservations in my book about the use of Federal power—those reservations apply in perhaps a more ideal world than we are in.

The main thing is after all to stop the destruction of lives, and if Federal power is necessary to do that then I am in favor of at least having a reservoir of Federal power if the States do not do the job.

Senator HATCH. I would like to ask each of you this question—would you address the assertion that some observers have made to the effect that there are no effective legal barriers in this country to a woman securing an abortion at any stage of her pregnancy for virtually any reason? Is that an accurate statement?

Let us put aside financial and geographical barriers for the time being, if they exist, and focus solely on the existence of legal or constitutional barriers. Is there an effective legal enforcement of abortion on demand in this country today?

Mr. TRIBE. Senator Hatch, there are of course some restrictions the Court has upheld. It has upheld a rule requiring that the abortion be performed by a physician even in the first semester; a rule requiring that it be performed in a hospital in the second; rules excluding elective abortion from public hospitals and other public facilities throughout pregnancy; and, although your question says "excluding financial barriers," in many ways the most fundamental barrier of all to abortion both before and after *Roe* v. *Wade* has been financial.

There have been places, whether you call them abortion havens or not, both in this country and outside, where abortions could be obtained by those who have money. The fact that public funding can now be cut off for abortion represents an important limit.

As to late pregnancy—after viability—I very much disagree with Mr. Noonan's statement that it is impossible to provide protection.

Colautti v. *Franklin*, the 1979 decision arising in Pennsylvania, in involved a law that would have been a lot better if those who have worked with you in drafting this amendment had had a hand in it. It was a very badly drafted law that said that a physician can go to jail if he fails to take undefined reasonable steps to save a fetus that "may" be viable—not one that is viable but one that may be viable.

I think the Supreme Court had relatively little difficulty saying that a law that is written in invisible ink like that cannot be the basis for putting a well-meaning doctor in prison. The fact that that law was struck down does not mean that protection after viability could not be intelligently provided.

Senator HATCH. I think one of the points I am making is that there really are no legal barriers though. Am I incorrect on that?

Mr. TRIBE. I think it is incorrect to say that they could not be written.

Senator HATCH. I am unclear as to what these might be.

Mr. TRIBE. But as the constitutional law exists States have the power to forbid elective abortion after viability.

I have not canvassed all the States to see how many have done a decent job trying to do that, but that power is given to the States under *Roe* v. *Wade*.

What they do not have the power to do is to coerce a woman to remain pregnant, and I never suggested that someone gets a particular glee out of forcing involuntary pregnancy. That was not my point; it was my point that some people are willing to impose that burden as the price for protecting the unborn, and the Court has said that that is a price that cannot be imposed on the woman.

If I might just take an additional moment to refer to something else that came up in Mr. Noonan's reply to your question, he says that the word "liberty" in the 14th amendment was perverted in *Roe* v. *Wade*—that it is just as reasonable to talk about the liberty of a person to hold another human being as a slave as a form of property—that this is just as reasonable a use of "liberty" as it is to talk about the woman's liberty of her body. I must say I find that quite incomprehensible.

I do not think we can simply erase our current understanding of what slavery was and pretend by being moral relativists, that it is all one and the same thing.

The fact is that the alleged "liberty" of holding another in bondage was always an obscene blot on the American Constitution and was never reasonably defensible. The fact that there were some people who fooled themselves into believing it is really beside the point.

I do not think that anyone could claim that someone who believes that forcing a woman to remain pregnant in order to save a fertilized ovum is a severe intrusion on her liberty is as insensitive, even from a right-to-life point of view, as is the person who thinks it is OK to treat another human being as property.

The liberty that was involved in *Roe* v. *Wade*, I would submit, is not even very controversial. The fact that one has a liberty interest in not having one's life radically changed and one's body used is hardly novel; you do not have to be a constitutional expert to know that this is a standard kind of liberty.

All that was ever genuinely controversial about *Roe* v. *Wade* is the question of whether the States have the power to override that liberty in the interest of fetal life.

I admit there is a deep controversy there, but I was suggesting that it is quite conventional in our system to say that when a basic liberty is involved, we need consensus to override it. We do not override it in order to generate consensus.

Justice Stevens, in a case called *Cary* v. *Population Services International* in 1977, made a rather similar point. The State of New York had forbidden the use of contraceptives by, and the sale of contraceptives, to unmarried minors. In effect, Justice Stevens said, "I agree with some of my brethren that it is OK to prevent premarital sex among teenagers, but what I think is not OK is to do so in this particularly coercive way—by forcing, teenagers to undergo the risk of venereal disease and pregnancy in order to make a point"—in order to generate consensus around the State's law. "That," Justice Stevens said, "is coercive propaganda; it is not democracy."

Of course the intentions behind this amendment are much nobler than that. The intentions are democratic, but the idea of forcing people to remain pregnant in order to hope that some consensus emerges, I submit, is not compatible with the American tradition.

Senator HATCH. Nobody is trying to force anybody to do anything. All that the amendment does is say, "Let's have the elected representatives make the decision, and if they make a decision that is wrong the people can throw them out and replace them with others." That is a little bit different than the bondage in which those who disagree with indiscriminate abortion are in today, where they have absolutely no say in it.

Mr. TRIBE. They can do a great deal to undermine and prevent it. The Court has said that they can fund alternatives to abortion and that they can deny funding for abortion.

Let me say something about this idea of just sending it to the States. It all sounds so rosy, but what you are doing is saying, "Under the Constitution a State that wants to ban abortion and restrict a woman's liberty is free to do so."

The meaning of individual rights has never been something up for grabs by majority vote. That has never been our tradition.

Senator HATCH. Again, we are on two sides of how you define "rights," and "liberties," and which are involved here.

Professor Noonan, what do you have to say about that question?

Mr. NOONAN. I have listened to Professor Tribe. I have read his very illuminating book on constitutional law, and I still have not heard or read any constitutional basis that stands up for the *Roe* v. *Wade* decision, so I am bound to say it is ad hoc, fiat, and a perversian by the Holmesian standard.

I have not heard any argument at all as to the limitations in a realistic sense on the destruction of life, and I certainly have not heard a word as to the massive social consequences that have followed on the exercise of this alleged private right.

It is paradoxical, to say the least, to have Professor Tribe accuse me of moral relativism in asking him to transport himself back to the middle of the 19th century.

Erasing your consciousness temporarily and looking at it in those terms, the liberty to hold people as property was a very real liberty. Of course it is not today. No one would say it is today. It was then, and that is the analogy.

I would venture the prophesy that 100 years from today people will wonder at the very eminent, distinguished, and kind people who take the position they do take in favor of destroying unborn life. They will be surprised that people of such intelligence and virtue could have held that position.

I am sure that the course of history, Mr. Chairman, is with us in protecting the liberty to life of the unborn. As to this liberty to life the Supreme Court in a very sweeping phrase in *West Virginia* v. *Barnette* said, "The right to life is subject to no election."

Well we have put the right to life to the subject of an election by seven middle-aged men. They did not think it was protectable, and they eliminated it.

Professor Tribe lays stress on the fact that these seven middle-aged men had the power under our Constitution to make that decision. They did; but surely not every decision, reasoned or unreasoned, is to be frozen there forever.

We know the famous examples. Some of them have been eliminated by the Court changing its mind, others by constitutional amendment, but there is nothing in our democratic Government that says once seven or five people who have the power controls at their fingertips have made a decision that is frozen as a constitutional liberty forever.

Senator HATCH. Let me ask you this: Assume that I was a State senator who felt very strongly that abortion was wrong and that it represented bad public policy. Assume further that both of you were my legislative assistants—I am sure that you would perish the thought and I asked you what I could do consistent with the Constitution to limit the availability of abortions to make abortions less convenient or to insure that a woman act with greater caution prior to securing an abortion.

What kind of legislative advice could I expect from both of you, apart Professor Tribe from suggesting that maybe I had hired the wrong legislative assistant in the first place?

Mr. TRIBE. I suppose as your assistant I could suggest, first, that it is within your power to close public facilities to elective abortion; second, that it is within your power to cut off public funds for elective abortion and therapeutic abortion; and, third, that it is within your power to undermine the conditions that lead women in desperation to want and need abortions—that is, that you could make childbirth itself and the experience of having a child less lonesome and traumatic an event by making care for newborn children more widely available, by making adoption services more widely available.

I would suggest, then, that, as to viable fetuses, you could make it a crime, in the absence of a genuine health need, to have an abortion.

There is a great deal you could do, but I would tell you forthrightly that the one thing you cannot do under the Constitution as it now stands is express your moral convictions by passing a law that makes a woman remain pregnant.

I would also suggest that you do have the power under our system to speak against *Roe* v. *Wade* and to advocate an amendment. *Roe* v. *Wade* is not the last word. It is not final just because it was rendered by the Supreme Court.

I am only suggesting that it is not nearly as unprecedented as has been said—and that it is right, even from the point of view of someone who believes in human life deeply and committedly, to believe that that conviction should not lead to coerced pregnancy.

Senator HATCH. Professor Noonan?

Mr. NOONAN. Senator, I would place in your hands a synopsis of Professor Wardel's excellent review of all the efforts of the States to limit abortion and the disastrous ending—mostly in Federal courts—of those efforts.

The States, cities, and even the towns have tried just about everything, from zoning out abortion clinics, which are often an odious blight, to trying to provide information to the woman seeking an abortion, to trying to protect the unborn child in the later stages of pregnancy, and virtually every one of those efforts has foundered in a Federal court.

The Federal judiciary has made it a very discouraging undertaking to try to design protections as the law now stands.

Senator HATCH. As I recall the Pennsylvania case you cited basically held that even if an aborted fetus survived and could be saved that it was unconstitutional to impose such an obligation upon an abortionist.

Mr. NOONAN. Professor Tribe did pick out the words that the Court found unconstitutionally vague, but of course there was a dissent that says those were the kind of words physicians can easily understand. "May be viable" means something to most people.

If it is a certainty of viability that is required, how many people can be certain of viability? In other words, the Court really gave the State no option, when they said the "may be viable" statute was invalid. What would pass constitutional scrutiny?

Then consider the cases actually involving not just the late abortions but children said by State prosecutors to have been born alive—the *Edelin* case, the *Floyd* case in South Carolina, and the *Wardell* case. Children born alive it has been contended should not be protected by the States because of the interaction of the constitutional liberty to abortion with the State's criminal statute.

The abortion rights advocates very rightly from their standpoint said, "If you punish infanticide in these cases you are going to chill the abortion liberty, because we want that freedom to operate in the late stages. It is chilling for us to have to hold back." In Massachusetts, in California, and in the Federal court in South Carolina judges accepted that kind of argument.

You have heard a very benign interpretation of the Supreme Court today in the *Floyd* v. *Anders* case. I think we should recall that Judge Haynesworth—a judge of some eminence—interpreted the Supreme Court to mean that the fetus in the womb was not alive. That was the solemn holding of the lower Federal court in ,*Floyd* v. *Anders*.

Senator HATCH. Let me ask you this: There seems to be some confusion as far as whether or not a State may establish a requirement that a minor consult with her parents or receive the consent of her parents prior to obtaining an abortion.

Could you please sort out for me the *Danforth* and the *Bellotti* cases and the recent *Matheson* case from my own State? What precisely can the State do in this area consistent with the Court's holding?

Let us start with you, Professor Noonan.

Mr. NOONAN. I think it is confusing, because you have got in the final Supreme Court decision *Bellotti* simply a plurality opinion, so that it is not even a majority of a court that accepted the position.

As I understand the result of *Bellotti*, a State must always permit a mature minor to have an abortion if she chooses, and the State must always leave in the discretion of a judge the question of whether even in the case of an immature minor an abortion is or is not in her best interest.

Effectively, the last word of the parents—whether the girl is mature or whether she is immature—has been denied. If she is mature, it is her decision; if she is immature, it is the court's decision. I would say that that effectively removes parental control.

In the course of deciding *Bellotti*, which was a Massachusetts case, you have minor bizarre features added by the State court. The State court created, for example, out of whole cloth a right to counsel on the part of a girl seeking an abortion and required that she be funded in that by the State—something that was not in the Massachusetts legislature or constitution before that decision.

Effectively, *Bellotti* leaves the parental power to make a medical decision—which I believe in every other instance at common law was left to the parents—to the child.

The notice requirement in *Matheson* applies constitutionally at least to an immature minor living at home with her parents. A State can require notice to the parents of such a child, but they have no veto power and if the girl is determined enough she can insist that her parents go to court to get a judge to decide in her favor.

The family structure has been hideously eroded with a final power vested in some judicial figure and this very intimate family matter being taken away from the parents.

Senator HATCH. Professor Tribe?

Mr. TRIBE. I would not disagree with the description, but some of the epithets I think are curious.

A recent case in Oklahoma involved a 12-year-old girl who was pregnant as a result of rape. Her parents for religious reasons refused to give consent for an abortion. They had been notified under the State's notice law but refused to give consent. The doctor thought that the abortion was necessary to prevent the young girl from suffering life-long severe injury.

In those circumstances, society and the courts inescapably become involved.

It is not a warm, happy family where the parents are telling their daughter that although she has been raped and although her life may be in danger, she has to go through with the pregnancy in order to teach her a lesson.

I submit that, when a court in a case of that kind protects the right of the minor to terminate her pregnancy, the family structure is not being hideously distorted. On the contrary, if that child is forced to bear a child of her own and risk her future health and survival, I think an appropriate epithet might be that that would be hideous.

Senator HATCH. May a State enact any form of fetal protection statutes under present court rulings. In *Colautti,* for instance, as I recall there was a great deal of emphasis on the need to be precise with respect to any kind of obligation to be imposed upon a doctor.

Is it constitutional for a State to impose a life-saving obligation upon a doctor with respect to a potentially viable fetus that has been aborted?

Professor Tribe?

Mr. TRIBE. "Potentially viable" is itself perhaps redundant. "Viable" means capable of survival, and with artificial help if necessary.

A State may, the Court stressed in *Colautti,* impose an obligation on a doctor to take steps to save a viable fetus. But in drafting a criminal law in this area, understandably a State must proceed with care. Threatening to imprison someone for guessing wrong about a profoundly difficult question is not part of our tradition.

So the answer to your question would have two parts: First, they may do it; but, second, they have got to do it with greater care than Pennsylvania used.

Let me add that the parade of horribles that is sometimes adduced—what happened in the *Edelin* case in Massachusetts, what happened in the opinion by Judge Haynsworth I think is a diversion from the central point: States do have the power to protect viable fetuses. Certainly they have the power to require efforts to save someone who has already been born. Those lower courts that have misread *Roe* v. *Wade* must not set the standard for this committee or for this Congress.

The fact that some people have said, "You need to practice infanticide in order to give abortion breathing space," I think is an abomination. That is not the law today; that is not the law as announced by the U.S. Supreme Court.

I have no doubt that the States have full power to prevent infanticide and to protect viable fetuses.

Senator HATCH. Are not rape and incest also diversions? In other words, you can provide worst-case scenarios on both sides.

Mr. TRIBE. But the issues of parental consent are often "worst-case" issues. It is not the garden-variety, lovely case that involves a dispute between parents and children and a judge over an abortion.

Senator HATCH. I think it may be different than that. I think we do not even see most of the cases where parental consent really is in issue.

You might be able to show a worst case scenario in any situation to create sympathy, but we are talking about general principles here, not just one or two cases either way.

Mr. TRIBE. I understand, Senator. But in your own State, the Court did uphold quite recently a law that said that "an unemancipated dependent minor cannot get an abortion without parental notice."

In most cases, as a practical matter, parental notice is awfully close to parental veto. There are not many dependent, unemancipated minors who will be able to go ahead over a parent's veto, even as an informal matter, once the notice requirement has been complied with.

Senator HATCH. Professor Noonan?

Mr. NOONAN. I would start from the basic point that health abortions can be performed at any time and that health—genuine health, as Professor Tribe puts it—would be "health" as defined by the Supreme Court, which includes a variety of emotional and psychological factors.

With that definition, I would suppose that any abortion of a viable fetus would be constitutionally protected.

With that as the governing constitutional consideration, I would doubt very much that a State could legislate that the method of abortion must be one that prefers the survival of the viable fetus to the health of the woman. I think the health of the woman would constitutionally control.

In the effort of Missouri, for example, to rule out saline abortions, which are a most painful way of inflicting death on the unborn, that effort was ruled out by the Supreme Court as unconstitutional.

With the constitutional considerations weighted in this way I would say there was extremely little the States could do to enact legislation insuring the survival of the viable child.

Once the child is outside the womb of course the formal laws of infanticide have not been repealed, despite the efforts of a good

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
THE CONSTITUTION

OF THE

COMMITTEE ON
THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110

BILLS PROPOSING A CONSTITUTIONAL AMENDMENT WITH RESPECT TO ABORTION

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CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

MONDAY, OCTOBER 5, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators DeConcini and Leahy.

Also present: Senator Packwood.

Staff present: Stephen Markman, general counsel; Peter Ormsby, professional staff assistant; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. This marks the first in a series of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution regarding abortion.

There are currently four constitutional proposals on this subject before the subcommittee—Senate Joint Resolution 17, introduced by Senator Garn; Senate Joint Resolution 18, introduced by Senator Grassley; Senate Joint Resolution 19, introduced by Senator Helms; and Senate Joint Resolution 110, which I introduced recently.

These hearings represent the first report by the Senate in more than 6 years to address all of these questions, although hearings were held earlier this year in the Subcommittee on the Separation of Powers on the subject of S. 158, a statutory measure designed to restrict abortions.

Given the continuing controversy in this land on the abortion issue and the divisions that the issue has created, I believe that the time is long overdue to take another look at the propriety of legislative action.

During these hearings we hope to hear from witnesses with a broad variety of perspectives on the abortion issue. Given the inevitable constraints of time, as well as our intention to engage in substantial dialog with most of our witnesses, this subcommittee will not be able to hear from everyone who can contribute to our deliberations on this issue.

We will do our best however to insure fair and thorough hearings and would very much welcome written statements by those whom we are unable to accommodate.

Whatever their respective views on the issue of abortion, what has become increasingly clear to most people since January 22, 1973, is that the passions generated by the Supreme Court's decisions that day—*Roe* v. *Wade* and *Doe* v. *Bolton*—are not going to gently subside and disappear.

The social consensus that frequently develops around even controversial decisions of the High Court has simply never emerged. Rather, the intensity of the early response to these decisions has endured. This intensity has increasingly been reflected in bitter and divisive congressional debate.

While I will leave it to our highly capable witnesses today to expound upon these decisions and their offspring, what they did, in summary, was to read into the Constitution a previously unrecognized right in a woman to terminate her pregnancy.

During the first trimester of pregnancy this right was absolute and could not be restricted by society. During the second trimester this right remained inviolable except that the State could require that an abortion be performed in a hospital and by a licensed doctor. During approximately the final trimester this right could be restricted except to the extent that the mother's health would be jeopardized.

As a result of these decisions State laws in virtually every State of the country were rendered unconstitutional. Prior to the abortion cases 31 States had enacted virtually total prohibitions on abortion, with no State having enacted anything as permissive of abortion as required by *Roe* and *Doe*.

As a result of these decisions there are those who would argue that in this country today there is effective abortion on demand throughout the entire term of a pregnancy. Others would dispute this description. I would look forward to this issue being addressed by our witnesses today and in the future.

In any event, I believe that it is fair to say that there are few societies that have more permissive abortion laws than in the United States today. Quite apart from the merits or demerits of this abortion right, much of the controversy that has been generated about it has stemmed from the manner in which it has been achieved.

It has emerged, not through the representative, legislative processes, not through a newly developing social consensus, not through an amendment to the Constitution, and not in response to any revolution in moral and ethical principles that might have been reflected through evolving Federal and State policies.

Rather, it emerged through a decision of the Supreme Court based, many feel, more upon the personal policy preferences of the Justices than upon the dictates of the document that they purported to interpret.

There is no shortage of serious criticism of the jurisprudence of the abortion cases from legal and constitutional scholars who are entirely unmoved by the abortion issue itself.

The Constitution has been amended before in response to Supreme Court decisions. The 11th amendment, the 14th amendment, the 16th amendment, and the 26th amendment all were ratified in order to overturn Court decisions that were believed erroneous or that were disapproved for other reasons by the people.

Before we proceed, I would briefly like to summarize my own views on the abortion controversy. By and large, they have not been a secret to anyone in the past. Quite simply, I believe that abortion under virtually all circumstances is wrong because it involves the taking of a human life. This is my own moral, ethical, and—dare I say it—religious perspective. I believe also that, from a medical and a legal perspective, a similar conclusion results.

Whatever ambiguity or uncertainty there may be about the existence of this human life—and I do not believe there is any, personally—I believe that such ambiguity or uncertainty ought to be resolved in behalf of extending legal protections.

Further, because I believe that it is human life that we are talking about, I personally have no reservations about elevating this protection into the Constitution. Where doubts about the "personhood" of blacks once justified a constitutional resolution, I believe that similar doubts about the "personhood" of the human fetus may appropriately be resolved through the Constitution.

We are fortunate enough on this day to have two of the Nation's foremost legal and constitutional scholars with us to address our subject.

For our first day of hearings we will focus on the matter of the constitutional and legal background of the abortion right. I very much look forward to the testimony and at this time will turn to Senator Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Leahy**. Thank you, Mr. Chairman.

If there is one quality of the U.S. Constitution that distinguishes it from every other written constitution on Earth it is the durability of the document. It has endured in its original text for nearly 200 years. It has been amended very, very sparingly.

The 16 amendments adopted since the adoption of the Bill of Rights have covered a very wide range of moral and political concerns. One issue has accompanied every proposal to amend the Constitution, and it is with us today—namely, the appropriateness of amending the Constitution to settle a matter that deeply divides the Nation.

The hearings we begin this morning will ideally do at least two things: They will raise every possible point of view on the status of abortion in America, ranging from an historical and legal review, religious and moral viewpoints, and a discussion of several proposals to amend the Constitution to change the law relating to abortion.

But underlying these concerns will be a second point of the hearings—exploring the issue of implementing a national abortion policy by means of a constitutional amendment.

Amendments to the Constitution have generally reflected the outcome of issues resolved by the American people, sometimes after generations of debate and deep divisions of opinion.

The adoption process is difficult and is purposely designed to prevent amendments that do not reflect the sound and durable consensus of a pluralistic society.

The amendments that have embodied such a consensus have endured, and they are a living part of the Constitution, but where we amended the Constitution without a national meeting of the minds we were forced to retract the amendment and only after devastating effects on society.

Today in the United States there is no consensus on the issue of abortion. I have a great concern that the proponents of the amendments we will consider in the next weeks believe that a constitutional amendment will provide consensus and thereby end the shrill and divisive debate about abortion, privacy, the nature of human life, sound medical practice, and an almost endless list of related issues.

Constitutional amendments memorialize consensus, but they do not create it. In normal times I would say that my concerns about improvident constitutional amendments are adequately dealt with by the adoption process which requires a two-thirds vote by the Congress and ratification by three-fourths of the States, but it is even possible for this process to produce unwise results if the atmosphere of deliberation gives way to one of passion and pressure.

I do not expect the coming debate to be an unemotional one. In fact, on such an issue I do not think anybody should claim that it should be. But I do hope that as Senators we can evaluate the testimony we are about to receive from a legal, an historical, and a moral point of view, and whatever our conclusion—whatever our conclusion—then go on to debate the wisdom and appropriateness of a constitutional amendment.

Maybe for this issue it is asking the impossible. But if there is a body in the Nation that should be able to be passionate and concerned as people and fair and dispassionate as makers of law, it should be the U.S. Senate.

It must be obvious to all by now that these hearings are not unrelated to a great deal of political change that has occurred outside of these Chambers in the last few years.

The conservative mood in the country is a matter of record, and the flowering of that new mood or any other mood is what political liberty is all about.

New conservatism or old liberalism are simple labels, and they really do not concern me at all, but I am deeply concerned about what I might call the new positivism—the conviction that one's views have the quality of revealed truth and that all opposition is perversity.

A tremendous amount of national energy is now being devoted to the effort to amend the Constitution. I am afraid that in the wash of that energy anyone who says he or she is a strong personal opponent of abortion but who does not support efforts to impose that opinion on everyone in nearly all circumstances is said to give lip service only.

I oppose abortion. I oppose it for moral and ethical reasons. I would like to see the need for abortion decline through a responsible but thorough education of our young people through counseling and through more effective birth control programs.

I question whether my personal views on abortion should be imposed on others. I question whether the views of this committee or the Congress or of any government authority seeking to impose uniform rules of conduct where people are deeply divided on a matter of individual conscience can work.

Those are the issues. Those are the issues that we must face here.

I agree that the issue of human life is the most important issue of our time or any time. It is an issue that hangs in the balance as we seek to put behind us the specter of nuclear holocaust. It is an issue as we dare to raise our heads and look into the bulging eyes of starving children in the homes of one-third of the world. It is an issue as we decide if we will stop poisoning the air and the ocean. The human life issue goes across all things, not just the one that we face here in this committee.

There are few easy solutions to any of these problems, and no lasting solution comes from one sweep of a pen. This is a good time in history for all of us, especially those of us in Congress, to recognize our limitations and our fallibility.

In the next weeks we will hear from witnesses whose convictions and expertise are undoubted. We are thankful to them. Mr. Chairman, as all other members of this subcommittee, I will listen carefully.

I would also note for the chairman that, as he knows, we have—as often happens in these matters—before the Intelligence Committee a matter of very significant importance at 10:30 this morning which will require the attendance of any of us who are also members of the Intelligence Committee.

Senator HATCH. We understand. We know how busy all Senators are.

We are happy to have the ranking minority member on the Constitution Subcommittee here, Senator DeConcini.

[The bills introduced follow:]

97TH CONGRESS
1ST SESSION

S. J. RES. 17

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 5), 1981

Mr. GARN (for himself, Mr. ABDNOR, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. EAGLETON, Mr. EAST, Mr. FORD, Mr. GOLDWATER, Mr. GRASSLEY, Mr. HATCH, Mr. HATFIELD, Mrs. HAWKINS, Mr. HELMS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. LUGAR, Mr. McCLURE, Mr. NICKLES, Mr. PRESSLER, Mr. PROXMIRE, Mr. RANDOLPH, Mr. SYMMS, Mr. ZORINSKY, Mr. ANDREWS, and Mr. KASTEN) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

"SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

"SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.".

○

97TH CONGRESS
1ST SESSION

S. J. RES. 18

Proposing an amendment to the Constitution of the United States with respect to the right to life.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 5), 1981

Mr. GRASSLEY introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to the right to life.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

"ARTICLE —

"SECTION 1. With respect to the right to life, the word 'person' as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

"SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

"SECTION 3. The Congress and the several States shall have power to enforce this article by appropriate legislation.".

○

97TH CONGRESS
1ST SESSION

S. J. RES. 19

Proposing an amendment to the Constitution of the United States guaranteeing the right of life.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 5), 1981

Mr. HELMS introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States guaranteeing the right of life.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE XXVII

"The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency.".

○

II

97TH CONGRESS
1ST SESSION

S. J. RES. 110

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21 (legislative day, SEPTEMBER 9), 1981

Mr. HATCH introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern.".

○

[From the Congressional Record, Sept. 21, 1981]

By Mr. HATCH: S.J. Res. 110. Joint resolution to amend the Constitution to establish legislative authority in Congress and the States with respect to abortion; to the Committee in the Judiciary.

HUMAN LIFE FEDERALISM AMENDMENT

Mr. HATCH. Mr. President, I am proposing an amendment to the Constitution today—the human life federalism amendment—that would overturn the infamous decision of the U.S. Supreme Court in *Roe* v. *Wade* 410 U.S. 113 (1973). This amendment would restore to the representative branches of Government the authority to legislate with respect to the practice of abortion.

ROE AGAINST WADE

In Roe against Wade, the Court found that the due process clause of the 14th amendment contained a guarantee of a "right to privacy" that was broad enough to encompass a woman's decision "whether or not to terminate pregnancy." Id. at 153. Because the right to personal privacy was a "fundamental right," it could be limited only by some "compelling State interest." Id. at 153. While such an interest could not be based upon the inclusion of unborn human life in the term "person" in the 14th amendment—with respect to which there may be no deprivation of life without due process of law—the Court nevertheless found some meausre of State interest in protecting maternal health and in preserving the "potential life" of the fetus. Id. at 148.

In seeking to give expression to these interests, as well as protecting the newly discovered right to terminate one's pregnancy, the Court summarized its holding in the following manner:

(a) For the stage prior to approximately the end of the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. 410 U.S. at 164–165.

The scope of the abortion right set forth by the Court in Roe against Wade on January 22, 1973, was broader than that existing at the time in every one of the 50 States in the Union.

Prior to Roe against Wade, 31 States had statutes on their books that totally protected life from conception. Of the 19 that permitted abortion under certain circumstances, all 19 permitted abortions where necessary to save the life of the mother, 6 permitted abortions in cases of rape, 5 in cases of incest, and 4 in cases where there was likelihood that a child would be born with a substantial deformity. In only four States was abortion on demand permitted and in each of these, there were temporal limits to such a right. The most liberal provision existed in the State of Massachusetts which permitted abortions without restrictions until the sixth month of pregnancy.

Whatever one's perceptions about abortion, it is difficult to argue with the proposition that Roe against Wade has created a regime of abortion on demand, a national policy of abortion without restrictions of any significant kind. It is this status quo that would be overturned by the proposed human life federalism amendment.

During the first trimester of the pregnancy, the plenary right to abortion is express. During that period, there is absolutely no governmental authority to intervene in the woman's decision to abort. During the second trimester, a Government interest in abortion does arise—the interest in protecting and preserving maternal health. This interest may be expressed through governmental requirements that such abortions be performed within hospitals, clinics, or other facilities licensed to perform abortions.

There remains an absence of governmental authority, however, to do anything more than insure the safeness of the procedures of abortion. There are no protections whatsoever for the unborn fetus during this stage of the pregnancy.

During the final trimester of abortion—or approximately at that point at which the fetus reaches "viability"—a potential interest arises in protecting the fetus. The Government, finally, was in a position to protect the life of the fetus.

The Court, however, limited even this authority with an exception—and it was an exception that consumed the rule. During even the third trimester of the pregnancy, the right to abortion existed where necessary to protect the life or health of the mother. The critical element here was the health of the mother.

According to the Court in the companion case of *Doe* v. *Bolton* 410 U.S. 179 (1973), whether or not the health of the mother necessitated an abortion was a medical judgment to be made "in the light of all factors—physical, emotional, psychological, and the woman's age—relevant to her well-being." Id. at 192.

In other words, to quote Prof. John Noonan of the University of California Law School, the absolute right to abortion was curbed during the final trimester only by "the necessity of a physician's finding that she needed an abortion." Noonan, "A Private Choice" (New York: MacMillan, 1979), 12. It would be a rare physician who would be incapable of defending an abortion decision on the grounds that, in his best medical judgment, the "well-being" of the mother demanded it.

The abortion right then is a virtually unrestricted right under Roe and Doe. Any significant restrictions on this right are illusory. To quote Professor Noonan again:

For the nine months of life within the womb the child was at the gravida's (pregnant woman's) disposal—with two restrictions: She must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion. *Id.* at 12.

No substantial barriers of any kind exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy.

JURISPRUDENCE OF ROE

Apart from the national policy of abortion that it spawned, the Roe decision has been criticized broadly as an exercise in jurisprudence by observers of varying political persuasions and varying perspectives on abortion. In dissent in the Roe and Doe cases, Justice White observed:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing State abortion statutes. 410 U.S. at 221.

Justice Rehnquist added in an accompanying dissent:

The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. . . . To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. 410 U.S. at 174.

Prof. Archibald Cox, the former Solicitor General of the United States, remarked of the Roe decision:

The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. . . . Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution. Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976), 113–114.

Prof. John Hart Ely of the Harvard Law School, while taking care to divorce himself from critics of the substantive policy expressed in Roe, concluded:

It is, nevertheless, a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be. Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade* 82, Yale Law Journal 920, 947 (1973).

Alexander Bickel, professor at the Yale Law School, described the decision as akin to a "model statute" and expressed bewilderment at how such a responsibility had come to be vested in the Court:

One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject . . . *Roe* is derived not from Herbert Spencer's Social Statics, but from fashionable notions of progress . . . this will not do. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 28.

Prof. Charles Rice of the Notre Dame School described the decision as "the most outrageous decision ever handed down by the Court in its entire history"; Prof. Richard Epstein of the University of Chicago Law School referred to Roe as "comprehensive legislation," without "principled grounds"; Prof. Robert Byrn of the Fordham Law School attacked the decision as resting upon "multiple and profound misapprehension of law and history"; Dean Harry Wellington of the Yale Law School viewed Roe as "Pickwickian" and "without mandate"; and Prof. Joseph Witherspoon of the University of Texas Law School described the decision as "unquestionably the most erroneous decision in the history of constitutional adjudication by the Supreme Court." Professor Noonan concluded his analysis of the abortion cases by stating:

> The liberty established has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitmate and unprincipled, the imposition of the personal beliefs of fifty States. The continuation of the liberty is a continuing affront to constitutional government in this country. Noonan at 189.

OVERTURNING SUPREME COURT

Justice White in his Roe dissent aptly characterized the majority decision when he observed:

> The upshot is that the people and the legislatures of the fifty States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other hand.

It is this result that the proposed human life Federalism amendment is intended to overcome. The proposed amendment would restore to the States—as well as invest in Congress—the authority to legislate with respect to abortion. While I would personally favor an amendment that would personally favor an amendment that would impose a duty upon the States to prohibit virtually all abortions. I must stress that this is not the objective of the present amendment. It is not necessary that there be this duty in order to overcome the Roe and Doe decisions. It is necessary only that the representative branches of the Government no longer be totally limited in their ability to act in restricting or regulating or prohibiting abortion because of some presumed constitutional right to abortion.

There is no such constitutional right to abortion, in my view. It has never existed and there is nothing in the proposed measure that would concede that such a right has ever existed. I recognize, however, that, under our structure of Government, it is the duty of the Court to "say what the law is," *Marbury* v. *Madison* 1 Cranch 137 (1803). For better or worse, the Court has spoken on the issue of abortion in Roe and Doe; it has articulated a constitutional right to abortion emanating from the 14th amendment. There is no alternative now that a constitutional amendment to overcome this result—except to wait for the slim possibility that the Court may some day admit its error and overturn on its own the abortion cases.

There is certainly ample precedent for such a response to a Supreme Court decision. The 11th amendment to the Constitution, prohibiting the Federal judicial power to be exercised in suits by citizens of a State against another State, came in direct response to an action of the Supreme Court in accepting jurisdiction over such a case. *Chisholm* v. *Georgia,* 2 U.S. 419 (1793).

The 14th amendment, in circumstances not dissimilar from the present case, was proposed to the Constitution following the infamous decision of the Supreme Court in the *Dred Scott* case finding that black individuals were nonpersons under the Constitution. 60 U.S. 393 (1857).

The 16th amendment, permitting the imposition of a Federal income tax, was later enacted in response to a Supreme Court decision finding an unapportioned—by State—tax to be in violation of article I of the Constitution. *Pollock* v. *Farmer's Loan and Trust Co.,* 157 U.S. 429 (1895); 158 U.S. 601 (1895).

Finally, the 26th amendment, according 18-year-olds the right to vote in Federal and State elections, was proposed following the Court's decision that the Congress lacked authority to impose such an obligation statutorily upon the States. *Oregon* v. *Mitchell* 400 U.S. 112 (1970).

In addition, serious efforts at constitutional amendment were made in response to Court decisions on the subjects of child labor laws. *Hammer* v. *Dagenhart,* 247 U.S 251 (1918), later overruled in *United States* v. *Darby,* 312 U.S. 100 (1941); and State legislative apportionment requirements, *Baker* v. *Carr,* 369 U.S. (1962).

PROGENY OF ROE

It is not simply the abortion right that was created in Roe and Doe that is the object of my proposed amendment. However indefensible these decisions as matters of policy and jurisprudence, they have been distroted further by a series of subsequent decisions clarifying the scope of this right. Each of them have come in response to post-Roe efforts by the State to accord some measure of protection to unbron human life, or to establish some procedure to insure that the abortion decision was a deliberate, carefully considered one. In virtually every instance, the Supreme Court has struck down these exercises.

In *Planned Parenthood* v. *Danfoth* 428 U.S. 52 (1976), the Supreme Court held that spousal consent statutes, which required the consent to an abortion by the father of a fetus, were unconstitutional. See also *Coe* v. *Gerstein* 376 F. Supp. 695 (S.D. Fla. 1974), affirmed 428 U.S. 901 (1976). The Court in Danforth also held that so-called informed consent statutes, which required a physician to obtain the written consent of a woman after apprising her of the dangers of abortion and possible alternative, were constitutional only if the requirements were closely related to meternal health and not unnecessarily burdensome upon the abortion right. See also *Freiman* v. *Ashcroft* 584 F. 2d 247, affirmed 99 S. Ct 1416 (1979).

In *Belotti* v. *Baird* 443 U.S. 622 (1979), the Court held that, while parental consent statutes requiring monors to obtain the consent of their parents prior to having an abortion were not unconstitutional per se, the State must also provide alternative procedures for obtaining an abortion in the event that parental consent is not forthcoming or if the minor does not want to request such consent.

See also *Planned Parenthood* v. *Danforth* 428 U.S. 52 (1976). In *H.L.* v. *Matheson* Docket No. 79-5903 (1981), however, the Court upheld a Utah State statute prohibiting physicians, under narrowly defined circumstances, from perfoming an abortion of unemancipated minors without parental notification. The statute was drawn extremely narrowly to require such notification "if possible" and to apply if the minor is living with and dependent upon her parents and has made no showing or claim of unusual maturity.

In *Colautti* v. *Franklin*, 439 U.S. 379 (1979), the Court ruled that fetal protection statutes were generally unconstitutional by reason of being vague and overy broad. Such statutes, in one manner or another, impose an obligation upon a performing doctor to make reasonable efforts to save the life of an aborted fetus. In Colautti, the Court found that such statutes were permissable only with respect to viable fetuses—who by definition were least in need of such protection—and that they must contain precise standards for determining such viability. See also *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

Thus, even at the latest stages of pregnancy, the Court refused to find a significant interest in the life of the fetus that could be balanced against the apparently unrestricted right of the woman to terminate her pregnancy at will. It is the progeny of Roe and Doe, as much as Roe and Doe themselves, toward which my proposed amendment is directed. It is these cases which make clear the lengths to which some on the Court are prepared to go in defense of the abortion right.

FEDERALISM AMENDMENT

The proposed amendment would read in its entirety:

The right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions; *Provided*, That a law of a State more re-restrictive than a law of Congress shall govern.

It is language that I hope will be scrutinized by my colleagues, by the public, and by participants in the hearing process that will begin next month in the Subcommittee on the Constitution.

In removing the abortion controversy from the Federal judicial branch, the proposed amendment would place the debate within those institutions of Government far better equipped to deal with the issue. By its very nature, the judiciary is the wrong forum to resolve the enormously difficult problem of abortion. Because they cannot control the specific types of cases that come before them, and because they are limited in their ability to fashion compromise solutions to difficult issues, the courts are entirely the wrong place within which to argue about abortion.

The "all or nothing" legalization, of abortion-on-demand of Roe and Doe has done nothing but exacerbate the tensions already created by the abortion controversy. Unlike most legislative solutions in which some element of deference is paid to major political or social or occupational groupings, the abortion decisions involved a small group of seven individuals who totally ignored the passionately held views of a large number of the American people. They did this not in response to the unequivocal demands of the operative document of our Nation, but in the course of a decision whose jurisprudence and whose textual and historical foundation in the Constitution is at least as suspect as the policies that it fostered.

Let me be clear about what I am saying. I personally believe that abortion is an "all or nothing" issue. I am irreconciliably opposed to abortion. I believe that abortion involves the taking of a human life. It is morally, ethically, and—I believe—constitutionally wrong. Should my amendment become part of the Constitution, I would be among those seeking the most restrictive State and Federal laws with respect to abortion. When a greater consensus exists in this country on the repugnance of abortion—which consensus I believe will be promoted by this amendment—I will be among those seeking a direct constitutional prohibition on abortion.

That consensus, unfortunately, does not exist yet today. The abortion issue, if it is to be elevated into an issue of constitutional proportions, should be elevated only through the normal consensus-building procedure of the article V amendment process rather than through the process of judicial reinterpretation.

For the present, I believe that it is important to reenfranchise all the people in fashioning a solution to the abortion controversy. That can only be done by placing this issue back within the representative branches of Government where it should have remained all along. I would expect that the result would be difficult legislative compromises, bitter sessions of negotiation and give-and-take, and solutions not entirely satisfactory to any single group or individual, including myself.

Although I would expect to continue personal efforts to secure a total abolition of abortion in this country, I know that I would be able to tolerate a regime that permitted some abortions much better if it were the result of the clear will of the citizenry speaking through their representatives than where it has been the result of a small elite imposing their own personal views through the pretext of constitutional interpretation.

LEGISLATIVE OPTIONS

Because the proposed amendment would only provide authority to the State legislatures and Congress to act on the issue of abortion—without dictating particular legislative outcomes or policies—I would hope that all of my colleagues who can distinguish between abortion and run-of-the-mill medical operations would consider supporting it. Nothing is mandated by this amendment. It does not get involved with any issues relating to "when human life begins." It does not read in "rape" or "incest" or "medical necessity" exceptions into the Constitution. It does not require any particular treatment of contraceptives—which would not be covered by the amendment—or abortifacients or IUD's. No questions of tort law or criminal law or insurance law are inadvertently raised.

All that the proposed amendment would do is to "deconstitutionalize" the issue of abortion. There would no longer be a constitutional right or guarantee of abortion. Congress and the States, it is true, could act under the proposed amendment to totally prohibit abortion. They could prohibit abortions in all but narrowly limited or defined circumstances. I would personally support this. But, if they chose, they could undertake far less extensive reforms. They could, for example—

First. Choose only to limit the circumstances of late pregnancies alone;

Second. Choose only to impose obligations upon physicians to save the lives of fetuses capable of surviving an abortion;

Third. Place limitations upon the experimental and medical research use of fetuses;

Fourth. Require that women contemplating abortion be fully apprised of the risks of abortion and alternatives to abortion;

Fifth. Require some form of parental consent to abortions performed upon minors;

Sixth. Require some form of spousal consent to abortions performed upon a woman;

Seventh. Establish some minimum waiting period before and abortion could occur or require some form of professional consultation prior to an abortion;

Eighth. Establish rights of refusal to perform abortions in physicians or nurses, or in entire hospitals;

Ninth. Limit the commerce in abortifacient devices;

Tenth. Limit public advertising by abortion clinics and by abortion services.

The Congress and the States, if they chose, could further decide to do nothing about abortion. That, too, would be within their discretion under the proposed amendment.

MISCELLANEOUS ASPECTS

Let me briefly summarize some of the technical aspects of the proposed amendment that I have tried to consider carefully. I will, of course, look forward to hearing testimony on these and other aspects of the amendment during the upcoming Subcommittee on the Constitution hearings:

The "right to abortion" referred to in the first sentence is a right that apparently was derived in Roe from the due process clause of the 14th amendment. There is some suggestion even in Roe, though, that the right may be derived from the ninth amendment. Roe at 153. There is some confusion on this point. The purpose of the proposed amendment is to abrogate this "right" whatever its alleged constitutional basis.

There is some disagreement as for as whether or not each of the individual sentences of the amendment standing alone would effectively overturn Roe. I believe that they probably would, but have chosen to clarify this issue by proposing that each be placed into the Constitution. Together, it should be explicit that there is no constitutionally based right to abortion emanating from any provision of the Constitution that might potentially restrict the ability of Congress or the States to legislate with respect to the subject.

The right to legislate with respect to abortion would, of course, be restricted by other provisions of the Constitution not relating to a right to abortion. It would be a clear violation of the equal protection clause of the 14th amendment, for example, for a State to distinguish between women on the basis of race in permitting or restricting abortions.

The concept of "concurrent" power to legislate with respect to abortions is not dissimilar to the concept of "concurrent" power given Congress and the States to enforce the 18th amendment relating to the manufacture, sale, or transportation of intoxicating beverages. There would be separate and independent—not joint—power in Congress and the States to exercise their territorial limits. *National Prohibition Cases* 253 U.S. 350 (1920).

The question of whether a Federal law enacted under the proposed amendment would conflict with a State law is largely one of statutory construction that cannot be approached mechanically. Similarly, what is more or less "restrictive" in the way of placing limits upon abortion is a matter that cannot be summarized through formulas.

The basic premise of the amendment, however, is this. The Congress would be empowered to establish minimum national standards with respect to abortion, if it chose. Under the supremacy clause of the Constitution, a Federal enactment would take precedence over a State enactment in the case of irreconcilable conflict. See for example, *State* v. *Gauthier* 118 A. 380 (1922); *State* v. *Ligaarden* 30 N.W. 729 (1930); *State v. Lucia* 157 A. 61 (1931).

The latter clause of the second sentence, however, would alter this general rule of preemption to the extent that a State enactment was more restrictive of abortion than a congressional enactment.

In some respect, the differences between the more traditional constitutional amendments relating to abortion and the immediate amendment are not as great as appears at first glance. Even a proposed amendment that directly prohibited abortion would not be selfenforcing. It would require Federal and State enabling legislation. Given that the judiciary would—properly—be reluctant to force a coequal legislative branch of government to pass legislation, there would likely be a major element of discretion deposed in the legislative branches of Government under even a direct human life amendment.

Finally, I would note that, because it is a Constitution that we are amending, not a legal code, I have placed a priority on making clear the principle that is being pursued, not on insuring that each and every opportunity for possible circumvention is forestalled. I am not sure that this is possible. In this respect, I quote again from Professor Noonan:

> The Constitution is not addressed to persons of bad will, but to persons—judges, legislators, officeholders, citizens—who want to abide by its provisions. Therefore, it is neither necessary nor desirable to draft with an eye to silly, sophistical, or evasive interpretations. No language can be made foolproof. There is no language that cannot be distorted by evil men or inverted by clever men. It is not hard to show the vulnerability of any form of words to ingenious and insympathetic interpretation. As the Constitution is not addressed to the wicked or the foolish, so it is not addressed to the sophistical. The Constitution, and any amendment to it, speak to the understanding of those who with good will seek to comprehend the purposes of its framers. *Noonan* at 182.

CONCLUSION

Let me conclude by saying to those who would argue that this amendment represents a concession to, or a compromise with, a morally indefensible policy. I do not believe that this is true. Not only would the proposed amendment overturn Roe against Wade, but it would, arguably, go further by clarifying that Congress, as well as the States, possesses authority with respect to abortion. It would restore the status quo prior to the Roe decision—and then some.

While I would personally prefer that we go further, there can be absolutely no doubt in anyone's mind that there is not currently the kind of consensus for this action—either in the country or in Congress—that would permit this to be done. Nor is such a consensus imminent. The longer that abortion on demand continues, the more acceptable that it becomes, the more that it becomes institutionalized. I do not believe that we can permit this to happen.

Once, however, we can establish in the Constitution the principle that abortion is not an ordinary, routine medical operation, I believe that we can begin to reeducate all the American people to the cruel realities of abortion. Acceptance of this principle in the organic law of our land will better enable us to carry on education and information efforts.

The longer that the status quo—unrestricted abortion—continues to be the law of the land, the greater the number of citizens who will grow up in this country oblivious to any other reality, the greater the number of citizens who will forget that there was a time at which abortion was condemned unanimously by the States. Not during the Middle Ages, not during the era of the Founding Fathers, not during the industrial revolution, but during the entirety of our Nation's history through the 1950's and the 1960's and up until January 22, 1973.

The law is, in fact, a teacher. We must give it that opportunity before it is too late, before the lesson goes permanently unlearned.

I urge the support of my colleagues for the proposed amendment—not only those who share the full extent of my concern about abortion, but those as well who are uneasy at any aspect of the structure that has been erected by the Supreme Court, those who are hesitant at the process by which the abortion revolution has been wrought, and those who recognize the social divisions that have been caused this country by a Court that ignored the strengths of the democratic, representative processes of government in resolving differences among citizens.

I ask unanimous consent that the full text of the joint resolution appear at this point in the RECORD:

There being no objection, the joint resolution was ordered to be printed in the record, as follows:

S.J. RES. 110

Resolved by the Senate and House of Representatives of the United States in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided,* That a law of a State which is more restrictive than a law of Congress shall govern.".

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much. I will be brief.

Having looked at the witness list and knowing the intensity of feeling on this issue I think we have ahead of us a most educational and thought-provoking process. It is a foremost issue of our times. The constitutional process has been outlined by both you and the distinguished Senator from Vermont.

I think it is time that Congress address this issue forthrightly, and I commend the chairman for having the time and the courage to put forth these hearings and to move swiftly in this process.

It is not going to be easy. Historically constitutional amendments have not just been popped in and approved by Congress.

The debate today and in the days following, I am sure, will be emotional, as the Senator from Vermont indicated, but I think we can rise above the emotionalism and touch the real issue of human life.

Are we going to continue in the manner which the Supreme Court set forth in 1973, or is it going to be a position of this Nation that life is a cherished, delicate thing that we cannot dismiss and we cannot permit for the Government or anyone else to freely make the decision on whether that life should continue?

With the carnage that has been counted on an annual basis, it seems to me that we are long overdue on such comprehensive hearings.

The human life legislation, S. 158, recently the subject of hearings by the Separation of Powers Subcommittee of the committee is disturbing to me because of the ease with which the bill would have Congress change the legislative standards by which we judge when human life begins.

The Constitution is there. It is there for a purpose. Amending the Constitution need not be a divisive act provided that the proper process is followed. I compliment the chairman for initiating that process.

I too, Mr. Chairman, have to be at the Criminal Laws Subcommittee this morning, but I will return here after my testimony on the exclusionary rule before that subcommittee. I look forward to the debate, to the testimony, and to hearing from the distinguished Senator from Oregon.

Senator HATCH. Thank you, Senator DeConcini.

For those who are here, today's hearing is devoted to the constitutional and legal background of the abortion right.

We anticipate on October 14 and 19, and November 4, a hearing on the myths and realities of abortion in America; on November 6 we will discuss the abortion right—the moral dimension; on November 12 and 16 pending constitutional proposals and their legal impact—that will be the first session on that. Then we will have organizational testimony in two sessions.

We will try to cover this issue as thoroughly as it has ever been covered by a congressional committee. In the process we intend to have both sides fully represented. We think that is the only way to cover the matter.

We are very pleased to have with us this morning the distinguished Senator from Oregon, Robert Packwood.

Senator Packwood, we will turn the time over to you.

STATEMENT OF HON. ROBERT PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman and members of the subcommittee, let me congratulate you on that schedule that you have just announced. There will be differences of opinion on this subject, but I think at the end of these hearings few will be able to claim that their position has not been heard.

No matter what decision is made by this subcommittee, eventually the committee, and perhaps the full Congress, it is imperative that no one feel shut out. You have accomplished that or will accomplish it with this schedule, and I congratulate you.

Senator HATCH. Thank you.

Senator PACKWOOD. Mr. Chairman, to my mind there is one very simple issue concerned here, and it is the issue of freedom. In this case, it is the issue of the freedom of a woman to choose whether or not she wants an abortion.

No one is trying to compel anyone to have an abortion. For those who morally object to it, they should not have one. For those who morally do not object to it, they should not be prohibited from having one.

The history of freedom and liberty is the history of the restraint of government. Most of the freedoms we guarantee in this country were copied after protections of freedom in England, and the English experience was that government would abuse the liberties of its citizens and that government had to be restrained.

England's early experience was that it was the King who would abuse the liberties of the citizens, and therefore it was assumed necessary to strengthen the powers of Parliament vis-a-vis the King because the Parliament would protect the citizenry from the King because, allegedly, the Parliament was made up of the citizenry. Therefore, many of the early restraints were placed on the King's interference with Parliament, and we copied most of those protections in our Constitution.

For example, very early Parliament passed a statute that said, "It is accorded that a parliament shall be holden every year once or more often if necessary." In our Constitution we simply said, "The Congress shall assemble at least once every year."

When the King tried to imprison members of Parliament for what they said in Parliament, in the English bill of rights they simply said that, "the freedom of speech and debate through proceedings in Parliament ought not to be impeached or questioned in any other court or place out of Parliament." In our Constitution we said it more simply: "Senators and Representatives for any speech or debate in either House shall not be questioned in any other place"

Lastly, the King, seeing that he could not stop Parliament from meeting or could not arrest its members for what it said, simply tried to keep the citizens from the Parliament and to punish them if they approached the Parliament. So in the English bill of rights England said that, "it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegal." In our Bill of Rights we said, "Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances."

Mr. Chairman, as I said, the early English experience was that it was the King who would abuse your liberties and the Parliament who would protect them. But all of that changed with the Cromwellian experience in England.

You will recall that during the 1630's and then into the 1640's there was a great moral tug in England between the independents, the Puritans, the Church of England, and the King. Finally, in the

1640's the Puritans gained control of Parliament. These were the kith and kin of the Puritans who had only 20 years earlier settled in Massachusetts. They were moral, and they knew that their morality was not only just but right, and they were determined to impose it on the rest of the country.

Oliver Cromwell was their leader. He organized a new and very efficient military called the New Model Army. Finally, even the Puritans fell to squabbling among themselves, and the faction of the Puritans led by Cromwell won out. One day Colonel Pride stood at the door of Parliament and turned away all but those that Cromwell agreed with, and 53 were left in Parliament to govern England.

Finally, Cromwell could not even agree with the 53, and he dismissed Parliament altogether and ruled solely and alone with the New Model Army as his instrument of terror.

It was at this stage that the entire whole of England turned against Cromwell. It is not said any better than in Winston Churchill's "History of the English Speaking Peoples" when he says, "The story of the second civil war is short and simple: The King, lords and commons, landlords and merchants, the city and the countryside, the church, the Scottish army, the Welsh people, and the English fleet all now turned against the New Model Army. The army beat the lot. And at its head was Cromwell. It was the triumph of some 20,000 resolute, ruthless, disciplined, military fanatics over all that England has ever willed or ever wished."

Cromwell ruled harshly, but effectively, until his death in 1658, and so joyous were the English at the death of Cromwell that in 1660 they restored the monarchy that they had overthrown and installed as King the son of the King that they had beheaded. And from this period onward the documents of English history have run not just against the King but against the government generally, be it royal or common.

Trial by jury: "No free man shall be seized, or imprisoned, or stripped of his rights or possessions, or outlawed, or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, nor send others to do so except by the lawful judgment of his equals or by the law of the land."

How did we say it in the Bill of Rights? "No person shall be deprived of life, liberty, or property without due process."

In the English bill of rights they said that, "Excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We copied it word for word in our Constitution.

The English said, "To no one will we delay right or justice."We said, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial."

As far as double jeopardy is concerned the common law in England by court decision determined that you could not be tried twice. In the plea of autre foi acquit and autre foi convict the court said, "A man shall not be brought into danger for one and the same offense more than once." How did we say it in the fifth amendment? "No person shall be subject to the same offense to be twice put in jeopardy of life or limb."

That particular decision, Mr. Chairman, is very important, because it was proof that the courts, as well as the Parliament, had the right to extend liberty and to protect individual freedom.

As far as self-incrimination is concerned, England said, "In future, no official shall place a man on trial upon his own unsupported statement." In our Bill of Rights we say, "No person shall be compelled in any criminal case to be a witness against himself."

Mr. Chairman, I could go on with cite after cite after cite. It took the English the better part of 500 years—roughly from Magna Carta in 1215 to their bill of rights in 1689—to nail down their basic liberties. Most of them were acts of Parliament.—Simple majority acts based upon experience, and that experience was that government will try to take away your liberties and that all governments must be restrained.

As far as the right to an abortion was concerned, it is very, very important to note what the right to abortion was at common law.

I read Professor Noonan's testimony in which he says, "Since the beginning of the Republic, abortion has been a crime at common law." I turned to him, and I said, "I want to make sure, Professor, I understand your use of the word. It was not a felony." "That is correct," he said, "It was barely a misdemeanor, if that." And I think he will indicate that is correct.

From one decision about abortion comes the term, "a great misprision," which was a term unusual in the common law and especially at a time when the word "misdemeanor" was in common use. Be that as it may, whether or not abortion even rose to the level of a misdemeanor—and that is questionable—at common law, any woman who had an abortion prior to quickening—which is roughly what we might call viability—was not punished, nor was the person producing the abortion punished at common law.

At the time we wrote our Constitution our Founding Fathers saw no need to write into the Constitution a prohibition on abortion. Nor did any of the States at that time by statute prohibit abortion.

So when people talk about returning to the morality and the law of our forefathers, I am one who would be happy to say, "Yes." I am satisfied to live with their concept of morality and their concept of law as far as it concerns the right of a woman to choose whether or not she wanted an abortion.

Mr. Chairman, as I indicated, we took the British experience concerning liberties and we wrote it into our Constitution and Bill of Rights. In addition, we added two very essential liberties that Britain did not have—freedom of religion and freedom of speech and press.

We did this because our experience as a colony indicated that we did not want a State church, be it Christian, Moslem, Jewish, or otherwise. We did not want any government or the citizens thereunder imposing their religious or moral views on the rest of us. In addition, we wanted to secure freedom of speech and freedom of the press because England had tried to limit those when we were a colony. We wanted no government prohibiting those rights.

From 1791 to date we, like the English, have expanded the liberties of our citizens. Sometimes those liberties were expanded by additional amendments to the Constitution such as those amendments prohibiting slavery and extending the right to vote to women.

Sometimes those liberties were expanded by courts, as the Supreme Court did in *Brown* v. *The Board of Education*, when it reversed *Plessy* v. *Ferguson* and said that henceforth, despite the fact that the Court had ruled otherwise before, Government-imposed racial segregation was no longer constitutional; or in *Roe* v. *Wade*, in which the Court for the first time found that Government prohibition of the right of a woman to choose whether or not she wanted an abortion was unconstitutional.

But always, Mr. Chairman—always—from Magna Carta, through the English bill of rights, through our Bill of Rights, through the Civil War amendments, and to date, the history of liberty has been the continued expansion of personal liberty and freedom and the continued limitation on the powers of government.

Mr. Chairman, the Constitution and the amendments thereto occupy equal stature, some are not greater and some lesser. In George Orwell's "Animal Farm" is expressed the theory that, "all animals are created equal—but some are created more equal than others." That is not true of the Constitution.

The right of a woman to choose for herself whether or not she wants an abortion is a right entitled to as much protection and sanctity as any other provision of the Constitution.

Let me read the amendment that you, Mr. Chairman, have proposed: "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent powers to restrict and prohibit abortion, provided that a law of a State which is more restrictive than a law of Congress shall govern."

Mr. Chairman, let me slightly paraphrase that amendment as follows: "Freedom of speech is not secured by this Constitution. The Congress and the several States shall have the concurrent powers to restrict and prohibit free speech, provided that a law of a State which is more restrictive than a law of the Congress shall govern."

Would this Congress or our people agree to such an amendment? I hope not. But there are some who regard freedom of speech as an impediment to an otherwise orderly government and they, indeed, would change it.

Similarly, there are those who regard a woman's right to choose whether or not she wants an abortion as an impediment to an otherwise moral government. These people, Mr. Chairman, are not in the majority any more than Cromwell's Puritans were in the majority.

It is very clear that the public, by any measure of any opinion poll, supports the Supreme Court's decision, but these modern-day Puritans are convinced that they are right, as convinced as Cromwell, and they are prepared to impose upon us, if they can, their view of God's will. It is a dangerous and a pernicious theology, and those who hold it—if they are successful in this effort—will not stop until they have imposed upon us a restriction of all of our liberties with which they do not agree.

Let me ask three questions: Do those who want to inhibit a woman's right to choose have the might to amend the Constitution? Do they have the right to amend the Constitution? And is it wise to amend the Constitution?

Mr. Chairman, to the extent that we have a representative form of Government, the ultimate sovereign power resides in the people. We exercise it at the ballot box. And to the extent that the people have the power to do what they want, then they have the might to amend the Constitution. If you adopt the philosophy that might alone makes right, then they have the right to amend the Constitution.

Mr. Chairman, is it wise to do so? In my mind the answer is clearly no. Rather than restraining liberty, we should continue to expand it. Rather than some of us attempting to impose our moral views on others, we should instead be fostering a decent respect for diversity.

Mr. Chairman, the liberties of the least of us in the last analysis will be the liberties of all of us. Take away the liberties of a few and you take away the liberties of all. Let a minority impose upon this country, if it can by sheer might alone, regardless of whether it represents a majority in this country, its moral views, and we are asking not just for opposition but ridicule. If those minority moral views continue to be the law, we ask for more than ridicule; we ask for rebellion.

With all my heart, Mr. Chairman, despite the fact that you and I may personally differ on this particular subject, I would hope you would exercise wisdom and restraint so that those who would restrain our liberties today do not in another era find others who would restrain their liberties.

Mr. Chairman, a few years ago we celebrated our 200th anniversary as a nation. We should remember that we celebrated not just 200 years of American liberty but in addition almost 800 years of Anglo-Saxon history during which men and women have been tortured and imprisoned, and have fought and died so that we today can say what we want, do what we want, and be what we want.

In short, they have given us the blessings of liberty. It is the greatest blessing that anyone could ever give us. All I ask is that you cherish it, preserve it, protect it, and pass it on to our children a bit more secure than we received it.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Packwood.

Senator Leahy, do you have any questions?

Senator LEAHY. No, I do not, Mr. Chairman.

Senator HATCH. Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I do not have any questions. It was a fine statement, Senator Packwood, and I appreciate the obvious depth to which you have researched our basic freedoms.

My only comment is that I see some hard distinctions between your analogies of the British consideration—whether it is Cromwell or other areas—and the process which we are going through.

It seem to me that our Constitution has this amendment process built into it. Giving it the safest protection. Whether or not our Constitution is amended with the human life amendment will not be totally decided by those of us on this subcommittee, the full committee, or on the floor of the Senate or the House. The process at least in this Senator's view—gives us the greatest opportunity to get as close as we can to what the people want or do not want.

So I can foresee that some day, as in the past, this committee and this Senate might vote out a constitutional amendment, either on this issue or on another issue, and yet the people in the States elect not to ratify it.

I see a distinction that ought to be pointed out and applauded and one that gives great safeguards so that one single moral view in this country does not pervade. While you may be correct that mine is a minority view—although others will disagree with that characterization—it will have ample hearing, not just among 3 members of this subcommittee today, but ultimately 18 or 19 members of the Judiciary Committee, and I would hope 100 members of the Senate.

Senator PACKWOOD. Are you suggesting, Senator DeConcini—if I follow your line of argument—that this is not a decision only Congress should make, but that we should have a greater collective judgment on it, and perhaps the best way to do that is to send it out to the State legislatures?

Senator DECONCINI. I think that is a part of the process, and I do not believe the decision will solely be made here. That is my point.

Senator PACKWOOD. I would hope that you would not share that philosophy as far as it might extend to freedom of the press, freedom of speech, or the right to assemble—that if a group wants to amend the Constitution and prohibit it we ought to send it out to the legislatures.

Senator DECONCINI. I do not see a movement in this country to restrain freedom of the press or any other freedoms. This is an issue of the freedom to live and that is a freedom that I think should be protected.

So I think the processes that our forefathers put in the Constitution were deliberately put there to make sure that we would not fall into the same problems into which Great Britain fell.

I am pleased that the chairman is willing to go through this process. It is far easier to just look at a poll and say, "Well, the poll shows opposition to this." I have seen the polls on either side. I do not think the polls should be the determining factor.

I think the Supreme Court made a decision and that it is one that ought to be seriously considered. That is what I think we are doing.

Senator PACKWOOD. Senator DeConcini, I do not see today any movement to restrict freedom of speech. I do see some who would like to restrict freedom of the press.

Be that as it may, if you look at the history of our country you will see that we have gone through moments of passion and prejudice where the popular opinion was to abridge basic liberties.

We can start with the Alien and Sedition Acts. Fortunately, they expired. They would have been clearly unconstitutional, but because of the passion of the moment we passed them.

Look at Andrew Jackson's efforts to prohibit the mailing of abolitionists' tracts into the South. You can look at Franklin Roosevelt issuing the order to put into concentration camps native-born Americans of Japanese ancestry because the prejudices and the passion of the moment swept us away.

I am not saying today there is that movement as far as freedom of speech and freedom of the press are concerned, but that may come, and I would hope at that stage we would not say, "Well, it appears to be a popular movement at the moment, and therefore let's send it to the State legislatures for their approval."

Senator DECONCINI. My only response would be that when women's suffrage was debated in this country my observations show that it was not by any means a popular thing at the time and that change took a long period of time and a great deal of debate.

I think our system provides for protection. I am not certain that this amendment is going to pass out of this committee as it has been introduced by the chairman, but I think your point is we have to be cautious after seeing what happened with Cromwell. Although I agree that caution is necessary, I see a great distinction in today's modern America and our Constitution versus what occurred in the 1600's in England.

Senator PACKWOOD. It is interesting. I find the parallels very apt. I see local groups wanting to ban books. We do not see too much at the Federal level yet, but there are all kinds of cases that finally wend their way to the Supreme Court where local governments or local actions have attempted to abridge liberties because it was the popular thing to do at the moment in that area.

Fortunately they were prohibited from doing it. Hopefully they will continue to be prohibited from doing it. But to say that it does not exist in this country, to say that on occasion minorities, or in some cases majorities, would not override our liberties, I think belies both a knowledge of history and current events.

Senator DECONCINI. My only point, again, Senator Packwood, is that that is what this body is all about. You and I have that responsibility. We may differ on this issue, but I think we do agree that there is no great movement to change many of our liberties.

I think it is a matter of what is a freedom and a liberty. Is the right to live a freedom or liberty that ought to be a part of the Constitution? I think this question is the focus of the debate.

Maybe the right to live is not a freedom or liberty. Maybe it is not something that ought to be protected by the Constitution. On that point is where I think the arguments in opposition to this amendment will carry a great deal of weight. That is all I have to say.

Thank you, Mr. Chairman.

Senator HATCH. I enjoy your remarks on the subject of abortion. I have listened very carefully. I probably listen more closely than anybody else.

What is your viewpoint with regard to the willful killing of harp seals. You do not like that, do you? I do not like that either.

Senator PACKWOOD. No, as a matter of fact I do not. No.

Senator HATCH. Do you feel we should restrict that?

Senator PACKWOOD. If you do not send this amendment out, you will not have to listen to my speeches on this issue. [Laughter.]

Senator HATCH. As a matter of fact, I think that I will always have to listen to your speeches unless we do get this amendment out and let the representatives of the people make this decision.

I think you ought to reexamine the constitutional amendment we have filed. It may be the only way of literally ever resolving this question through achievement of a consensus. I think it has got more merit than you have.

Let me make a couple of points. I have a lot of admiration for you as a colleague. There is no question about your brilliance as a Senator. There is no question you care very deeply about this issue; you are, in my opinion, one of the most eloquent spokesmen for the abortion right in America. I know you are sincere in your belief, and there are many good people who support your particular beliefs in this area—people who are sincere, dedicated, religious people.

I think you have to acknowledge there are many sincere, dedicated, religious people on the other side of this issue, as well.

You have equated the right of abortion to freedom of speech. I think you are talking about oranges and apples. There are few in America who that want to repeal the first amendment.

Senator PACKWOOD. I have a number who live in a number of towns I speak in from time to time.

Senator HATCH. I see. There are always going to be some people who disagree with elements of our Constitution or disagree with its values.

There is no consensus—not even the most slight consensus—to do away with the first amendment in this country, but there is arguably a substantial consensus out there to protect what they call innocent human life. I do not think the analogy is a relevant analogy.

Let me just say this: You seem to be articulating a libertarian viewpoint here with regard to individual rights. I have sympathy for that viewpoint, with concerns.

Should women have the right to choose to smoke marihuana, or to take heroin, or cocaine whatever the impact upon themselves or their children?

Who makes these decisions for society? Unelected Federal judges or elected representatives? Was *Roe* a wise decision from a jurisprudential standpoint?

Senator PACKWOOD. Mr. Chairman, the Supreme Court will make many decisions I will disagree with. They have in the past; they will in the future. We all live with those decisions, whether we like them or not.

When you say you see no particular mood to change our liberties on freedom of the press and freedom of speech, I will take you back again, and I for the life of me have read and reread the decision, and apart from popular passion I do not know how the Court could find constitutional the imprisonment of native-born Americans during World War II——

Senator HATCH. I do not either.

Senator PACKWOOD. Interestingly, native-born Americans of only Asian ancestry, not Italian ancestry, not German ancestry; but they did.

Senator HATCH. Or finding that a black was not a person, as in *Dred Scott*.

Senator PACKWOOD. All I am saying is that popular passion can obscure judgment on occasion, and the Constitution is deliberately written to make that popular passion very hard to write into law.

Senator HATCH. I agree with that constitutional approach, but we have had 8 years of extensive debate on this issue. This is not a spur of the moment issue of temporary passion. I think we have had a lot more heat than light in many ways, and one reason we have is that we are limited from effectively debating this issue in public arenas.

My amendment is one way perhaps of resolving this issue through elected representatives through consensus and negotiation and compromise rather than by arbitrary lawmaking by unelected judges.

I think you ought to look at that issue, because if your position is correct, and justifiable in a free and open public debate, then why be afraid to have a public debate in the Congress and in the States and resolve this among the people's representatives where they can make the determination?

Senator PACKWOOD. Mr. Chairman, again I would go to any of our liberties. If you want to skip freedom of the press and freedom of speech, forget that. You and I know full well that there is a fairly substantial support in this country—maybe not majority, but a fairly substantial support—for in some way changing the right of self-incrimination—the thought that somehow criminals are getting away with something when they can plead the fifth amendment.

Senator HATCH. But who wants to do away with the fifth amendment?

Senator PACKWOOD. All I am saying is that passions come and go, and that is one you and I have both heard, especially when some criminal who has been let loose because there was not sufficient evidence to convict beyond a reasonable doubt and yet the public was convinced that that person was indeed the culprit and did not take the stand. The public thought something was wrong that allowed that, and given the opportunity they would change that protection.

Senator HATCH. I think that is a good point, but I do not think it is relevant to this. I would also suggest to my friend from Oregon that many believe, including myself, that it was the Court itself that amended the Constitution in 1973.

All I am saying is, "Let's see if your side has the votes. Let's see if our side has the votes. Let's see who wins this." Right now, debate is totally restricted because of what I think many constitutional authorities would call a dubious set of Supreme Court decisions.

Senator PACKWOOD. I think what you are saying, Mr. Chairman—and I guess you and I fundamentally disagree—is that at any time in our history or any time in the future when a serious majority questions one or more of the liberties in the Constitution, then it is the obligation of Congress to send out a constitutional amendment for full and free debate in the legislatures.

Senator HATCH. No; I am saying that where the Court makes a jurisprudentially questionable decision, overturning longstanding laws in 50 States, and where bitter controversy over such decision continues for a sustained period of time, perhaps another look ought to be taken at establishing an alternative rule of policy.

Senator Packwood. Mr. Chairman, I will recount a story—and it is not the reason. I had introduced legislation legalizing abortion nationwide prior to the Supreme Court decision. There was then no right-to-life movement—I use that generically, not Right to Life in the individual organization sense. I introduced an amendment to legalize it nationwide. I also had an amendment to legalize it in the District of Columbia, because the argument was made that we did not have the power to do it nationwide. They did not then have home rule. Some would question whether they have it now.

In any event, the argument of those who did not want to cosponsor my nationwide amendment was, "That's a local issue." Then when I would give them the District of Columbia amendment, they did not want to sponsor that either, even though we did have the power. I could not get a hearing.

One of those who was religiously opposed to my position was in my office one day, and I said, "Look, all I want is a chance to debate this, and I want a hearing." And the fellow said to me, "Senator, the law is on our side; we don't want any hearing." I could not resist—in about 1974 or 1975, when the movement for the amendments was taking place, and this fellow was in my office again pleading for a hearing—saying, "Gosh, I don't want a hearing; the law's on my side."

I do not share that view, but indeed I found his position hypocritical. I have no objection to the hearing, but I think we finally, after hearings—as we do with all legislation—exercise judgment and not just pass through to the public, as if we were a nonthinking conduit, whatever it is they want to debate, whatever it is they want to hear, and give up any judgment of our own as to whether or not it is a wise decision we are passing on to them.

Senator DeConcini. Mr. Chairman, would you yield?

Senator Hatch. Surely.

Senator DeConcini. Bob, the point has got to be made: I do not think anyone is professing that we not debate the issue or that we do not exercise our responsibility as elected officials.

I think the Senator from Utah is merely pointing out that the process was built this way for just this kind of question. I think—and maybe you do not—this is such an important issue that it ought to go through this process.

If the amendment does not make it all the way through, then I will have made a misjudgment. The elected responsible people in this body are going to decide first. I think that is a very good sign.

I find no problem with going through that process on an issue involving life. Maybe there will be other such important issues. I thought the issue of the equal rights amendment was proper. I was not here when that was debated, but I thought it was proper that it go through that process. The consensus here was, "Yes, let's report it out." It appears, obviously now, that the consensus in the country is opposed to it. I can accept those judgments.

Senator Packwood. The country is opposed to it?

Senator DeConcini. Apparently so because the State legislatures are three short of passage. What can you say but, "Well, we lose that one, and we will try again."

Senator Packwood. It is hard to tell whether the country is opposed. All we can go on are public opinion polls, and they change from time to time. At the moment public opinion polls seem to indicate that the bulk of the public supports the equal rights amendment by roughly two-thirds. Be that as it may, I will be intrigued because that is a very strong support.

I do not find that kind of support for overturning a woman's right to choose whether or not she wants an abortion.

But if unfortunately the equal rights amendment fails—even though there is at least a clear consensus of those who would like to have it—then I would be intrigued with the votes of many people in this Congress who are proposing this amendment as to whether they will vote to again send an equal rights amendment to the States because there is a consensus that wants to discuss it.

Senator DeConcini. I agree with you. I think the equal rights amendment was important, and I voted for the extension because I thought the people ought to have an opportunity to express their views. I do not find, by doing that, that I abrogated any responsibility as an elected representative from my State.

Senator Packwood. I will make you this bet, and we will have no way to prove it until we get there: Many of the people who will vote to send this amendment out, if they get a chance, will vote against sending out an equal rights amendment.

Senator Hatch. Is that not already decided? The extension was granted. It will expire on June 30, 1982, or it will be ratified by then. How is that relevant?

Senator DeConcini. It seems to me—if the Senator would yield—that if that bet had been made 2 years ago you would have lost. I do not know whether we will have an opportunity again or not.

Senator Packwood. My hunch is this: If unfortunately the three States do not ratify it so that the time limit holds, and the amendment is not adopted, as we have had with other amendments it will be put forth again in this Congress at some stage after a decent interval of time. It will be put forth again, and I will just be curious to see what the votes are in this Congress of those who argue consensus as a reason for putting this forth—as to whether they will argue consensus as a reason for putting that forth.

Senator Hatch. You are not arguing, Bob, that the equal rights amendment is directly related to abortion?

Senator Packwood. I am talking about procedures.

Senator DeConcini. We are talking about procedures, Mr. Chairman.

I think it is a very good thing that this country went through that whole process on the equal rights amendment. I wish it had passed because I believe in it. But I do not see any criticism of this Congress or the Congress that passed it, for going ahead and referring it to the people. I think the process is a good thing.

If this Congress decides to go through the amendment process on the issue that we are debating today, I think it will be a good thing. If it is turned down, I will be able to live by that judgment. If it is passed, then I think that is the judgment we live by until we want to go through the process again. Ours is not going to be a snap decision, either in this committee or by this country. The decision on the equal rights amendment has not been and neither was our decision on women's suffrage.

Anyway, I appreciate your scholarly presentation today. I thought it was excellent.

Senator **Packwood**. Thank you very much.

Senator **Hatch**. Let me close, Bob, with this: I agree with you in part, because I think we both agree that fundamental liberties ought to be inviolable by a majority vote. We simply have differing views on what these fundamental liberties really are.

I see the inviolable right, as the right of the unborn to life. You see the right differently.

I think the reason I filed that amendment was to try to get us off this problem. Let us at least try to reach an accommodation democratically. I think that is all that amendment would do.

Senator **Packwood**. Does the same philosophy hold of the right of a "born" to life?

Senator **Hatch**. The right of a what?

Senator **Packwood**. A "born," as opposed to the unborn. Does the State have any right to take the life of somebody who has been born?

Senator **Hatch**. There is indeed a right in the "born," except those who have committed the most heinous crimes, not to be denied their life by other individuals.

I suppose one of the difficulties I have always had is that many of those who support abortion rights work themselves into a terrific frenzy over the harp seal, the whales, and all kinds of animals, and yet have absolutely no consideration for the right of the life of the human unborn. I find that just a little ironic.

Senator **Packwood**. I would close in saying this, Mr. Chairman: Although it is not an argument I use for the right of a woman to choose, through our history and throughout the history of this country we have on many occasions justified the taking of innocent human life. We have justified it on the basis of what we thought was an overwhelming public necessity. Sometimes we have executed innocent people. Sometimes we have gone to war and killed hundreds of thousands of innocent people, but we justified it.

I do not use that argument, but for anyone to say we have got to protect unborn life but say we can take born life I find an inconsistent argument.

Senator **Hatch**. I do see the distinction between innocent life, and the life of a mass murderer as more than one of trivial nuance.

Senator **Packwood**. But when we drop a firebomb on Dresden and kill several hundred thousand in two nights, many of them innocent civilians—they were innocent human life.

Senator **Hatch**. Well, I think we probably lost considerably fewer lives in Dresden than we do in an average year in this country—1.3 million innocent human lives. The differences are much more significant, however.

Senator **Packwood**. Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator Packwood.

Our next two witnesses are two eminent constitutional authorities with different perspectives on these issues: Professor John Noonan who teaches jurisprudence and family law at the University of California Law School at Berkeley at Boalt Hall in Berkeley, Calif.

An opponent of the Court's *Roe* decision, Professor Noonan is one of the Nation's leading experts on the abortion right in the United States. He has spoken and written widely on this subject. He is the author of two important books on the subject at hand: "The Morality of Abortion" and "A Private Choice, Abortion in America in the Seventies."

It is the subcommittee's privilege and also a personal privilege to have Professor John Noonan with us today.

Professor Laurence Tribe teaches constitutional law at Harvard Law School in Cambridge, Mass. He is a supporter of the *Roe* decision and one of the Nation's foremost authorities on the abortion right in the United States.

He has written a number of scholarly articles on the *Roe* decision, among others, and is the author of one of the most widely used casebooks on constitutional law and eminently celebrated.

We welcome you again, Larry, to our subcommittee as well.

It is my recollection that almost exactly 7 years ago both of you professors testified before this subcommittee on earlier hearings on this subject. While I was not privileged to have been there at the time, I am looking forward to picking up where you left off then. I am not sure who had the last word at that time, but let us begin with Professor Noonan first and then Professor Tribe second.

Professor Noonan?

STATEMENT OF JOHN NOONAN, PROFESSOR OF LAW, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIF.

Mr. NOONAN. Thank you, Mr. Chairman.

I should like to congratulate you on holding these hearings. As you have indicated, they are due and overdue. I hope that Professor Tribe and I will not grow old attending hearings that go on into the eighties and nineties with this subject still unresolved.

I am submitting a written statement, of which I will only select highlights now. In that written statement I have ventured to make a few suggestions as to the actual text of the amendment that you have submitted.

This morning, in summarizing this written statement, I want to address just three points: The right to abortion as it existed before January 22, 1973; the radical right that was established on that date; and the social dimensions of the right.

THE RIGHT TO ABORTION BEFORE "ROE V. WADE"

Before January 22, 1973, no right to an abortion existed in the Constitution. Everyone knows that it is not there in the explicit text, and there was nothing in the traditions of the American people that made it a constitutional right.

As Senator Packwood conceded, since the beginning of the Republic abortion was a crime, and if we are to return to the state of our forefathers, as he also conceded, we would find that it was customarily characterized as a crime against the person.

In the great repository of the common law—Blackstone—you can find it dealt with at some length. You can go back as far as the father of the common law—Bracton—and find abortion is a crime.

If we went back to those early days, we would even find that if the aborted child was born alive and then died the crime was murder.

I doubt that all of the proponents of the abortion right would care to go back to those early days, but Senator Packwood said he would be willing to.

Of course when the 14th amendment was adopted there were by then statutes banning abortion. A considerable misconception has existed because in the early days the crime was banned by common law, although that was the way most or many crimes were banned. It was not customary to have statutory codes for all crimes.

By the time statutory regulation of criminal matters had become common the States began adopting abortion statutes, and all of the States who voted to ratify the 14th amendment had in force strict statutes against abortion.

That was the law, and as far as Supreme Court precedent went there was not a single case before 1971 that, as far as I can see, even dealt with the issue. In 1971 the Supreme Court sustained as constitutional the District of Columbia's abortion law.

The only faint vestige of anything having to do with abortion was the statement in *Griswold* v. *Connecticut* about the right to privacy—and that right, in the words of its inventor, Justice Douglas, was "confined to the marital bedroom." Privacy was something that had to do with supporting marriage.

Literally thousands of cases had interpreted the Constitution before *Roe* v. *Wade* was argued. There was nothing to indicate—except in a dictum given almost simultaneously with *Roe* v. *Wade*, that the right to bear children had a constitutional dimension—to support the right enunciated in *Roe* v. *Wade*.

When the right was created in 1973 it was without support in law, tradition, Supreme Court precedent; it was a right created by fiat. It was an amendment of the Constitution.

Justice Byron White called it an act of raw judicial power. I think you could drop the "judicial"—we know it was done by judges—it was an act of raw power.

In effect, it repealed a part of the Constitution—the protection of life. It amended the Constitution. It wrote in a new provision.

If Senator Packwood and those who feel that this is a basic American liberty are correct, they should put up--if they want to do it in an up-front manner—a constitutional amendment ratifying this decision of the Court in 1973 and see what kind of vote that would get in the legislatures of this country.

Senator HATCH. What kind of a vote do you think that would get, Professor Noonan?

Mr. NOONAN. I doubt if it would get a single State vote.

Senator HATCH. Do you think it would get a majority of votes in the Congress?

Mr. NOONAN. No, I do not think it would pass the Congress.

THE RIGHT CREATED BY "ROE V. WADE"

Taking up the second point—the extent of the right created—it seems to me particularly important to elucidate that because it has been obscured largely by the way it has been reported in the media and the polls. I think what Senator Packwood had to say about the polls shows that.

The popular polls—the Harris poll and the Gallup poll—have always asked, Will you support the right to abortion for 3 months, as secured by the Supreme Court in *Roe* v. *Wade*?

On that kind of question there has been a majority in the affirmative, but that of course has been a serious misrepresentation of the decision. The only scientific polls—conducted by Judith Blake, the demographer at the University of California—have shown a very substantial majority of Americans opposed to the full right of abortion as it now exists in constitutional law.

Well over 70 percent of Americans and an even larger number of American women are opposed to the abortion right as it has been established.

As it has been established, the right runs for the full 9 months. There are no practical restrictions on abortion by a licensed physician in the first 3 months; up to viability—which is reckoned at 7 months—they can be restricted to a hospital or a licensed facility, but with no particular protection for the unborn child; and for those first 7 months an unborn child has got less protection than kittens, dogs, or cattle.

There is not a State where you can put a kitten, dog, or calf to death painfully. There are statutes protecting from painful death these animals. But we put to painful death—shockingly painful death—thousands of human unborn children every week.

For the last 2 months in the womb the Supreme Court permitted protection of the unborn subject to the health of the mother. The Court then defines "health" in a most expansive way to mean emotional well-being. There is not an abortion in the world, I suppose, that does not have in some way the emotional well-being of the mother in mind.

As a result, for practical purposes, abortion is a right that goes for 9 months of life in the womb. To read the press and the polls you would never suppose that there was such a right, yet around the country, popping up time and again, there are cases involving late abortions.

The famous cases you know. There is the *Edelin* prosecution in Massachusetts, the *Floyd* prosecution in South Carolina, and the *Wardell* prosecution in California. Those are just the tip of the iceberg. They arise from pregnancies where the child was in fact not aborted but born alive and then, according to the prosecutors, died as a result of injuries inflicted during the abortion.

We would not have those cases if abortion could be restricted to 3 months or even to 6 or 7 months, as the media have indicated.

The right is about as radical as a right could be. There are minor qualifications, but I do not know any country in the civilized world that has such a radical right as this right created by the Court's amendment of the Constitution.

THE SOCIAL DIMENSIONS OF THE RIGHT

I come to my third point—the social consequence. We all know the slogans—a right to choice, a right to privacy, a right to the exercise of a private choice. I do not suppose there has ever been a right less exactly described or that there has ever been coined a more misleading slogan.

For most of us what is private is what can be done alone, at home, or with anyone's family. Here is a right that is exercised by the help of a trained professional, which depends on a medical staff, which depends on medical schools to select the right students who want to perform these things. Here is a right that has required over 100 decisions by Federal district courts and 15 decisions of the U.S. Supreme Court since it was first enunciated. Here is a private right which its champions have consistently said cannot be exercised without public funding.

It would strike most people as bizarre—that something so private depends on and cannot be effected without public funding. Yet that is the announced position of the supporters of abortion.

The abortion right has led to serious encroachments on our Constitution. It led to a single Federal judge in Brooklyn forcing an appropriation for 4 years from the Federal Treasury to pay for abortion, until finally and belatedly the Supreme Court held him to be in error.

Quite apart from the public law impact there has been an impact on the structure of the family. The family structure has been seriously attacked by Supreme Court decisions supporting the abortion right. The family structure has been attacked first by the final Court giving final authority over a decision which will seriously affect the physical, psychological, and moral health of a child, not to the father and mother but to a judge who can decide whether it is in the best interests of a child to have an abortion.

Then the Supreme Court has attacked the basic family structure by denying that a father, who has procreated a child jointly, has any responsibilities to exercise in the decision as to whether to annihilate that child.

The greatest social consequence of course has been the taking of human life. No one, I believe, doubts that we have here the unique chromosomal code of human beings, that every genetic feature of human beings is there, that we are talking about what can rightly be called human boys and human girls. These human boys and human girls in the womb are having their lives taken at the rate of over 1 million a year.

I am not surprised that Senator Packwood finds his analogies in war. This is a kind of war.

Heartbreaking as the cases are which the advocates of abortion have carefully selected, much as one's heart goes out to the people caught in them, those tragedies cannot compare to the tragedies that are being enacted now in this massive killing of the unborn.

That kind of choice cannot be a private choice. That kind of choice cannot be a liberty. A liberty to take someone else's life—someone else who is not your property, not your body—that kind of liberty is pernicious and destructive.

We can all agree that sexuality is private and reproduction is private, but when it comes to taking the life of the unborn we are no longer in the domain of the private. We are dealing with a social act—what is now a social act amounting to an American atrocity.

Senator HATCH. Thank you, Professor Noonan.

[The prepared statement of Professor Noonan and additional material follow:]

PREPARED STATEMENT OF JOHN T. NOONAN, JR.

RESTORING THE PROTECTION OF LIFE TO THE CONSTITUTION

I propose to address three topics:

1. The right to an abortion as it existed in the Constitution, American traditions, and judicial precedent before Roe v. Wade.
2. The radical right to abortion established by Roe v. Wade.
3. The social dimensions of this right.

In conclusion, I shall say something about the Amendment before you.

I. THE CONSTITUTIONAL RIGHT TO AN ABORTION BEFORE JANUARY 22, 1973

Before January 22, 1973, the date of the decision of Roe v. Wade, no right to an abortion existed in the Constitution.

The explicit text of the Constitution, as everyone knows, does not mention abortion. The Ninth Amendment, reserving unenumerated rights by the Constitution to the people, appeared to guarantee to the people the right to protect life, and in fact the fifty states did protect life outside the womb and within the womb. The Fourteen Amendment expressly declaring that no state shall "deprive any person of life" without due process of law appeared to guarantee the protection of all human beings. The Supreme Court in a stirring dictum had declared that "one's right to life" depends on "the outcome of no election." 1/ The right to life, put beyond electoral caprice, appeared to be secured by the due process clause. No student of language, no one faithful and attentive to the words of the Constitution, could have supposed that the very clauses which seemed to secure life could be turned inside out to mandate destruction of the states' life-protective measures.

Nothing in the traditions of the American people suggested that abortion was a constitutional right. Since the beginning of the republic, abortion had been a crime at common law. In the nineteenth century it became a crime by statute. [2/] The congressmen who proposed and ratified the Fourteenth Amendment approved legislation banning abortion in the federal territories. [3/] The State legislatures which ratified the Fourteenth Amendment enacted or left in force strict statutes against abortion. [4/] How amazed these congressmen and legislatures would have been to have told that the Amendment they adopted could be read to eradicate the criminal laws safeguarding life! From the date of the adoption of the Fourteenth Amendment in 1868 until January 22, 1973 the traditions of the American people assured the protection of life in the womb by criminal statutes.

No precedents of the Supreme Court indicated that there was any constitutional right to abortion. The Digest of Supreme Court Cases is bare of citation to abortion cases before 1971. In that year the Court sustained the constitutionality of the District of Columbia abortion law. [5/] The right to privacy as a constitutional right had only been discovered or created in 1965 in Griswold v. Connecticut, and in the language of its discoverer or creator, Justice Douglas, was a right based on the immunity of "the sacred precicts of the marital bedroom." [6/] The right to privacy as enunciated in 1965 supported the sanctity of marriage; it did not subvert it. Thousands of cases interpreted the Constitution before Roe v. Wade was argued. Not a single precedent in the Supreme Court held that there was any such thing as the right to abortion in the Constitution. Only, in the year Roe v. Wade was argued, the Court in Eisenstadt v. Baird stood the right of privacy on its head to include the rights of the unmarried and to hint in a dictum that the decision "to bear" children fell within its ambit. [7] But Eisenstadt v. Baird was decided with Roe v. Wade in view. It was a bit of bootstrapping by the Court, creating a half-precedent for a decision it was ready to make. In terms of almost two centuries of constitutional adjudication, the right to abortion proclaimed in 1973 was a right created out of the air by the will of a majority of the Court in 1973. It was without basis in the text of the Constitution, without basis in the traditions of the American people, and without basis in judicial precedent. Its creation was by fiat. Its creation was, in the words of Justice Byron White, an act of "raw judicial power." [8] By the power of the Court's majority the constitutional protection of life was, in effect, repealed; the Constitution was, in effect, amended; and a new constitutional provision was, in effect, written: "The right to abortion is conferred by this Constitution."

II. THE EXTENT OF THE RIGHT TO ABORTION

How extensive was the right to abortion created in 1973? The media have so consistently palliated and disguised the character of the right that it is necessary to be particularly exact in answering this question. The proper answer is that the right was the most radical in the civilized world.

The Court said that for the first three months of pregnancy no governmental authority of any kind could intervene in the decision to obtain an abortion from a licensed physician. [9] In the second stage of pregnancy, the state was permitted to require abortions to be performed within hospitals or other licensed facilities in order to safeguard the health of the pregnant woman; no protection was permitted during this period for the unborn child. [10] No recognition of the existence of the unborn child was accorded by the Court during the first two phases of pregnancy.

In the third and final phase of pregnancy, reached at viability (reckoned by Justice Blackmun to occur ordinarily at seven months), the zero which the unborn child was in the Court's eyes graduated to recognition as "potential life." At this stage, the state was permitted to protect the life of the child, subject however to a remarkable exception. [11] The exception was that no law could restrict an abortion performed for the health of the mother; and health was defined by the Court in the companion case of Doe v. Bolton in terms of "all factors -- physical, emotional, psychological, and the woman's age -- relevant to well-being." [12]

That definition and the health exception effectively negated the state's power to protect life in the womb after viability. There is not, I should suppose, a single abortion performed that cannot claim justification in terms of the emotional and psychological well-being of the person requesting the abortion. When the Constitution, as effectively amended and interpreted by the Court, declares that it is a person's constitutional right to be free of the restraint of any law interfering with emotional or psychological well-being when abortion is in question, there is no way that a state can effectively legislate to prevent abortion. Abortion on demand -- although Chief Justice Burger in a concurring opinion made a valiant attempt to deny it [13] -- is in reality the law of the land. Liberty of abortion, as a constitutional right, is, for practical purposes, virtually unlimited.

Because almost no governmental restriction on abortion is permitted in the first months of pregnancy, gross abuses have developed of the kind investigated by the Chicago Sun Times and reported in its issues of November 1978: fashionable, modern abortion clinics in the heart of the Chicago shopping district where "dozens of abortions" were performed on persons who were not pregnant; where abortions were performed on screaming women without anesthesia; where one successful operator billed Medicaid in a single year for $720,000; and where "an alarming number of women" suffered severe and permanent damage to their reproductive organs. These thoroughly legal clinics were the beneficiaries of the nearly absolute right to abortion created by the Court. 14/

Because no governmental restriction on abortion is effective in the late stages of pregnancy, there has been a rash of cases around the country involving the death of children after their abortion has failed. To cite three well-known examples, California prosecuted Dr. Wardell, Massachusetts prosecuted Dr. Edelin, South Carolina prosecuted Dr. Floyd, each for the post-abortion death of a child whose abortion the doctor had attempted; in each case the intersection of the constitutional right to abortion with the facts of the case resulted in the doctor's acquittal. 15/ That these cases involving children born alive should occur at all is symptomatic of a situation in which late abortions are permitted and not unfrequently occur.

Unregulated early abortion, late abortion risking infanticide, abortion for any reason related to the emotional well-being of the abortion seeker, these are the practices which fall within the scope and demonstrate the extent of the court-created, radical, constitutional right to abortion.

III. THE SOCIAL CONSEQUENCES OF THE CONSTITUTIONAL RIGHT TO ABORTION

The right to abortion was said by the Court to be part of the right to privacy; and the exercise of the right is said to be a private choice. Was there ever a right less exactly described? Was there ever a slogan more misleading? What is private is what can be done alone, or at home, or within one's family. The right to abortion is exercised with the help of a trained professional, a doctor, and often with the participation of a clinical or hospital staff. Its existence does not depend on personal volition but on pushing physicians to perform abortions and on pushing hospitals to make them available and on pushing medical schools to select students willing to perform them. The enforcement of this right of privacy has required constant litigation and the judicial overruling of dozens of municipal ordinances and state laws. A favorite contention of champions of this private right has been that its exercise cannot be effective without public funding! And this bizarre conclusion was enforced by a federal district judge for four years and is still the law of California and Massachusetts. The development of this form of privacy has led to the most deliberate and most serious intrusions by the state into the truly private realms of marriage and the family. It has resulted in an abortion epidemic of enormous proportions. Few constitutional rights in our country's history have had such massive social consequences as this offshoot of the right to privacy.

The right to abortion has resulted in the threat of malpractice suits against doctors that have not wished to perform or advise abortion. 16/ It has resulted in litigation against hospitals that have declined to provide abortion. 17/ It has led to the screening out of medical school candidates with conscientious objection against abortion. 18/ It has led the judiciary to strike down legislation intended to avoid by zoning the ugly urban blight of abortion clinics; 19/ to strike down legislation attempting to protect the child in a late abortion who might be born alive; 20/ to strike down legislation attempting to afford a minimal amount of information and a minimal time of deliberation to the abortion-seeker. 21/ It has been the banner under which almost the entire federal judiciary has enlisted with a zeal for social engineering and the re-shaping of state law that would do them credit as crusaders. I do not stop to dwell on the grievous error, now corrected, by which a single federal judge in Brooklyn, in contravention of the Article I of the Constitution, arrogated to himself the power to appropriate money from the Treasury which the Constitution allocates to Congress and ordered the payment of millions of dollars in the federal funding of abortion -- an order that stayed in effect for four years until finally held invalid. 22/

Most significantly of all, the constitutional right to abortion has permitted the courts to invade the family sphere and to hold, first, that parents have no final authority over their minor children in this matter which so deeply involves the physical and psychological and moral health of the child; 23/ and to hold, second, that a father -- although he has a constitutional right to share in procreating, per Skinner v. Oklahoma 24/ -- has no right whatsoever to protect the unborn child he has joined in procreating. 25/ No greater intrusion could be introduced into the legal structure of the family than these changes which allow the minor child to be autonomous in the abortion decision and the female progenitor to be solely responsible for the decision whether unborn offspring shall live or die.

The greatest social consequence of all has been the destruction of human life that has followed on the establishment of the constitutional right. No one doubts that the life in the womb -- conceived by two human beings, possessed of the human chromosomal code, possessed of every genetic feature of human beings -- is a human boy or a human girl. These lives are now being taken at the rate of over one million a year. This is a massive increase in abortion in America. This is an epidemic. Proponents of abortion are fond of bringing up tragic cases where abortion would resolve a heartbreaking situation. There are such tragic cases, and everyone sympathizes with persons caught in them. But these tragic cases cannot compare in number or in tragedy with the terrible social fact that Americans are now killing their own offspring on a scale exceeding that of any war.

A choice cannot be private whih affects another's life. The child in the womb has blood and brains, a respiratory system, a circulatory system, a urinary system that is not those of his or her mother. The child in the womb is not the property of her or his parent. The body of the child in the womb is not that of her or his parent. Sexuality may be private, reproduction may be private, but the taking of the life of the unborn cannot be private. It is a social act. Multiplied one million times a year, it is a social act amounting to atrocity.

IV. THE PROPOSED AMENDMENT

The Amendment before you is extraordinarly simple and extraordinarily direct. It denies that the Constitution contains the kind of right which fiat created nine years ago. At one stroke it demolishes Roe v. Wade and the unhappy sequelae of Roe v. Wade. With a few words it performs surgery by which the judicial amendment to the Constitution made nine years ago is excised. It restores to Congress and to the States the power to protect life.

The Amendment does not make abortion into murder -- that would be untraditional in both morals and in law. The Amendment does not confer any power over contraception. A favorite red herring of the supporters of abortion is the pretense that contraceptive rights are involved in what is done with abortion. It is time to call this confusion of contraception wit abortion what it is -- a lie. The Amendment uses the term traditionally used by criminal statutes "abortion." The Amendment uses the term as it was employed in Roe v. Wade to mean the taking of life at any time in the womb; and the Amendment denies the right to take such unborn life.

The Amendment does not attempt to solve, magically as it were, every problem associated with abortion by language frozen into the Constitution. There are those who believe that only language affirming the personhood of the unborn will suffice to staunch the wound Roe v. Wade created. But any language about "persons" is likely to involve the due process clause, a clause whose meaning has shifted again and again with judicial opinion. The life of a person cannot be taken without due process of law; but due process of law, as interpreted by the judiciary, is not a firm foundation on which to rely. Moreover, any attempt to provide in the Constitution against private action taking the life of the unborn must allow for the traditional exception by which abortion is permitted where the mother's life is at stake. There is grave danger that any exception to save life or to prevent death will be interpreted judicially to permit abortion for health reasons; and abortion for health reasons is easily turned into the equivalent of abortion on demand. 26/ We cannot risk a constitutional exception that gives such latitude to the courts.

The Amendment puts power to protect life where it had been from the inception of the Republic until January 22, 1973, and it makes one change. Because the Supreme Court acted nationally to legalize abortion, the Amendment gives Congress the power to establish a national standard of protection for unborn life. At the same time the Amendment recognizes the historic role and historic primacy of the States in the protection of life and commands that the more protective state laws shall prevail over the federal minimum.

After nine years of experience in attempting to draft language corrective of Roe v. Wade and in participating in the drafting efforts of others, I am convinced that there is no magic formula, no perfect form of Amendment, that is immune from misinterpretation or criticism. The Amendment before you is a very good Amendment. It accomplishes what must be accomplished. I offer by way of suggestion only the following changes in the draft:

> Sec. 1 No right to abortion is conferred by this Constitution.
>
> Sec. 2. Congress and the several States shall have power to restrict or prohibit abortion; provided that the more protective law shall prevail.

"No" instead of "the," so that the right is comprehensively denied. "Conferred" instead of "secured," because "secured" has too benign a flavor. "Abortion" in the singular, because it is a general evil, like slavery. "Protective," because it has a more positive flavor than "restrictive."

Whatever technical corrections are made in the Amendment, I urge you to accept it in substance. About it the lovers of life can unite. With its enactment the great goal of restoring the protection of life in the United States will have been achieved.

NOTES

1. West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943) at 638.

2. Louisell and Noonan, "Constitutional Balance," in Noonan, ed., The Morality of Abortion (Cambridge: Harvard University Press, 1970) 225.

3. E.g., The Compiled Laws of Wyoming (1876), chapter xxxv, sec. 25; see also Noonan, A Private Choice (New York: The Free Press, 1979) 5-6.

4. E.g., Laws of Vermont (1867) Public Act, no. 57.

5. United States v. Vuitch 402 U.S. 62 (1971); see Digest of United States Supreme Court Reports (1969) at "Abortion."

6. Griswold v. Connecticut 381 U.S. 479 (1965) at 486.

7. Eisenstadt v. Baird 405 U.S. 438 (1972) at 453.

8. Roe v. Wade 410 U.S. at 222 (dissenting opinion).

9. Roe v. Wade at 163; cf. Connecticut v. Menillo 423 U.S. 9 (1975).

10. Roe v. Wade at 164.

11. Roe v. Wade at 163-164.

12. Doe v. Bolton 410 U.S. 179 at 192.

13. Roe v. Wade at 208 (concurring opinion).

14. The Chicago Sun Times November 12 - November 18, 1978; see also Noonan, A Private Choice 164-165.

15. See, e.g., Commonwealth v. Edelin (Mass.) 359 N.E. 2d 4 (1976).

16. See Noonan, A Private Choice 84.

17. E.g., Doe v. Charleston Area Medical Center Inc. 529 F.d 638 (4th Cir. 1975).

18. See Noonan, A Private Choice 86.

19. Framingham Clinic Inc. v. Board of Selectmen of Southborough (Mass.) 367 N.E. 2d 606 (1977).

20. Colautti v. Franklin 439 U.S. 379 (1979).

21. E.g., Women's Services, P.C. v. Thorne 483 F. Supp. 1022 at 1049 (D. Neb. 1979).

22. Harris v. McCrae 448 U.S. 297 (1980).

23. Bellotti v. Baird 443 U.S. 622 (1979) (plurality opinion at 644).

24. Skinner v. Oklahoma 315 U.S. 535 (1942).

25. Planned Parenthood v. Danforth 428 U.S. 52 (1976).

26. See United States v. Vuitch 402 U.S. 62 (1971).

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A Private Choice

Abortion in America
in the Seventies

John T. Noonan, Jr.

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Inquiry 4

On the Jurisprudence of the Liberty

By jurisprudence is commonly meant those larger principles and assumptions that undergird a legal system and are the postulates of reasoning on any specific problem within it. Where the Constitution is concerned, jurisprudence and constitutional law overlap, for the fundamental concepts of the latter have the breadth of jurisprudential notions. It is worth, however, isolating the most basic views of legal power and responsibility in the American system from those which are constitutional law for the time being because they have been adopted by the Supreme Court.

Those most basic views constitute a paradigm or model of what the government is and of those it serves. In the American paradigm, the government is men and women acting according to laws they have made to serve the community and its members. The government is not an absolute sovereign with a will above the law. The government is not a mythic state, whose fiat creates rights and duties. Human beings exist before the government exists and are the reason why the government exists.

These observations are so obvious that they might not need to be made were it not for the existence of a competing viewpoint, whose most prominent modern exponent was the Austrian jurisprudent Hans Kelsen. In Kelsen's view, the legal order is the source of all legal rights, and a "person" is merely the personification of such legal rights.[1] In his words, "The physical (natural) person is, thus, no natural reality but a construction of juristic thinking."[2] If the legal order does not recognize any rights in a human being, such a human being is not a person. As Kelsen put it, "That a slave is legally no person, or has no legal personality, means that there are no legal norms qualifying any behaviour of this individual as a duty or as a right." [3] To have no rights is to be a nonperson, and the legal order is to determine if you have rights and are or are not a person.

Kelsen did not go so far as to say that whether you were a human being or not depended on the legal order. But he went almost that far by stating, "There is no kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right." [4] If there is no kind of human behaviour which cannot be made into a legal duty, it can be made law to disregard the humanity of certain classes of human beings. This doctrine, strangely prophetic of what the Nazi regime was to do, was framed by a fierce opponent of Nazism who thought that he put the law beyond politics by postulating a self-contained legal order.

In the United States Kelsen had been anticipated in only one important area: the law of slavery. Implicitly, not explicitly, it was assumed by the founders of the American Republic that the law could ignore the biological character of blacks as human beings and treat them as things.[5] That blacks were persons like whites was rarely put directly to the Supreme Court, so that the jurisprudence underlying this monstrous division was not articulated. Two famous cases, however, illustrated the practice.

In *The Antelope,* 281 Africans, rescued from an illegal slave ship, were claimed as property by representatives of Spanish and Portuguese slave-traders. The United States argued for their freedom, and Francis Scott Key on their behalf told the Court he represented "persons" who could not be treated as property under the American law against the slave trade.[6] But Chief Justice Marshall upheld the ability of the law to turn free men into slaves.[7] In *Dred Scott* v. *Sanford,* Chief Justice Taney treated the issue as one not of "personhood" but "citizenship" and held that the descendant of black slaves could never be a citizen of the United States.[8] In Taney's decision, as in Marshall's, there was an implicit Kelsenian jurisprudence: the law, not nature, determined who would count in the American constitutional scheme. In general, however, slavery aside, such a viewpoint was aberrant.

Before abortion became an issue, the Supreme Court had been strongly committed to the position that certain rights relating to marriage, procreation and education were prior to the state. In *Meyer* v. *Nebraska* in 1922 the issue had been posed whether the state could prohibit the teaching of languages other than English in elementary private schools. The Court ruled such a prohibition invalid as interfering with rights of teachers, students, and parents which did not depend upon the state for their existence.[9] Writing for the Court, Justice McReynolds recalled Plato's ideal republic where children were to be taken from their parents for upbringing. He observed, "It hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." [10] Three years later, in *Pierce* v. *Society of Sisters,* the Court held unconstitutional an Oregon law requiring children be sent to the public schools.[11] "The child," Justice McReynolds summed up, "is not the mere creature of the State." [12] The child's parents had the right, within broad limits, to determine the child's education, and that right was not a mere concession or creation of the state.

In the 1940s, in clear response to the association of compulsory sterilization with the Nazi regime in Germany, the Court in *Skinner* v. *Oklahoma* invalidated on equal protection grounds an Oklahoma law requiring the sterilization of habitual criminals.[13] Justice Douglas for the Court observed, "There is no redemption for the individual whom the law touches." [14] Justice Jackson, concurring, observed, "There are limits to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority." [15] The individual's procreative powers were not held by license of the state. The "natural powers" of persons were a check on fiats by the state.

In *Griswold* v. *Connecticut* in 1965 the Court held a law banning the use of contraceptives unconstitutional because it "invaded the sacred precincts of the marital bedroom." [16] For the Court, Justice Douglas wrote, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." [17] Two years later, in *Loving* v. *Virginia,* the Court held invalid a statute prohibiting the marriage of persons of different races. Chief Justice Warren for the Court declared, "Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State." [18] In both cases the power of the state was measured by the nature of marriage and the rights of persons anterior to the state and not dependent on it.

Meyer, Pierce, Skinner, Griswold, and *Loving* are the most famous cases of the Court treating the marital and family rights of persons as superior to the state. There are, of course, a host of cases where the rights of individuals to speak, to publish, to worship, and to defend themselves against the state have been vindicated. None of them are easily comprehensible if the state always had a fundamental power to decide who a person is. The ground of all these cases is that persons have certain rights and liberties. How easily the ground could have been removed by definition if that fundamental power to abolish personhood belonged to the state to exercise! How readily each case could have been won by a state claiming the capacity to determine for itself who was a person!

When the New York legislature in 1970 permitted abortion on demand for the first six months of pregnancy, Robert Byrn obtained appointment as guardian ad litem of unborn children who might be aborted under the statute, and he won a court order restraining the New York municipal hospitals from performing abortions except to save the life of the mother. The court appointing him treated the New York law as an unconstitutional infringement of the right to life of the unborn.[19] On appeal, the highest court of the state saw the question as turning on whether or not the unborn were persons; it held that they were not.

Speaking for the majority, Judge Charles Breitel granted that the unborn in the womb were "human" and "unquestionably alive." [20] But, he continued, "It is not true that the legal order corresponds to the natural order." Who was a legal person was "for the law, including, of course, the Constitution, to say." Kelsen was invoked by name to justify the conclusion that it was "a policy determination whether legal personality should attach and not a question of biological or 'natural correspondence'." [21]

In dissent, Judge Adrian Burke rejected the view that the state had the option to determine who was a person. He invoked the Declaration of Independence, "the basic instrument which gave birth to our democracy." The Declaration proclaimed that all men were "created equal" and were "endowed by their Creator with certain inalienable rights." These inalienable liberties preceded the state and arose from a source superior to the state, and the state could not deny them by classifying "a group of living human beings as fit subjects for annihilation." [22] Calling on the Declaration of Independence, Burke sought to give concreteness to what was a much larger idea, the "higher law" above the Constitution.[23]

In the clash between Breitel and Burke, two different jurisprudences were in conflict. It was that of Breitel and Kelsen which Justice Blackmun followed, up to a point, in *The Abortion Cases*

(*Roe* v. *Wade* and *Doe* v. *Bolton*). But while Breitel had left the making and unmaking of persons to the legislature with a reservation as to what the Constitution might say, Justice Blackmun, speaking as the Constitution, described the unborn as less than "persons in the whole sense"—a reduction which in fact treated them as less than human.[24] The biological evidence that they were human he ignored. Less candid than Breitel, he did not concede their humanity, nor did he cite Kelsen. He merely acted as a Kelsenite might feel free to act. The law created persons, and any human conduct might be given valid legal form.

The paradox of Justice Blackmun's opinion was this: To invalidate the state abortion statutes it was necessary for him not only to ignore the unborn child but to recognize a liberty anterior to the state in the carrier of the child. The invocation of liberty which was the very heart of his opinion was the invocation of a standard superior to enacted law. His radical use of "higher law" was only disguised by his claim that something in the Constitution supplied the standard by which the state laws on abortion were invalid. The ultimate basis of his decision was nothing in the Constitution but rather his reading of the natural law liberties of an individual.

The Abortion Cases themselves thus left the two jurisprudences in conflict. The negation of the unborn was inexplicable if the legal order had to bear some correspondence to the real order. The exaltation of individual liberty over a state statute was unintelligible unless the individual had rights not dependent on the state.

Only a sequel to *The Abortion Cases* showed how completely the courts were willing to accept the separation of the legal and natural orders to carry out the cases' basic thrust. In reaction to *Roe* v. *Wade*, Rhode Island enacted a law declaring that within its borders the unborn were persons. The constitutionality of the statute was promptly challenged in the federal court by lawyers for the Planned Parenthood Federation and the American Civil Liberties Union. In response, the State of Rhode Island offered witnesses to testify to the human character of the unborn.[25]

Sitting by himself and applying a rule that permitted him to declare unconstitutional by himself only "frivolous" legislative acts, Federal Judge Pettine refused to hear the state's witnesses. He invalidated the statute as "frivolous." "To me," he wrote, "the United States Supreme Court made it unmistakably clear that the question of when life begins needed no resolution by the judiciary as it was not a question of fact. . . . I find it irrelevant to all the issues presented for adjudication."[26] Once the Supreme Court had denied personhood to the unborn, there appeared to be no evidence on earth that would be permitted into the judicial system to persuade it that it had been wrong.[27] Personhood was a question not of fact but of fiat, and only the Court's fiat counted.

It sometimes makes debating points in the perennial quarrel between "positivists" and "natural law lawyers" that one or the other view of the law has led to, or justified, the worst consequences. One version of the natural law was once used to defend laissez-faire capitalism. On the other hand, the Nazi system of justice appears as a purely positivist monstrosity. It is clear that any jurisprudence may be misused, and that the worst consequences are not all to be laid at the foot of a legal philosophy.

Nonetheless, there is a difference between the two approaches in capacity for self-correction. From the eighteenth century on, from Blackstone onward, the legal system of slavery was attacked in the name of humanity and natural liberties; natural law was used to correct the mistaken claim that slavery was natural.[28] But if a pure positivist view of the law prevails, there appears to be no outside criterion to which to appeal if some human beings are excluded from the system. A revolution may overturn the system, but there is no vehicle for rational criticism of what the will of the judges has determined the Constitution to be.

This consequence is of special importance to our constitutional system. We have set up an elaborate protection of constitutional rights, especially for those who in Justice Harlan F. Stone's phrase constitute "discrete and insular minorities."[29] Such minorities can enjoy the liberties of the Bill of Rights secure in the knowledge that the Supreme Court will defend them against any infringements by the majority.

But all rights in our constitutional jurisprudence are premised on humanity. Your rights flow from your human character. None of them have security if it rests with a group of nine men, or a majority of them, to define you out of the human race. No discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman. If the legal order is a universe which can be developed without reference to the natural order, only the will of the makers of the legal order controls the recognition of legal existence. In the jurisprudence of Hans Kelsen, now officially that of the Supreme Court for the purposes of law on abortion, any human conduct can be made legally valid, and any human being can be expunged from the legal order and left without protection.

Such is the jurisprudential significance of *The Abortion Cases.* Their full legal significance, however, can be measured only in the more particular terms used by the scholars of constitutional law. The judgment from this perspective is no more reassuring.

Inquiry 5

On the Constitutional Foundation of the Liberty

If the full-dimensioned liberty is to be found neither in the Constitution nor in a jurisprudence of the natural rights of the person underlying the Constitution, is there a basis somewhere in American legal theory for what the Supreme Court did? Was the creation of the liberty an exercise of a discretion constitutionally entrusted to the Court? Or was its creation an act of usurpation, a fiat of "raw judicial power," as one dissenting justice suggested that it was? On these questions the persons in the best position to answer are the scholars whose profession is to study the Constitution and the Court.

Three principal elaborations and justifications of *The Abortion Cases* have been offered. Philip B. Heymann, professor of law at Harvard Law School, and Douglas E. Barzelay, a recent Harvard graduate, explain the decisions as continuing a long line of cases protecting "fundamental rights" from state interference—specifically, such private rights as the right to marry, the right to procreate, and the right to educate one's children.[1] They invoke the great cases that have built a bulwark around the family, including the cases protecting the rights of parents, *Meyer* [2] and *Pierce*.[3] They cite the assertion of the right to procreate in *Skinner*.[4] They point to the protection of rights centered in marriage in *Griswold*[5] and *Loving*.[6] They add one further case, decided in 1972, *Eisenstadt* v. *Baird*, which held that the state unconstitutionally violated the privacy of the individual by forbidding the distribution of contraceptives to the unmarried.[7] Taken together, Heymann and Barzelay say, the cases "delineate a sphere of interests—which the Court now groups and denominates 'privacy'." That privacy is implicit in the "liberty" protected by the

Fourteenth Amendment. At the core of this "sphere," subject only to limited social restrictions, is the right of the individual to make "the fundamental decisions that shape family life: whom to marry; whether and when to have children; and with what values to rear those children." The cases that created this protected zone are justified because "our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. . . . [T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it." [8]

Heymann and Barzelay are far more articulate than the Court. They make an impressive case for the rationality of *Roe* v. *Wade*. Constructing a consistent rationale for each decided case in the line they cite, they make the line speak for *Roe* v. *Wade*. In doing so they turn *Roe* v. *Wade* itself into a vindication of the family. What they do not notice or care to acknowledge is that *Roe* v. *Wade* was profoundly hostile to the family. The family unit which they say is "an integral part" of our constitutional system was rejected by *The Abortion Cases* and destroyed by their logical sequelae.[9]

The only case these scholars invoke which bears on the Court's true rationale is *Eisenstadt* v. *Baird*. That case followed by seven years *Griswold* v. *Connecticut*'s upholding of the right of the married to use contraceptives. *Griswold v. Connecticut* was based on the immunity of "the sacred precincts of the marital bedroom." [10] Invoking *Griswold, Eisenstadt* turned the liberty on its head. What had been founded on marriage was now said to be the liberty of the unmarried. For the Court, Justice William Brennan, Jr., wrote, italicizing the key word, "If the right of privacy means anything, it is the right of an *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [11] In those words a liberty that had been based on the special position of the married was made universal in a way that repudiated the legally privileged status of marriage.

Eisenstadt—decided after *Roe* v. *Wade* had been argued to the Court, so that its revolutionary rationale was probably invented with *Roe* v. *Wade* in view—was in fact *Roe* v. *Wade's* only true precedent. Each was premised on precisely the society that Heymann and Barzelay claim does not exist in America—a society of isolated individuals. Each rejected what Heymann and Barzelay say is integral to our constitutional system—the family unit. Each was a massive departure from the long line of cases that Heymann and Barzelay correctly portray as a vindication of the family. The attempt to show that *The Abortion Cases* were rooted in precedent ends in what is in effect a counter-proof. Except for a single case decided by the same judges at almost the same time, *The Abortion Cases* floated without mooring in the Constitution or in any decided case; indeed they denied the premises of the line of cases that put the person and the family beyond the power of the state.

Heymann and Brazelay came to the defense of *Roe* v. *Wade* in the spring of 1973. By the fall a new theory had matured. It was fashioned by another professor at Harvard Law School, Laurence H. Tribe. His thesis was that *Roe* v. *Wade* was an instance of the constitutional prohibition against establishment of religion. The Constitution, he noted, forbade the establishment of religion. Laws regulating abortion, he claimed, were an establishment of religion. Therefore, he concluded, they were unconstitutional.

To be sure, no one before Tribe had ever considered laws on killing to bear this kind of religious stamp. Tribe, however, argued that "whenever the views of organized religious groups have come to play a persuasive role in an entire subject's legislative consideration for reasons intrinsic to the subject matter as then understood," then the legislature cannot act without favoring a particular religious doctrine and thereby "establishing" a religion. A controversy, he contended, "may be so structured in a particular social and historical context that no attempt to resolve it in a public forum can avoid explicit confrontation with the religious differences that divide the disputants." Abortion was such a controversy and, as he put it, "triggered" the constitutional barrier to legislation.[12]

Tribe's explanation, like Heymann and Barzeley's, suffered from the disadvantage of not having been formulated by the Court. But as a rationalization of *The Abortion Cases* it was more plausible, as it was contradicted by nothing that the Court had said. It had the additional merit of describing the abortion battle as an advocate of abortion might view it: the sheer imposition of religious views on a dissident minority. But there were also serious problems with Tribe's account.

First, as stated by him, it scarcely applied to statutes that, when they were adopted, were not the subject of religious controversy. The abortion statutes in question were of that character. It was not at all evident what "organized religious groups" had led the Texas legislature to adopt its abortion statute in 1911 or even what "organized religious groups" had prevailed when Georgia had adopted the American Law Institute model in 1970. What Tribe had to mean in order to sustain the Court was that if, after a legislature had passed a law, a minority contended that the law was "intrinsically religious," then the Court should invalidate the law. This position seemed to suggest that any group that could point to "intrinsic" religious postulates behind legislation should be able to obtain the invalidation of the legislation. The law on marriage, for example, rested on religious belief. By Tribe's criteria, it was open to any group—polygamists, say, or mere believers in free cohabitation—to attack the intrinsic religious character of the law and procure its invalidation.

Even more serious was the way Tribe was forced to use his theory one-sidedly. His basic contention was that abortion was a subject of a religious nature because it involved "a decision as to what characteristics should be regarded as defining a human being," and that that decision "depended on a statement of religious faith upon which people will invariably differ." [13] If his contention were accepted, *any* decision as to who is human would be a religious decision. Why was his decision, then, to be preferred to someone else's? Why was it unconstitutional for the legislature, making what he called a religious decision, to treat the unborn as human, and constitutional for the legislature, making the same kind of decision, to treat the unborn as nonhuman? Tribe did not address these fundamental questions. However, "on reflection," as he put it five years later, Tribe rejected his own argument.[14]

A third and by far the most candid effort to defend *The Abortion Cases* was made by Michael J. Perry. Perry, an assistant professor of law at Ohio State, boldly made the claim that the phrase "due process of law" in the Fourteenth Amendment meant more than "process." It had a "substantive" content, and the states were bound to observe that substance. Not only were the states bound not to violate that substance; they were under a positive duty to enact only laws which "involved" it.[15] Perry identified this decisive "substance" with "the public welfare." And what defined the public welfare? To that crucial question, Perry answered forthrightly, "The scope of the 'public welfare' is a function of social conventions." Or, as he put it alternatively, "The basic determinants of the public welfare are the conventional attitudes of the sociopolitical culture." [16] The Court was assigned the task of making the states conform to the conventions of the day.

For the Supreme Court to determine public welfare in this way, Perry argued, the Court had to exercise "an ethical function." [17] In fulfilling this function, the Court propounded "general, fundamental ethical principles for the moral education and guidance of the political process." [18] Perry did not disguise or regret the teaching role he gave the Court. The Court was in a better position than any legislature to say what public morals should be, for it was "insulated from the bartering and pressures of a legislature process" and could "look beyond the demands of self-interested minority lobbies in an effort to discern the attitudes characteristic of the moral culture at large." [19] In an era of shifting sexual morality, the Court could act as "a jury." As "a matter of political reality" the Court was a jury that "generally will reflect and mediate the temper of the dominant political and moral culture." Acting as a juryman, "each Justice must ask whether particularized claims about that culture resonate with him or her." [20] In the vernacular, the "vibes" felt by the Justices were to guide their exposition of the Constitution.

Perry's defense of *Roe* v. *Wade* was bold, clear, consistent—consistent with the decision and internally coherent. Despite his own doubt as to "whether individual Justices are even aware of what they are doing," it sounded very much like what Justice Blackmun and his colleagues had been doing. His defense had the ring of realism and the innocence of the child who noted the emperor's absence of clothes. If there was any rebuttal to it on its own terms, the rebuttal could come only from the political process, showing that "the jury" had misread "the sociopolitical culture." But this kind of rebuttal depended principally on the political process; it escaped the confines of scholarly debate where Perry's candor enthroned the flat assertions that substantive due process had been employed by the Court and that substantive due process, reflecting the ethics of the nation as interpreted by the Justices, was a good thing.

Perry's defense, nonetheless, had a deficiency. It ran against the meaning of "liberty" that for seventy years had been accepted as valid by the best minds which had struggled to understand the Constitution. It gave a latitude to judicial lawmaking which generations of scholars had perceived as subversive of the limits of the American Constitution and destructive of American democracy and the distribution of organic powers by the Constitution.

For almost a century the nature of the liberty litigated in *The Abortion Cases* had been explored in another context by the Supreme Court and by scholars evaluating the Court's work. The context was the social legislation of the industrial states and the challenge to that legislation in the name of the constitutional liberty that the Fourteenth Amendment said could be taken only by due process of law. In that context, a theory of constitutional meaning and the limits of the judicial role had been worked out with a comprehensiveness and universality of principle that could not be confined to the cases decided but seemed to stand as general criteria which the Court could defy only at enormous cost. The criteria were summed up in Justice Holmes's dissent in the landmark case of *Lochner* v. *New York*.[21]

The New York legislature had passed a statute making it a crime for a baker to employ workers for more than sixty hours a week or ten hours a day in a biscuit, bread, or cake bakery. No general limitation on hours of work existed at the time or could have passed the legislature, and any "labor law" was regarded with suspicion by the courts. A sixty-hour work week was bold innovation. But the highest court of New York sustained the regulation on the ground that the law was intended to guard the health of the public by protecting it from the products of overworked men, exhausted by fatigue and thus likely to be careless in their baking, and on the additional ground that it was intended to protect the health of the workers themselves, subject as they were to the inhalation of particles affecting their lungs.[22] The decision was challenged in the Supreme Court by Joseph Lochner, a baker convicted in the Oneida County Court of a misdemeanor for permitting an employee to work more than sixty hours.

The Supreme Court held for Lochner. "The right to purchase or to sell labor," the Court declared, "is part of the liberty" protected by the Fourteenth Amendment. The state could not regulate Lochner's right to buy labor on his own terms. To be sure, the liberty was not absolute. The state in extreme cases could abridge the liberty in order to protect health; it could, for example, limit employment in underground mines to eight hours a day. But the state had no business protecting the health of bakers, even if "very likely, physicians would not recommend the exercise of that or of any other trade as a remedy for ill health." Statutes "of the nature of that under review are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed . . . upon the subject of the health of the individual whose rights are interfered with." Work in any department "carried with it the seeds of unhealthiness." That did not make state intervention lawful.[23]

Interpreting the moral conventions of their day and reading them into the meaning of "liberty," the Justices found that the

Constitution had created a virtually complete barrier to laws regulating the conditions of labor. Viewing the law not as a health measure but "as a labor law, pure and simple," the Court said that the constitutional answer might be given "in a few words." The "liberty of person" and the liberty of contract of the baker and his workers could not be interfered with. The Fourteenth Amendment was an absolute barrier to state regulation of the hours of work.[24]

Four Justices disagreed, and Justice Holmes wrote the dissent, which became classic. He repudiated the role of Platonic guardian. He would not read his view of a controverted matter into the meaning of liberty in the Constitution. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and longer before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Holmes then set out what was to be the touchstone for constitutional interpretation where an issue was one of political controversy and the legislature of a state had resolved it. The Court was not to see itself as possessed of resources or rationality superior to the political process:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[25]

Every law restricts a liberty. Unless a "rational and fair man" would "necessarily" admit that a state statute infringed "fundamental principles," the Court perverted the Constitution when it invoked "liberty" to invalidate a law. If a law took sides on an issue on which rational and fair men disagreed as to the fundamental principles at stake, the Court was not to take sides too. The Court was not to substitute its theory for the legislature's. As Holmes put it again near the end of his life, the Court's "own discretion" was not the criterion. The Fourteenth Amendment, he wrote, had not given the Justices "*carte blanche* to embody our economic or moral beliefs in its prohibitions."[26] The measure for constitutionality was provided not by the preferences of the Justices or by abstract theorizing about society, but by fundamental principles as they had been comprehended by Americans and set out in American tradition and law.

The criterion of Holmes became the watchword of great judges and scholars of the Court. It undergirded the dissent of Justice Brandeis in *Adams* v. *Tanner* a decade after *Lochner*, when the Supreme Court read "liberty" to mean that the state of Washington, attempting to regulate private employment agencies, had violated such agencies' liberty to do business as they chose.[27] And Holmes joined Brandeis's dissent in 1924 when, again on behalf of bakers, the Supreme Court held their liberty to be violated by a statute prescribing specific weights for loaves of bread. The Court, said Brandeis, engages in "an exercise of the powers of a super-legislature —not the performance of the constitutional function of judicial review."[28] Such a redistribution of organic powers originally distributed in a different way by the Constitution was seen as a gross deformation of the Constitution.

Laissez-faire economics masquerading as the voice of the Constitution were what Holmes and Brandeis fought, and they fought men too unself-conscious and too unself-critical to realize that what they put forth as the pure voice of the Constitution were only the clichés of one side of a debated question. Self-conscious and self-critical themselves, they could not but see the folly of their brothers deluding themselves that they were more reasonable than the legislators and that Justices in the shelter of their chambers had the special wisdom needed to be super-legislators. Why would anyone suppose that nine men picked by politicians to be designated "Justice" acquire by virtue of their office an insight superior to all other mortals in the country?

The evil Holmes and Brandeis protested was succinctly summarized by Felix Frankfurter, while he was still a scholar off the bench. Celebrating "Mr. Justice Brandeis and the Constitution," Frankfurter wrote:

> The veto power of the Supreme Court over the social-economic legislation of the States, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The most destructive, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely, the tests of trial and error.

> The least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal authority of the Constitution.[29]

Destructive, irresponsible centralization and fallible judgment put forward as Constitutional mandate—these were the evils of "due process" when the Justices acted as though they were specially inspired in giving a substantive content to "liberty" which no legislature had the ability to perceive.

The criticisms of Holmes, Brandeis, and Frankfurter carried the day in the world of legal education. In time the Supreme Court came to make their criteria its own. In 1963, upholding a state statute regulating debt collectors, Justice Black stated for a unanimous Court, "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." That doctrine "has long since been discarded. . . . We refuse to sit as 'a super-legislature to weigh the wisdom of legislation'." [30] The dissents of Holmes and Brandeis were now the accepted rule of the Court. It was not for the Justices to decide what social philosophy a legislature must follow to enact constitutional legislation.

Three years before *The Abortion Cases,* Justice Stewart (later to be part of the *Roe* and *Doe* majority) declared that once "the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought' . . . That era long ago passed into history." [31] To quote from Justice Stewart may only demonstrate that the memory of judges is short, that judges like other men are fallible, and that when a judge wants very much to achieve a result he may use the discredited techniques of his predecessors. Yet unless ideas mean nothing, unless great constitutional principles are produced ad hoc as flummery to rationalize the desires of the moment, everything that Holmes, Brandeis, and Frankfurter held to be true was disregarded by *The Abortion Cases.* No matter could have been said to fall less "within the special competence of the judges." No decisions ever sheltered more behind "the impersonal authority of the Constitution." No opinions were so clearly the work of fallible individuals acting as a super-legislature drafting rules for the nation.

The incompatibility of *The Abortion Cases* with the criteria of Holmes and Brandeis was quickly remarked by modern scholars who were, in many cases, not unsympathetic to abortion on moral grounds but who would not abandon their most cherished view of constitutional government in order to accommodate or rationalize a personal preference. For example, Archibald Cox, the former Solicitor General, the hero of the Watergate prosecution and the present Williston Professor of Law at Harvard Law School, wrote, "The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. . . . Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution." [32] Cox could not discover the principle that led Blackmun to act as a superlegislator for the nation

Alexander Bickel, Sterling Professor of Law at Yale and *The New York Times*'s counsel in the *Pentagon Papers Case,* described Justice Blackmun's opinion in *The Abortion Cases* as a "model statute" of the kind usually drafted by the Commissioners of Uniform State Laws. How did the model statute become the mandate of the Constitution? A great constitutional lawyer, Bickel was puzzled: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject." [33] The Court, in Bickel's view, was "not excused in transgressing all limits, in refusing its own prior discipline." The Court, he reminded the Justices, was in the end subject to "the discipline of the political process," and that discipline was "subsequent." [34] The answers the Court was attempting to give today were "derived, not from Spencer's Social Statics, but from fashionable notions of progress." It may take time, Bickel observed magisterially, "before the realization comes that this will not do." [35]

Richard Epstein, professor of law at Chicago, evaluated *The Abortion Cases* in the journal professionally devoted to commentary on the Court's work, *The Supreme Court Review.* He began by observing that Janet Roe, the pseudonymous plaintiff in *Roe* v. *Wade* had presented a case which was moot—that is, by the time the Court came to decide her liberty of obtaining an abortion, she was no longer pregnant. Applying the usual rules, the Court would have dismissed her action; in its eagerness to resolve the issues it leaped over its own procedural standards and pressed on to decide her case.[36] There was a second, telltale stain: The plaintiff had claimed that the Texas statute was adopted when abortions were surgically unsafe and was intended to protect the mother's health. This rationale was a piece of fancy appealing to Justice Blackmun; [37] but even as fancy it had no relevance, because the Texas law at bar had been reenacted in 1911 when surgical abortions were safe.[38] Justice Blackmun did not notice how late the law had been legislated, and he swallowed the plaintiff's theory whole.

Epstein moved to a frontal attack upon *The Abortion Cases.* "In the case of the Supreme Court," he noted, "only principled grounds for decision stand between it and the charge of arbitrary decision based upon its naked political preferences." [39] Epstein could not find in the Constitution the "principled grounds" of Justice Blackmun. He had produced "comprehensive legislation," which he had "enacted in the name of the Due Process Clause of the Constitution." How had the Justice determined that the unborn child was not a person within the meaning of the Constitution? He had not said. He had claimed that there was substantial disagreement as to when life began, and that the Court need not resolve the disagreement, but he had in fact resolved the disagreement—to the detriment of the unborn.[40] He had decided that life did not begin before birth. Even in doing this, he was inconsistent. He had spoken of "potential life" in the third trimester. "But is there not," Epstein asked, "potential life in the unborn child from the moment of conception?" [41] How would Justice Blackmun describe the child from conception to viability? His principles and his standards were "invisible." [42]

Harry Wellington, professor, and later dean, of the Yale Law School, observed, "The Court would have put it better had it been candid enough to quote *Lochner:* 'Statutes of the nature of that under review are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed . . . upon the subject of the health of the individual whose rights are interfered with'." [43] By *Lochner,* Wellington meant the majority opinion in *Lochner,* and he found the parallel to it exact in *Doe* v. *Bolton,* where Justice Blackmun had held invalid the requirement of Georgia law that *two* physicians concur in the need for an abortion. Such a cautious restraint on physicians, "most" of whom, Justice Blackmun thought, were "good men," had been found to run afoul of the Constitution. The Court, Wellington remarked, "treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association." [44] Even if only the health of the pregnant woman were to be considered, Wellington continued, Justice Blackmun had not explained why the state could not regulate early abortion with an eye to her health, unless liberty meant "instantaneous gratification." Even the First Amendment, he added, "grants no such right."[45]

But more than the carrier's health was at issue. To justify the taking of fetal life, the Court had invoked precedents on the privacy of the marital bed. The Court's use of privacy, Wellington declared, was "Pickwickian."[46] Abortions were performed not in marital beds but in hospitals. As far as Wellington could determine, "conventional morality" in America justified some kinds of abortion, but not all. Conventional morality was "the outer limit of the Court's legitimate authority." The Court had no "mandate" to create new morality "when elaborating the concept of liberty in the Fourteenth Amendment."[47] The Court had acted as though it had such a mandate and imposed the ethical preferences of the Justices on the people.

John Hart Ely, a professor of law at Yale and then at Harvard Law School, made a close comparison between *Lochner* and *The Abortion Cases* and concluded that they, like it, answered questions the Constitution had not made the Court's business. The decision was "a bad decision." It was bad for one basic reason: It did not explain how its elaborate regulations were constitutional law.[48] Like the other constitutional law scholars, Ely could find no principle or standard which had guided Justice Blackmun in his extraordinary interpretation of the Constitution.

Ely did observe that the result was congruent with the judicial philosophy of Richard Nixon (who had appointed Justice Blackmun and two of the other judges making up the majority in *The Abortion Cases.*) Nixon had enunciated a result-oriented view of the Court's function. "That this sort of invitation, to get in there and Lochner for the right goals, can contribute to opinions like *Roe* is obvious. In terms of process it is just what the President ordered."[49] Political pragmatism, not constitutional principle, appeared to be the *raison d'être* of *The Abortion Cases.*

Critics did exist who condemned *The Abortion Cases* by asserting that the Court could not add to the written Constitution.[50] Critics did exist who were as outraged by what the Court had done to the unborn as by what it had done to the Constitution. Bickel, Cox, Ely, Epstein, and Wellington, however, were five critics who were neither fundamentalists in constitutional theory nor champions of the cause of the unborn. They accepted constitutional development by judicial interpretation as necessary, ranging in their views on this point from the pure Frankfurtian position of Bickel to Wellington's acceptance of "conventional morality" as a guide. They showed no special commitment to the anti-abortion side. In their cool professional judgment, *The Abortion Cases* were indefensible because they had a basis neither in the Constitution nor in a principled interpretation of the Constitution.

There is a tendency for any layman to rate one expert in a field as good as another. But to the experienced in any field, experts are not fungible. In the field of constitutional law, persons of experience would probably conclude that Barzelay, Heymann, Perry, and Tribe were outweighed by Bickel, Cox, Ely, Epstein, and Wellington. The balance of expert opinion viewed the liberty as a disaster. As the critics successfully evoked Holmes, Brandeis, and Frankfurter, the weight of their judgment was overwhelming.[51]

The judgment was remarkably harsh: without principle, a failure; a refusal of the Court's own discipline, a transgression of all limits, something that will not do; naked political preference, comprehensive legislation, invisible standards; a replay of *Lochner,* an advertising agent's view of doctors, Pickwickian, beyond the outer limit of legitimate authority; none of its business, a bad decision, an out-Lochnering of *Lochner* in the result-oriented style of a result-oriented Nixon.

Scholarly authority judged the liberty to lack constitutional basis. Its establishment, as Justice White had said, was an act of raw judicial power.[52] If the liberty did not have a foundation in the Constitution or in constitutional principle, its basis had to lie in politics.

Senator HATCH. Professor Tribe?

STATEMENT OF LAURENCE TRIBE, PROFESSOR OF LAW, SCHOOL OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

Mr. TRIBE. Thank you, Mr. Chairman and members of the subcommittee.

I am honored to be here to address this subcommittee on what I think is one of the most profound, difficult, and troubling issues of our day. I join Senator Packwood in congratulating the chairman for having confronted head-on what is a terribly troublesome issue.

Let me ask permission to have my prepared statement made part of the record.

Senator HATCH. We will make all prepared statements a part of the record as though fully read, without objection.

Mr. TRIBE. What I want to do then is talk more or less extemporaneously about the issue and suggest what I think are the crucial questions before this subcommittee.

The Constitution has been amended 4 times to overturn decisions of the Supreme Court and 22 times for other reasons. I think it is noteworthy that not 1 of those 26 amendments denied or rolled back what anyone could describe as a civil right.

Thus, I believe Senator Packwood is correct in describing the history of the Republic, and certainly the history of the Constitution from 1787 to the present, as a history of expanding liberty.

Senator Hatch, speaking of the equal rights amendment, once said, "Amending the Constitution is a means of last resort, an act of desperation." I think it is all the more true that it is an act of desperation—something we ought to resist unless there is a showing of clear and compelling necessity—when we undertake to amend the Constitution, to undo what has become a basic right of women and their families, a right to choose, independent of majority vote either in this Congress or in any State of the Union, whether to terminate a pregnancy—a right independent of the vicissitudes of democracy.

I disagree profoundly with anyone who says, as Mr. Noonan did, that this right is a mere slogan. For those whose lives it affects the right is truly indispensable.

I fully understand that there are those who believe equally conscientiously that there is a profound right on the other side—the right of the unborn to life. I want therefore first to address the question—I might even call it the myth—that somehow *Roe* v. *Wade* denied the right to life, or repealed—as Mr. Noonan puts it—the Constitution's protection of the living, and created a novel, unsupported, unprecedented kind of liberty.

I think it is flatly false to understand *Roe* v. *Wade* as denying the protectability of life or creating an unprecedented liberty. Let me say something to this subcommittee as to why that is so.

The issue is not how the common law did or did not treat abortion. I think Mr. Noonan misunderstands Senator Packwood on the point, but I do not want to get into that. That is not the point—whether it was a crime at common law or by statute. The issue rather is how this Nation has confronted the problem of Government power over life and liberty—Government intrusion into spheres of choice.

What I would like to explain briefly is how *Roe* v. *Wade* emerged, not as the creation of a novel liberty but as the recognition and extension of traditional and well established limits on the power of the State—on the power of Government.

It is noteworthy—despite the fact that some proponents of choice have urged that there be public funding, as Mr. Noonan says—that the Supreme Court of the United States has unequivocally held, in 1977 and again in 1980, that the Government is entirely free to protect life and to protect the unborn by denying public funds even for therapeutic abortion.

There are those who thought that an unwise decision—who thought that it discriminated against the poor. But it reflected the Supreme Court's recognition that what it was protecting was not freedom for abortion on demand, and particularly at public expense, but liberty from undue governmental intrusion into private life.

Indeed, even Justice Rehnquist, who dissented in *Roe* v. *Wade* and is no supporter of any constitutional right of abortion, said in no unmistakable terms that in his view the Constitution imposes substantive limits on Government interference through restrictive abortion laws with the life of a woman.

He said that, when a woman's life is at stake, it would not be permissible to ban abortion. And I remind the subcommittee that, because the risk of death from pregnancy or childbirth is between 6 and 7 times as high (and in some cases 40 times as high) as the risk of death in first trimester abortions, it is not a mistake to suppose that a concern with life is involved in every case.

But the problem goes deeper than risk to life. The woman's body is at stake; her future is at stake. Of course those who want to protect the life of the unborn are prepared to interfere with that future by coercing continued pregnancy.

The issue that *Roe* v. *Wade* confronted was whether traditional limits on governmental power are surpassed when the Government tells someone, "You must serve as the involuntary host for this life."

You speak, Senator Hatch, about the lives of seals and whales, for which I have great sympathy. I have greater sympathy for the life of a human fetus. But no woman has ever been forced to incubate a seal or a whale.

The issue confronted by the Supreme Court in *Roe* v. *Wade* was not whether there is some special and novel liberty of abortion. The issue was whether the undisputed liberty to control one's body, one's life, and one's future is transgressed when the Government imposes this kind of severe coercion.

Senator Hatch, in a statement that you introduced accompanying your amendment on September 21, you said—and I think quite rightly—that there can be absolutely no doubt in anyone's mind that there is not currently a "consensus" in this country on the "repugnance of abortion." Were there such a consensus, I suppose you would have favored a stronger amendment.

But let me point out what the Supreme Court in *Roe* v. *Wade* was concerned to infer from the absence of that kind of consensus.

There is no doubt that restrictive abortion laws, particularly in early pregnancy—and some 91 percent of abortions are performed in the first trimester—interfere importantly with the life and liberty of the woman.

In American constitutional history that kind of liberty can be overridden only when there is a clear national consensus on some overriding value on the other side. It has been our constitutional tradition that, when there is an absence of such consensus, we do not simply leave it to the States or to Congress to have a vote up or down. What we do when fundamental liberties are involved and there is no genuine consensus the other way is err on the side of liberty and insist that liberty be protected.

Senator HATCH. Could I interrupt you on that?

Mr. TRIBE. Certainly.

Senator HATCH. Do you not feel, Professor Tribe, that one reason there is no national consensus is that there has not been the opportunity of developing such a consensus as a result of *Roe* v. *Wade?*

If we allowed this to be open to the democratic processes, we might develop a consensus one way or the other.

Mr. TRIBE. Senator Hatch, I respect your view, but I respectfully disagree with it completely. Let me tell you why.

First of all, the Supreme Court has not prevented public debate on this issue. No issue has been more thoroughly debated over the last 8 years, as you and I both know.

What the Supreme Court has said is that when we are in agreement that a basic liberty is involved—and we have since *Marbury* v. *Madison* entrusted the Court to define basic liberties—then, even if the majority in any given State develops something of a consensus that it would be wise to override that liberty, the American Constitution takes such power from Government.

By submitting this matter to the States we would create an opportunity in every State to vote down the woman's liberty by a bare majority, but it seems to me that that is not what the Constitution's protection of liberty has ever meant.

Senator HATCH. But the point I am making is that I do not think there is any consensus in this country today about the nature of the fundamental liberty in the first place—the liberty that you are seeking to "balance."

Mr. TRIBE. But we do not arrive at liberty, Senator, through consensus.

Justice Jackson in *West Virginia* v. *Barnette* said——

Senator HATCH. Liberty can be identified on both sides of this question.

Mr. TRIBE. If I could just continue for a moment——

Senator HATCH. I get so wrapped up in some of these concepts.

Mr. TRIBE. I am afraid I do too.

Senator HATCH. I have noticed. That is good. Go ahead.

Mr. TRIBE. In *West Virginia* v. *Barnette* Justice Jackson said that the whole point of the Bill of Rights was to remove certain liberties, which we entrust life-tenured judges to define from the vicissitudes of a shifting political majority.

When there is deep disagreement on whether there is some overriding value—the right to life, for example—that justifies intruding upon a liberty, it has not been our tradition to submit the matter to public referendum. Democracy has always been limited by judicially defined protections for liberty, and the enterprise in which I am engaged is to ask whether the Court in *Roe* v. *Wade* was really creating a liberty out of whole cloth or just recognizing the implications of long-established limits on Government power.

The Government has not in this country been allowed to tell you or me how we must use our bodies, even to save another life, let alone to save something that some people do not regard as a human being.

Senator HATCH. That is an eloquent defense of judicial supremacy, but we do have three separated powers, and the Congress representing the people as elected representatives may also have some desire to participate in the process of defining what is fundamental "liberty."

Mr. TRIBE. I think Congress should have that right, and all I am saying is that, in exercising it, Congress should not be misled by the myth that *Roe* v. *Wade* was made from whole cloth. I am only trying to describe the antecedents.

Senator HATCH. We all agree it was made from new cloth—that is the point.

Mr. TRIBE. Whole cloth—w-h-o-l-e.

Senator HATCH. Oh, "whole" you are saying. I am sorry; I thought you were saying "old cloth."

Mr. TRIBE. No—"whole cloth." It is settled that the Government should not have power to intrude in the bedroom and in the family. It may be that the Supreme Court's decisions protecting the right of an individual and of a couple to decide whether to have children—decisions in the area of contraception—are not themselves the target of this amendment.

Yet it should be understood that *Roe* v. *Wade* the Supreme Court's abortion decision—emerged in part from a recognition that, if Government does not have the power to enter the bedroom and control the behavior of people as to the initial stage of conception, then it is very difficult to give it the power to forbid abortion in the earliest stages.

Conception is not a moment; it is a process. We know that there are difficult line-drawing problems. You would want to leave them, I think, to the States. But the Supreme Court entered the picture partly out of a recognition that, if people have a right to prevent conception—if that is truly private—then the early period of an hour or so during which that initial cell divides must also be beyond the power of Government.

It is true that the Constitution does not say anything about abortion. It does not say anything about freedom of thought either. It does not mention freedom of belief. It does not mention the rights of family or of marital integrity. But the 9th amendment to the Constitution makes it clear that it is the function of the judiciary to identify rights that the framers might not happen to have mentioned.

Senator HATCH. Could I interrupt you on that point?

Mr. TRIBE. Certainly.

Senator HATCH. You have raised a very provocative point, and this may be the better place to raise this question rather than waiting for you to complete your statement. I do not mean to be discourteous to you.

One thing that has always perplexed me about the abortion issue is how a right that is supposedly granted growing from a right to privacy has been so deeply involved in controversies that have nothing to do with privacy in a reasonable definition of the term.

For example, there are the issues: whether or not taxpayers should have to pay for this right, whether or not doctors or nurses should be compelled to perform operations relating to this right, whether or not taxpayer supported hospitals should be required to implement this right, et cetera, et cetera, et cetera.

I can at least understand how the issue of contraceptive use in the *Griswold* case relates to this right. I can at least understand the argument that what happens in the marital bedroom is protected by this right. But what, however, does all of the rest of this have to do with abortion?

Mr. TRIBE. Senator, I hate to say I am glad you asked me that question.

Senator HATCH. It is kind of a home-run ball pitch.

Mr. TRIBE. The Supreme Court has said, in the very list of examples you gave, that its restrictions on government intrusion do not prevent government from doing the very things you say—do not prevent government from closing public hospitals to elective abortions; and do not prevent government from selectively using its funding powers to pay out of the public purse for childbirth, for adoption services, and for other medical procedures, but not for abortion, even therapeutic abortion.

The connection between the abortion right and privacy itself is made visible precisely in those decisions. The court has not said there is a right to have an abortion. It has said there is a right to get government off your back on certain matters, and when government coercively intrudes on a matter on which the Nation is so deeply divided, a matter that touches such intimate human dimensions as the dimension of deciding whether to be a childbearer—whether to have a child—then privacy is very much involved. It is no less involved 13 seconds after conception than 13 seconds before conception. I think that was a good bit of what the Supreme Court had in mind in *Roe* v. *Wade*.

It seems to me also that there are other limits on government power that are involved here and that we do not really focus on when we talk purely in terms of the liberty of abortion.

One of those limits is the limit on government by discretion—government by whim. I think a great deal of what is behind the current deregulation movement is the sense that being subject to the whim of a bureaucrat, or a sovereign, or even a prosecutor is incompatible with a government of laws.

Chief Justice Burger, who is himself in many ways a conservative man, joined the majority opinion in *Roe* v. *Wade*, saying that what particularly troubled him was that, however absolutely they might be written, abortion laws in all likelihood were going to be riddled with exceptions in their actual administration—that for such cases as the 13-year-old girl who had been subjected to rape or incest, exceptions would be made.

He said that, under a government of laws, the kind of prosecutorial discretion to which people are therefore subject when abortion is restricted by a society that is inevitably unwilling to live with the most draconian versions of those restrictions is incompatible with fundamental rights and liberties.

In other decisions entirely independent of any novel liberty of abortion the Supreme Court has insisted on avoiding treacherously ambiguous and vague criminal prohibitions which interfered with the autonomy of the medical profession—again not because of a special liberty of abortion, but because of a tradition in this country that criminal laws should be clear and not hopelessly difficult to comply with.

The bottom line of all of this is that the liberty recognized in *Roe* v. *Wade*, although not mentioned in the Constitution, was anything but novel.

Let me return to the ninth amendment to which I referred earlier. Professor Noonan's book "A Private Choice" finds it bizarre that the Supreme Court should have been able to rely on the ninth amendment in *Roe* v. *Wade* because he says—and I quote him—"The ninth amendment declared that all powers not expressly conferred upon the national government belonged to the people."

If it really did say that all powers not expressly conferred belonged to the people it would indeed be an odd basis for the *Roe* decision. But that is not what it says. The ninth amendment says that the enumeration of certain rights in the Constitution shall not be construed to disparage the existence of other rights that are not mentioned.

The Supreme Court several times before the abortion decision, and at least once since in a decision upholding the right of the press and the public to be present at a criminal trial—another right not mentioned in the Constitution—has reminded us that the existence of a liberty is not to depend on whether the Constitution framers ever got around to specifically naming it.

So the burden of my point is that *Roe* v. *Wade*, far from creating some novel and unprecedented liberty, simply recognized and extended some deeply felt and well established principles about the limits of governmental power.

The challenge that the Supreme Court faced in that case, therefore, was one that I think it met with a reasoned and a defensible decision.

In amplifying the meaning of that decision briefly, I want to say something about what I think are the hidden constitutional costs that are associated with trying to undo it—by any method.

First of all—and I think obviously flowing from the restrictions on government that I have already described—there is the risk of major, even if unintended, expansion of government power over individual and family life.

There is the risk, in addition, of expanding national power at the expense of the States. The amendment that you have introduced, Senator Hatch, would of course not simply toss the matter back to the States but would also empower Congress, through a law more restrictive than that in a particular State, to make the will of this body prevail.

As you said in discussing the equal rights amendment, traditionally the States have regulated family life, including the care and custody of children. I would think that giving the national legislature new power in this realm of traditional local responsibility is not something one would do lightly.

Mr. Noonan, in his book, says, "Although abortion is evil, the Federal system should not be distorted to overcome it." I think that giving the National Government more power is not simply restoring the status quo prior to *Roe* v. *Wade,* but it is going a good bit further.

One reason that one is impelled to go a good bit further is that, when we as a nation have come to recognize that a woman has an important liberty interest at stake in her body, her own life, and her own future, we are understandably unwilling to override that interest simply on the basis of this or that majority vote. It can be overriden only on the basis of a consensus that what is inside her body must be protected even if it means forcing her to remain pregnant.

Until that consensus exists nationally, I think there is a basic feeling, by many who are familiar with constitutional traditions, that it is an extraordinary thing to impose a duty to remain pregnant just because one or another State happens to favor doing so.

For that reason I think it is natural that one pushes the amendment further and says that Congress should be able to establish a nationwide floor. But in doing that one crosses a barrier of Federal-State relations that I think you in the past have been reluctant to cross.

So a first risk of undoing *Roe* v. *Wade*—a first hidden cost—is the cost of major new power for government in general and the National Government in particular. A second risk is the risk of a major setback in the status and equality of women.

During Senator Packwood's testimony this morning there was reference to the equal rights amendment. That amendment was very much alive and well in 1973 when *Roe* v. *Wade* was decided. It is not dead yet, but I think a realist would have to say it is in some trouble.

Consider for a moment what would be the combined impact, No. 1, of a foundering or a defeated equal rights amendment; and, No. 2, of an amendment reintroducing the legal power to impose involuntary pregnancy in this country. The combined impact on the advances of women and on women's equality would not be inconsiderable; it would be profound.

Whatever one might say of the sanctity of fetal life, the unmistakable uniqueness of a restriction on abortion—unlike many other protections of life—is that such a restriction tells half the people that they, and they alone, can be forced to use their bodies to sustain other lives. That kind of setback, in the wake of difficulty for the equal rights amendment, would represent a second major, if hidden, constitutional cost of undoing *Roe* v. *Wade* by any proposed amendment.

Let me say a word finally about the compromise that has been in fact struck by the Supreme Court's abortion decisions. The Court has confronted the difficult question of how to avoid involuntary pregnancy while allowing government in various ways to protect unborn life.

The current compromise reflected in constitutional doctrine, and I think reflected well in your question about how there is a difference between privacy and public funding, is that government can place no coercive obstacles in the path of a woman, through a criminal prohibition, until the fetus is viable—that is, so long as keeping the fetus alive means using the woman's body against her will.

But, until that point, methods of protecting the unborn short of coercion have been authorized and approved by the Court—the right to refuse to participate in an abortion in 1973, the right to exclude elective abortion from public facilities in 1977, the right on the part of the States or Congress to fund only alternatives such as childbirth and to refuse funding even for therapeutic abortion in 1977 and 1980.

Let me add that there is another major life-protecting option left open by the abortion decisions, and that is the right to protect the fetus from elective abortion after viability. That is, once protecting the fetus no longer requires coercing continued pregnancy, there is much broader State power of prohibition.

What does that really mean? It means, as the Court has stressed in several decisions, that a society that wants to protect unborn life can invest resources in accelerating, through medical research and development, the ability to protect the fetus outside the woman's body.

Several years ago the cutoff statistically for viability was probably close to 28 or 29 weeks. Now in many places it is closer to 25.

I hope no one is suggesting that a woman should be forced to remain pregnant simply because, someplace in the country, there is an incubator that could save her fetus.

What is being suggested is that if the society wants to protect unborn life in a truly equal way and not simply by imposing a burden on pregnant women that others in the society never have to bear, it can do that through medical research by advancing the options for saving the fetus at earlier and earlier stages of pregnancy without forcing the woman to serve as an involuntary incubator.

What all of this means is that it is simply false—utterly and completely false—to say, as Mr. Noonan did, that *Roe* v. *Wade* repealed the protection of life. What *Roe* v. *Wade* did was recognize the protection of liberty and the limits of government powers.

Contrast the compromise that the Court has struck in these cases—where the woman cannot be coerced by criminal law but where public policy can encourage protection of life—with what any amendment to undo *Roe* v. *Wade* would really mean.

I submit that any amendment to undo *Roe* v. *Wade* would mean the coercive domination of one group by another.

The point really is that, unlike the issue of slavery on which reasonable people just cannot differ, reasonable people of good moral conscience—as you yourself recognize—differ profoundly on the question of whether the nature of the fetus is such that it is justifiable to force women to remain pregnant against their wills.

As long as there is that difference—and I think we know that this difference will remain even after years of national debate—the traditions of our Constitution have been to find some accommodation—some compromise—not to have the view of one group—the group that says, "Fetal life above all"—vanquish the view of the other group—the group that says, "Leave it up to the person who is most intimately, even if tragically, involved."

Justice Holmes, dissenting in *Lochner* v. *New York* in 1905, made an important observation about why our Constitution has lasted: "It has lasted because it has been made for people of fundamentally differing views. It has not attempted to impose one philosophy to the total vanquishment of others."

I do not think that *Roe* v. *Wade* and the decisions following it impose a single philosophy. Given the options left open to protect fetal life without coercion of the woman—options that are certainly not as dramatic as some would want but options that represent a genuine, conscientious accommodation of values—it would fly in the face of a constitutional tradition of accommodation and comprise to insist that one view be written into the Constitution just because a large enough majority favors and fosters it.

Senator HATCH. If I could add: The principle purpose of course of congressional authority in the amendment I have filed is to allow Congress to reinforce any consensus that has emerged in the States and to insure that such consensus is not violated by one or two States serving as effective abortion havens.

This provision would insure that the will of let us say 40 to 45 States is not circumvented merely because 1 or 2 States are abortion havens. That is the reason for that provision in the amendment. I think it is a good amendment.

Mr. TRIBE. It is very ingenious, Senator, and I congratulate you for it, but calling them abortion havens——

Senator HATCH. I expect a brilliant man like you to not only see that it is ingenious but to see it is a wonderful way to try and solve this problem in a democratic way. More than seven judges deserve a voice on this issue.

Mr. TRIBE. First of all, they were the seven people that have the authority under our Constitution to make decisions about fundamental liberties.

Senator HATCH. They are, but that does not mean that the people cannot, through the article V constitutional process, overturn them.

Mr. TRIBE. You certainly have the power; we are talking just about the question of wisdom.

For those who feel any uncertainty in this tragic realm, the constitutional upheaval that I have described undoing *Roe* v. *Wade* as causing could in itself constitute a fairly convincing reason to protect life by methods short of an amendment, not simply to remit things back to the States, and especially not to override the views of the majorities in the five States in your hypothetical illustration, that think the liberty of the woman absolutely deserves and requires protection.

But I believe that even someone quite single-mindedly committed to a prolife position might well pause long before inviting the States or the Congress to install a regime in which pregnant women can be compelled to dedicate their bodies, their futures, and sometimes their very lives, to the survival of the unborn.

That pregnancy in an ideal world would never be unwelcome and no child would ever be unwanted states a dream, but it is not yet a reality. I do not believe that rewriting the Constitution, even through many years of public debate, could make that dream come true.

Thank you.

Senator HATCH. Thank you, Professor Tribe.

Professor Noonan, Professor Tribe has given a very provocative statement, as you have. What comments do you have to make concerning the liberties that Professor Tribe would like to preserve, as he defines them, as contrasted to the liberties that you would like to preserve, as you define them? Feel free to comment on anything else you would care to. Then I will ask more questions of you both.

Mr. NOONAN. I would like to start with Holmes' words in *Lockner* v. *New York:* "I think the word 'liberty' in the 14th amendment is perverted unless a rational and fair man necessarily would admit that the proposed statute would infringe on fundamental principles as understood by the traditions of our people and our laws."

That, to my mind, is a good standard of constitutional adjudication. I doubt if even Professor Tribe would say that a rational and fair man necessarily would admit that the abortion statutes that were in force on January 22, 1973, infringed on fundamental principles as understood by the traditions of our people and our laws. Our traditions and our laws supported those statutes.

By the Holmesian standard the word "liberty" was perverted when the Supreme Court decided *Roe* v. *Wade*.

To use that perversion of a constitutional term and equate it with a great constitutional right seems to me sheer sophistry. It is, I suppose, the privilege of an advocate to engage in sophistry at times, but on a serious constitutional matter sophistry does not take us very far.

To pretend that we have here something like the first amendment guarantees of religion or free speech is, I think, straining the credulity of all of us.

Senator HATCH. You are not disagreeing with my eminent colleague, are you, who testified earlier?

Mr. NOONAN. Well, I think I might be disagreeing.

Senator HATCH. I kind of interpreted it that way.

Mr. NOONAN. I was startled, I must admit, to have Professor Tribe describe the present situation as a compromise. I think that is—I will not say a Pickwickian description of a compromise, but certainly an unusual one where a million-plus lives can be taken but it is a kind of working out of competing values.

When I look at the Supreme Court decision in *Colautti* v. *Franklin,* where the State of Pennsylvania did try to design a statute to protect the late-born fetus and the Court invalidated it on grounds that very few people can understand, I see that the Court has no desire to protect even the late-born child.

I have begun to suspect incidentally, Mr. Chairman, that we have hope for a consensus. We have both Mr. Tribe speaking of early abortion and your colleague Senator Packwood speaking about the 18th century regime. I begin to suspect we have a consensus that would be against all late abortion. But it would be impossible under the present Supreme Court amendment to the Constitution to design protection for the child in the later stage of pregnancy.

Again—and I give quite a lot of latitude to advocacy. It must say that it seems to me to border on the disrespectful to say that those of us who believe in the sanctity of unborn life are people who want to create involuntary pregnancy, as Professor Tribe has said.

We do not want to create involuntary pregnancies. We have no interest in this, other than the defense of innocent unborn life. I do not think that such an attitude should be imputed to us with the kind of wild rhetoric that sometimes is engaged in in street debate.

It has been suggested that this amendment would extend the power of the Government over the family. I do not know anything that equals the expansion of destructive power over the family that has taken place in the last decade under the aegis of the Supreme Court and principally in promotion of the abortion decision.

I do not think Professor Tribe has touched on this, but we have major encroachments on both the marital and parental relations, and that is about as large an encroachment as has ever happened in Western history.

Professor Tribe suggested that this was different from the slavery debate, and he also said that this was different from other amendments because no other amendment could have been reasonably described as a curtailment of liberty. But I think that represents—if I may say so—an impoverishment of historical imagination.

There were millions of people of good will in the 19th century who believed slavery was a liberty—a fundamental liberty to hold property as they chose. They were just as rational as you and I.

In fact, the only way I can understand how decent and honorable people like your colleague and Mr. Tribe defend the abortion liberty is to analogize them to the very honorable people who were once defenders of slavery.

It did not seem outrageous to hold other human beings in bondage to very good 19th century people, as it does not to many good Americans today to put the unborn to death.

Nonetheless, the fundamental liberty, as they saw it, to hold their property and take their property where they chose was denied by the 13th and 14th amendments. There was a curtailment of liberty, and it is the same kind of curtailment of liberty to do things with other people—the kind of people who were spoken of in the ninth amendment as well as in the due process clause.

Senator HATCH. Of course Professor Tribe's argument is that by not giving the woman the right to free choice you are curtailing liberty; that analogy could go either way.

Mr. NOONAN. It could of course, but I think it is certainly a reasonable analogy to say that the alleged liberty over one's body is quite comparable to the alleged liberty over property that was defended in the 1850's.

As I see it, Senator, we have this perverted use of liberty—an excrescence on the Constitution. I will not go further on the terms of this amendment, except to say that the reservations in my book about the use of Federal power—those reservations apply in perhaps a more ideal world than we are in.

The main thing is after all to stop the destruction of lives, and if Federal power is necessary to do that then I am in favor of at least having a reservoir of Federal power if the States do not do the job.

Senator HATCH. I would like to ask each of you this question—would you address the assertion that some observers have made to the effect that there are no effective legal barriers in this country to a woman securing an abortion at any stage of her pregnancy for virtually any reason? Is that an accurate statement?

Let us put aside financial and geographical barriers for the time being, if they exist, and focus solely on the existence of legal or constitutional barriers. Is there an effective legal enforcement of abortion on demand in this country today?

Mr. TRIBE. Senator Hatch, there are of course some restrictions the Court has upheld. It has upheld a rule requiring that the abortion be performed by a physician even in the first semester; a rule requiring that it be performed in a hospital in the second; rules excluding elective abortion from public hospitals and other public facilities throughout pregnancy; and, although your question says "excluding financial barriers," in many ways the most fundamental barrier of all to abortion both before and after *Roe* v. *Wade* has been financial.

There have been places, whether you call them abortion havens or not, both in this country and outside, where abortions could be obtained by those who have money. The fact that public funding can now be cut off for abortion represents an important limit.

As to late pregnancy—after viability—I very much disagree with Mr. Noonan's statement that it is impossible to provide protection.

Colautti v. *Franklin*, the 1979 decision arising in Pennsylvania, in involved a law that would have been a lot better if those who have worked with you in drafting this amendment had had a hand in it. It was a very badly drafted law that said that a physician can go to jail if he fails to take undefined reasonable steps to save a fetus that "may" be viable—not one that is viable but one that may be viable.

I think the Supreme Court had relatively little difficulty saying that a law that is written in invisible ink like that cannot be the basis for putting a well-meaning doctor in prison. The fact that that law was struck down does not mean that protection after viability could not be intelligently provided.

Senator HATCH. I think one of the points I am making is that there really are no legal barriers though. Am I incorrect on that?

Mr. TRIBE. I think it is incorrect to say that they could not be written.

Senator HATCH. I am unclear as to what these might be.

Mr. TRIBE. But as the constitutional law exists States have the power to forbid elective abortion after viability.

I have not canvassed all the States to see how many have done a decent job trying to do that, but that power is given to the States under *Roe* v. *Wade*.

What they do not have the power to do is to coerce a woman to remain pregnant, and I never suggested that someone gets a particular glee out of forcing involuntary pregnancy. That was not my point; it was my point that some people are willing to impose that burden as the price for protecting the unborn, and the Court has said that that is a price that cannot be imposed on the woman.

If I might just take an additional moment to refer to something else that came up in Mr. Noonan's reply to your question, he says that the word "liberty" in the 14th amendment was perverted in *Roe* v. *Wade*—that it is just as reasonable to talk about the liberty of a person to hold another human being as a slave as a form of property—that this is just as reasonable a use of "liberty" as it is to talk about the woman's liberty of her body. I must say I find that quite incomprehensible.

I do not think we can simply erase our current understanding of what slavery was and pretend by being moral relativists, that it is all one and the same thing.

The fact is that the alleged "liberty" of holding another in bondage was always an obscene blot on the American Constitution and was never reasonably defensible. The fact that there were some people who fooled themselves into believing it is really beside the point.

I do not think that anyone could claim that someone who believes that forcing a woman to remain pregnant in order to save a fertilized ovum is a severe intrusion on her liberty is as insensitive, even from a right-to-life point of view, as is the person who thinks it is OK to treat another human being as property.

The liberty that was involved in *Roe* v. *Wade*, I would submit, is not even very controversial. The fact that one has a liberty interest in not having one's life radically changed and one's body used is hardly novel; you do not have to be a constitutional expert to know that this is a standard kind of liberty.

All that was ever genuinely controversial about *Roe* v. *Wade* is the question of whether the States have the power to override that liberty in the interest of fetal life.

I admit there is a deep controversy there, but I was suggesting that it is quite conventional in our system to say that when a basic liberty is involved, we need consensus to override it. We do not override it in order to generate consensus.

Justice Stevens, in a case called *Cary* v. *Population Services International* in 1977, made a rather similar point. The State of New York had forbidden the use of contraceptives by, and the sale of contraceptives, to unmarried minors. In effect, Justice Stevens said, "I agree with some of my brethren that it is OK to prevent premarital sex among teenagers, but what I think is not OK is to do so in this particularly coercive way—by forcing, teenagers to undergo the risk of venereal disease and pregnancy in order to make a point"—in order to generate consensus around the State's law. "That," Justice Stevens said, "is coercive propaganda; it is not democracy."

Of course the intentions behind this amendment are much nobler than that. The intentions are democratic, but the idea of forcing people to remain pregnant in order to hope that some consensus emerges, I submit, is not compatible with the American tradition.

Senator HATCH. Nobody is trying to force anybody to do anything. All that the amendment does is say, "Let's have the elected representatives make the decision, and if they make a decision that is wrong the people can throw them out and replace them with others." That is a little bit different than the bondage in which those who disagree with indiscriminate abortion are in today, where they have absolutely no say in it.

Mr. TRIBE. They can do a great deal to undermine and prevent it. The Court has said that they can fund alternatives to abortion and that they can deny funding for abortion.

Let me say something about this idea of just sending it to the States. It all sounds so rosy, but what you are doing is saying, "Under the Constitution a State that wants to ban abortion and restrict a woman's liberty is free to do so."

The meaning of individual rights has never been something up for grabs by majority vote. That has never been our tradition.

Senator HATCH. Again, we are on two sides of how you define "rights," and "liberties," and which are involved here.

Professor Noonan, what do you have to say about that question?

Mr. NOONAN. I have listened to Professor Tribe. I have read his very illuminating book on constitutional law, and I still have not heard or read any constitutional basis that stands up for the *Roe* v. *Wade* decision, so I am bound to say it is ad hoc, fiat, and a perversian by the Holmesian standard.

I have not heard any argument at all as to the limitations in a realistic sense on the destruction of life, and I certainly have not heard a word as to the massive social consequences that have followed on the exercise of this alleged private right.

It is paradoxical, to say the least, to have Professor Tribe accuse me of moral relativism in asking him to transport himself back to the middle of the 19th century.

Erasing your consciousness temporarily and looking at it in those terms, the liberty to hold people as property was a very real liberty. Of course it is not today. No one would say it is today. It was then, and that is the analogy.

I would venture the prophesy that 100 years from today people will wonder at the very eminent, distinguished, and kind people who take the position they do take in favor of destroying unborn life. They will be surprised that people of such intelligence and virtue could have held that position.

I am sure that the course of history, Mr. Chairman, is with us in protecting the liberty to life of the unborn. As to this liberty to life the Supreme Court in a very sweeping phrase in *West Virginia* v. *Barnette* said, "The right to life is subject to no election."

Well we have put the right to life to the subject of an election by seven middle-aged men. They did not think it was protectable, and they eliminated it.

Professor Tribe lays stress on the fact that these seven middle-aged men had the power under our Constitution to make that decision. They did; but surely not every decision, reasoned or unreasoned, is to be frozen there forever.

We know the famous examples. Some of them have been eliminated by the Court changing its mind, others by constitutional amendment, but there is nothing in our democratic Government that says once seven or five people who have the power controls at their fingertips have made a decision that is frozen as a constitutional liberty forever.

Senator **Hatch**. Let me ask you this: Assume that I was a State senator who felt very strongly that abortion was wrong and that it represented bad public policy. Assume further that both of you were my legislative assistants—I am sure that you would perish the thought and I asked you what I could do consistent with the Constitution to limit the availability of abortions to make abortions less convenient or to insure that a woman act with greater caution prior to securing an abortion.

What kind of legislative advice could I expect from both of you, apart Professor Tribe from suggesting that maybe I had hired the wrong legislative assistant in the first place?

Mr. **Tribe**. I suppose as your assistant I could suggest, first, that it is within your power to close public facilities to elective abortion; second, that it is within your power to cut off public funds for elective abortion and therapeutic abortion; and, third, that it is within your power to undermine the conditions that lead women in desperation to want and need abortions—that is, that you could make childbirth itself and the experience of having a child less lonesome and traumatic an event by making care for newborn children more widely available, by making adoption services more widely available.

I would suggest, then, that, as to viable fetuses, you could make it a crime, in the absence of a genuine health need, to have an abortion.

There is a great deal you could do, but I would tell you forthrightly that the one thing you cannot do under the Constitution as it now stands is express your moral convictions by passing a law that makes a woman remain pregnant.

I would also suggest that you do have the power under our system to speak against *Roe* v. *Wade* and to advocate an amendment. *Roe* v. *Wade* is not the last word. It is not final just because it was rendered by the Supreme Court.

I am only suggesting that it is not nearly as unprecedented as has been said—and that it is right, even from the point of view of someone who believes in human life deeply and committedly, to believe that that conviction should not lead to coerced pregnancy.

Senator **Hatch**. Professor Noonan?

Mr. **Noonan**. Senator, I would place in your hands a synopsis of Professor Wardel's excellent review of all the efforts of the States to limit abortion and the disastrous ending—mostly in Federal courts—of those efforts.

The States, cities, and even the towns have tried just about everything, from zoning out abortion clinics, which are often an odious blight, to trying to provide information to the woman seeking an abortion, to trying to protect the unborn child in the later stages of pregnancy, and virtually every one of those efforts has foundered in a Federal court.

The Federal judiciary has made it a very discouraging undertaking to try to design protections as the law now stands.

Senator **Hatch**. As I recall the Pennsylvania case you cited basically held that even if an aborted fetus survived and could be saved that it was unconstitutional to impose such an obligation upon an abortionist.

Mr. NOONAN. Professor Tribe did pick out the words that the Court found unconstitutionally vague, but of course there was a dissent that says those were the kind of words physicians can easily understand. "May be viable" means something to most people.

If it is a certainty of viability that is required, how many people can be certain of viability? In other words, the Court really gave the State no option, when they said the "may be viable" statute was invalid. What would pass constitutional scrutiny?

Then consider the cases actually involving not just the late abortions but children said by State prosecutors to have been born alive—the *Edelin* case, the *Floyd* case in South Carolina, and the *Wardell* case. Children born alive it has been contended should not be protected by the States because of the interaction of the constitutional liberty to abortion with the State's criminal statute.

The abortion rights advocates very rightly from their standpoint said, "If you punish infanticide in these cases you are going to chill the abortion liberty, because we want that freedom to operate in the late stages. It is chilling for us to have to hold back." In Massachusetts, in California, and in the Federal court in South Carolina judges accepted that kind of argument.

You have heard a very benign interpretation of the Supreme Court today in the *Floyd* v. *Anders* case. I think we should recall that Judge Haynesworth—a judge of some eminence—interpreted the Supreme Court to mean that the fetus in the womb was not alive. That was the solemn holding of the lower Federal court in ,*Floyd* v. *Anders*.

Senator HATCH. Let me ask you this: There seems to be some confusion as far as whether or not a State may establish a requirement that a minor consult with her parents or receive the consent of her parents prior to obtaining an abortion.

Could you please sort out for me the *Danforth* and the *Bellotti* cases and the recent *Matheson* case from my own State? What precisely can the State do in this area consistent with the Court's holding?

Let us start with you, Professor Noonan.

Mr. NOONAN. I think it is confusing, because you have got in the final Supreme Court decision *Bellotti* simply a plurality opinion, so that it is not even a majority of a court that accepted the position.

As I understand the result of *Bellotti*, a State must always permit a mature minor to have an abortion if she chooses, and the State must always leave in the discretion of a judge the question of whether even in the case of an immature minor an abortion is or is not in her best interest.

Effectively, the last word of the parents—whether the girl is mature or whether she is immature—has been denied. If she is mature, it is her decision; if she is immature, it is the court's decision. I would say that that effectively removes parental control.

In the course of deciding *Bellotti*, which was a Massachusetts case, you have minor bizarre features added by the State court. The State court created, for example, out of whole cloth a right to counsel on the part of a girl seeking an abortion and required that she be funded in that by the State—something that was not in the Massachusetts legislature or constitution before that decision.

Effectively, *Bellotti* leaves the parental power to make a medical decision—which I believe in every other instance at common law was left to the parents—to the child.

The notice requirement in *Matheson* applies constitutionally at least to an immature minor living at home with her parents. A State can require notice to the parents of such a child, but they have no veto power and if the girl is determined enough she can insist that her parents go to court to get a judge to decide in her favor.

The family structure has been hideously eroded with a final power vested in some judicial figure and this very intimate family matter being taken away from the parents.

Senator HATCH. Professor Tribe?

Mr. TRIBE. I would not disagree with the description, but some of the epithets I think are curious.

A recent case in Oklahoma involved a 12-year-old girl who was pregnant as a result of rape. Her parents for religious reasons refused to give consent for an abortion. They had been notified under the State's notice law but refused to give consent. The doctor thought that the abortion was necessary to prevent the young girl from suffering life-long severe injury.

In those circumstances, society and the courts inescapably become involved.

It is not a warm, happy family where the parents are telling their daughter that although she has been raped and although her life may be in danger, she has to go through with the pregnancy in order to teach her a lesson.

I submit that, when a court in a case of that kind protects the right of the minor to terminate her pregnancy, the family structure is not being hideously distorted. On the contrary, if that child is forced to bear a child of her own and risk her future health and survival, I think an appropriate epithet might be that that would be hideous.

Senator HATCH. May a State enact any form of fetal protection statutes under present court rulings. In *Colautti*, for instance, as I recall there was a great deal of emphasis on the need to be precise with respect to any kind of obligation to be imposed upon a doctor.

Is it constitutional for a State to impose a life-saving obligation upon a doctor with respect to a potentially viable fetus that has been aborted?

Professor Tribe?

Mr. TRIBE. "Potentially viable" is itself perhaps redundant. "Viable" means capable of survival, and with artificial help if necessary.

A State may, the Court stressed in *Colautti*, impose an obligation on a doctor to take steps to save a viable fetus. But in drafting a criminal law in this area, understandably a State must proceed with care. Threatening to imprison someone for guessing wrong about a profoundly difficult question is not part of our tradition.

So the answer to your question would have two parts: First, they may do it; but, second, they have got to do it with greater care than Pennsylvania used.

Let me add that the parade of horribles that is sometimes adduced—what happened in the *Edelin* case in Massachusetts, what happened in the opinion by Judge Haynsworth I think is a diversion from the central point: States do have the power to protect viable fetuses. Certainly they have the power to require efforts to save someone who has already been born. Those lower courts that have misread *Roe* v. *Wade* must not set the standard for this committee or for this Congress.

The fact that some people have said, "You need to practice infanticide in order to give abortion breathing space," I think is an abomination. That is not the law today; that is not the law as announced by the U.S. Supreme Court.

I have no doubt that the States have full power to prevent infanticide and to protect viable fetuses.

Senator HATCH. Are not rape and incest also diversions? In other words, you can provide worst-case scenarios on both sides.

Mr. TRIBE. But the issues of parental consent are often "worst-case" issues. It is not the garden-variety, lovely case that involves a dispute between parents and children and a judge over an abortion.

Senator HATCH. I think it may be different than that. I think we do not even see most of the cases where parental consent really is in issue.

You might be able to show a worst case scenario in any situation to create sympathy, but we are talking about general principles here, not just one or two cases either way.

Mr. TRIBE. I understand, Senator. But in your own State, the Court did uphold quite recently a law that said that "an unemancipated dependent minor cannot get an abortion without parental notice."

In most cases, as a practical matter, parental notice is awfully close to parental veto. There are not many dependent, unemancipated minors who will be able to go ahead over a parent's veto, even as an informal matter, once the notice requirement has been complied with.

Senator HATCH. Professor Noonan?

Mr. NOONAN. I would start from the basic point that health abortions can be performed at any time and that health—genuine health, as Professor Tribe puts it—would be "health" as defined by the Supreme Court, which includes a variety of emotional and psychological factors.

With that definition, I would suppose that any abortion of a viable fetus would be constitutionally protected.

With that as the governing constitutional consideration, I would doubt very much that a State could legislate that the method of abortion must be one that prefers the survival of the viable fetus to the health of the woman. I think the health of the woman would constitutionally control.

In the effort of Missouri, for example, to rule out saline abortions, which are a most painful way of inflicting death on the unborn, that effort was ruled out by the Supreme Court as unconstitutional.

With the constitutional considerations weighted in this way I would say there was extremely little the States could do to enact legislation insuring the survival of the viable child.

Once the child is outside the womb of course the formal laws of infanticide have not been repealed, despite the efforts of a good many of the people that Professor Tribe is speaking for. These odious efforts have not succeeded, but only the worst cases get prosecuted. I think there are lots of cases—doctors indicate there are lots of cases—that do not get prosecuted.

So, in effect, as our new Surgeon General has put it directly, infanticide is being practiced today in the best teaching hospitals in America.

Dr. Koop has made that clear from his own ample clinical observations: Infanticide flourishes today, and the States in practical effect are not able to stop this practice.

Mr. TRIBE. Might I respond, Senator Hatch?

Senator HATCH. Surely.

Mr. TRIBE. First of all, I do want to stress that I am speaking as a constitutional scholar, and not for any group, contrary to what Mr. Noonan suggests.

Second, the example of the Danforth case is obviously irrelevant because that dealt with pre-viability abortions.

Third, if infanticide is truly prevalent in this country, then I cannot resist suggesting a much more urgent agenda for people who want to save lives.

Senator HATCH. What exactly is the significance of the concept of "personhood" in the context of the abortion cases? The Court, if I am correct, suggested that no compelling State interest could be found sufficient to overcome the woman's right to privacy from the fact that the unborn were "persons" under the 14th amendment.

Is it necessary to redefine "person" in order to overturn the Court's decision in *Roe*, or was that essentially dictum?

I think you can start first on this one, Professor Noonan; and we will let Professor Tribe have the last word.

Mr. NOONAN. I think that dictum of the Court has, of course, been responsible for a lot of drafting efforts at an amendment, with the aim being to define the "unborn" as persons and thereby take away the foundation of *Roe* v. *Wade*.

But as I think Professor Tribe himself may have pointed out 7 years ago—or if he did not, his colleague did—the Supreme Court might balance the interests of one person against another. Even if "personhood" were restored, there would be a problem of balancing the life of the unborn person against the life now of the person seeking the abortion.

Obviously, the people who think that defining "person" to include the unborn are thinking in the traditional terms under which one person cannot take another person's life except to save life.

But I have no great confidence that the present judiciary would make that traditional balance. Given the rather substantial ideological investment in abortion, it seems to me at least conceivable and perhaps even plausible that, although you had two persons by constitutional definition, the unborn person would turn out to be less equal than the born person, and the born person's health would prevail over the unborn person's life.

Senator HATCH. Professor Tribe?

Mr. TRIBE. Actually, I think I agree with everything Mr. Noonan said this time, but he answered the other half of the question—not the half you asked. That is, he was answering—I think quite correctly—the question: Would it be sufficient to give status to a fetus as a person? I think he is correct in saying that that might not suffice to overturn *Roe* v. *Wade.*

I understood your question to be different. I understood you to be asking: "Is it necessary?" My answer is: No, it is not. That is, I believe your amendment is a much more direct response to *Roe* v. *Wade.* Any amendment which, in effect, says, "There is no right to abortion; it is up to the States or Congress to regulate it," is a direct assault on *Roe* v. *Wade.*

Senator HATCH. My amendment is, you are saying?

Mr. TRIBE. That is right.

I do not think it is at all necessary to rewrite the dictionary about "personhood." Nor do I think it would be sufficient. That really was dictum; that is not the core of the *Roe* decision.

Senator HATCH. Let me just say this. I have a number of other questions. This has been to me a very important and very significant day of testimony on this issue. I want to compliment both of you.

I admire both of you. There is no question about your eminence in the field of constitutional law, though with differing perspectives on this issue.

Although I may differ with you on a variety of matters pertaining to abortion, Professor Tribe—maybe everything pertaining to abortion—I still admire you. You certainly have had a vital imprint on constitutional law today, as has Professor Noonan.

Mr. TRIBE. Thank you.

Senator HATCH. This has been, in my opinion, a very good session.

In my opinion, this is clearly the *Dred Scott* issue of this century. I do not think we can just sit back and act like the divisions, social, religious, political that it has created do not exist.

I would also like to have any further thoughts that you might have on pending legislative proposals on abortion.

Maybe it is unfair to say this, but I take it you, Professor Tribe, would be against any of the amendments we have discussed as well as the human life bill—but do not let me put words in your mouth.

Could you both share with us your general views on these proposals?

Mr. NOONAN. I am wholeheartedly in favor of the enactment of the form of amendment that you have introduced. I have ventured a few very minor verbal changes as suggestions in my written statement, but in substance I believe that would be the proper and best solution.

Senator HATCH. Do you agree with Professor Tribe that that overcome *Roe* v. *Wade?*

Mr. NOONAN. It would do away with it.

Senator HATCH. And it would leave it up to the elected representatives.

Mr. TRIBE. Senator Hatch, as to your question: Would I be against them? I guess I do not see it as my role here to be for or against. I am trying to explain what I understand the constitutional bases of *Roe* v. *Wade* to be. I have said, I think, that that case made constitutional sense, and I am trying to explain to you the upheaval these amendments would cause, but it is really up to you to decide.

Senator **Hatch**. But, from your discussion, provided I have interpreted it correctly, if you were sitting in the U.S. Senate you would be against all of them?

Mr. **Tribe**. I think that is right.

Senator **Hatch**. OK. I think that is fair.

I just want to thank both of you for the expenditure of effort, time, and thought you have given to assist this subcommittee. Thank you very much.

With that, we will recess this subcommittee.

[Whereupon, at 12:10 p.m., the hearing was recessed, subject to the call of the Chair.]

[The prepared statement of Laurence Tribe follows:]

October 5, 1981

The Abortion Decision: What It Did, What It Did Not Do, And What Undoing It Means to the United States Constitution

Prepared Statement of
Laurence H. Tribe, Professor of Law,
Harvard University

Mr. Chairman and Members of the Subcommittee:

I am honored to appear at the Subcommittee's invitation to explore the issues posed by the various constitutional amendments on abortion -- all of which are designed, at least in part, to overturn the Supreme Court's much-discussed Abortion Decision, Roe v. Wade, 410 U.S. 113 (1973).

INTRODUCTION

The Constitution has been amended four times since 1787 -- in the eleventh, fourteenth, sixteenth, and twenty-sixth amendments -- to reverse decisions of the Supreme Court. The question before this Subcommittee is whether the Court's Abortion Decision provides an apt occasion for the fifth such reversal. The answer partly depends, of course, on one's substantive views, moral and social, about abortion itself. But the answer depends even more crucially upon what Roe v. Wade actually did and did not do -- and upon what undoing it would do to the Federal Constitution. It is these matters that I hope my testimony will illuminate.

I. THE MEANING OF THE ABORTION DECISION FOR STATE AND FEDERAL POWER TO PROTECT THE UNBORN.

Perhaps the most basic of the many questions posed by Roe v. Wade and its progeny is the degree to which the Supreme Court's interpretation of the Constitution has precluded government action to protect the unborn. It is, after all, a Constitution we are talking of amending -- and, as this Subcommittee's Chairman quite rightly said in the context of the Equal Rights Amendment, altering the Constitution "is a means of last resort, an act of desperation." To quote Senator Hatch again, "When it is not necessary to adopt a constitutional amendment, it is necessary not to adopt an amendment." From the pro-life perspective, the claimed necessity of an anti-abortion amendment rests, of course, upon the view that Roe v. Wade and the rulings that followed in its wake essentially foreclose the defense of fetal life -- including action to encourage alternatives to abortion. Yet is is precisely this view that cannot withstand analysis.

Without meaning to minimize the significance of Roe v. Wade as a practical and symbolic hurdle in the path of the right-to-life movement, let me suggest the respects in which its impact has been overstated. As the Supreme Court itself put the matter in Doe v. Bolton, 410 U.S. 179, 189 (1973), "Roe v. Wade . . . sets forth [the] conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." (See also the concurring opinion of Chief Justice Burger, 410 U.S. at 208.) As Justice White was later to observe, "[t]he constitutional right recognized in Roe v. Wade was [a] right to choose . . . without coercive interference by the government" -- not a "right to have abortions . . . but only a right to be free from unreasonable official interference with private choice." Harris v. McRae, 448 U.S. 297, 327-8 (1980) (concurring opinion) (emphasis added).

To appreciate the many pro-life options left open by the Supreme Court's constitutional rulings, consider:

1. "[A] physician or any other employee has the right to refrain, for moral or religious reasons, from participating in [an] abortion procedure." Doe v. Bolton, 410 U.S. at 197-98.

2. The Constitution permits states and localities to close their public facilities to abortions while making those facilities fully available for childbirth. Poelker v. Doe, 432 U.S. 519 (1977) (per curiam).

3. Roe v. Wade "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy [but] . . . implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Maher v. Roe, 432 U.S. 464, 473-74 (1977). Indeed, a state is not even required to show "a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education." Id. at 477 (footnote omitted).

4. Congress is likewise free to "reflect[] . . . 'traditionalist' values towards abortion" by withholding funds from the latter even in cases of medical need -- so as to "establish[] incentives that make childbirth a more attractive alternative than abortion," in pursuit of "the legitimate congressional interest in protecting potential life." Harris v. McRae, 448 U.S. 297, 319, 325 (1980). As the Court put it, "[a]bortion is," after all, "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Id. at 325.

5. Similarly, government may require parental notice, although not parental consent as such, where a dependent minor living with her parents seeks an abortion -- even if such notice is not required for "other medical procedures . . . [where the minor] carries the child to term." H.L. v. Matheson,

101 S.Ct. 1164, 1173 (1981). Far from being compelled "to encourage or facilitate abortions," states are free to encourage the opposite choice. Id.

6. Finally, beyond the panoply of incentives through which government (and, of course, private groups) may permissibly facilitate and encourage childbirth, and beyond the power of government to protect fetal life from experimental and other intrusions not required for the exercise of the right recognized in Roe v. Wade, there is the little-noticed power of the state, through its criminal laws if need be, to forbid elective abortions beyond the point of fetal viability -- the point at which "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with [such] . . . artificial support [as may be required]." Colautti v. Franklin, 439 U.S. 379, 388 (1979). The Court deliberately "left the point [of viability] flexible for anticipated advancements in medical skill," id. at 387, thereby leaving "the State [with] the right to readjust its views and emphases in the light of the advanc[ing] knowledge and techniques of the day." Doe v. Bolton, 410 U.S. at 191. Permit me to quote what I had to say on this flexible aspect of Roe v. Wade a half-decade ago:

> [To] the extent society as a whole becomes willing to invest sufficient resources in the protection of the unborn and newly born -- a willingness likely to be reflected by the advancing line of viability -- Roe permits greater state protection of the fetus to follow. Seen in this light, Roe reflects not so much an absolute rejection of the sanctity of "life" from the moment of conception as a structuring of how a value choice on that subject should figure in constitutional principles. "Society's" claim of a constitutionally dominant interest in fetal life is made commensurate with the society's genuine and general exertion to further that interest -- not with its willingness to give the interest token recognition by legislatively condemning women to bear unwanted children or to abort under hazardous and illegal conditions.

Tribe, "Structural Due Process," 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 269, 297 (1975) (footnote omitted).

* * * * *

In short, Roe v. Wade and the decisions that followed it have not enshrined abortion as a permanent feature of the social and medical landscape. Those convinced that fetal life should be defended have been left with a broad band of options for implementing their moral vision without altering the Constitution.

II. THE ABORTION DECISION: CREATING A NOVEL LIBERTY -- OR ELABORATING TRADITIONAL LIMITS ON GOVERNMENT AUTHORITY?

If Roe v. Wade put abortion and the freedom to pursue it on no special pedestal, one may be excused for wondering just what that decision was all about. What was the point of invalidating restrictive abortion laws if government has at the same time been invited to protect the unborn and indeed to discourage abortion while encouraging childbirth?

Permit the Court to speak for itself on the issue: "Drawing on a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities, we concluded that the Fourteenth Amendment's concept of personal liberty affords constitutional protection against state interference with certain aspects of an individual's personal 'privacy,' including a woman's decision to terminate her pregnancy." Maher v. Roe, 432 U.S. 464, 471-72 (1977). A footnote the Court included at that point bears quotation: "A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. Indeed, the right of procreation without state interference has long been recognized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.'" Id. at n.7 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

In other words, Roe v. Wade had less to do with any "liberty of abortion" as such than with several overlapping restrictions on government's power over, and coercive intrusion into, the lives and choices of private citizens -- however legitimate and indeed noble government's aims might be. As the Supreme Court observed nearly four decades ago, "[i]t is not necessary to inquire [what] will exempt [someone] from the duty to [perform an act] unless we first find power to make the [act] a legal duty." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 635 (1943). Put otherwise, "[o]ne need not posit a [special] constitutional right to [make a particular choice] to characterize . . . as irrational and perverse," or as otherwise forbidden, a specific government measure profoundly intruding upon that choice. *Carey* v. *Population Services International*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).

1. Even Justice Rehnquist, who has made clear that he would find no abortion right *as such* in the Constitution, wrote in his *Roe* v. *Wade* dissent: "The Due Process Clause . . . undoubtedly does place a limit . . . on legislative power to enact laws such as [the Texas abortion restriction]. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . . ." *Roe* v. *Wade*, 410 U.S. at 173. In a sense, of course, *a mother's life is in jeopardy whenever continued pregnancy is at stake*: her chances of dying in childbirth are at least 6 times as great (if she is white and between 20 and 24), and up to 40 times as great (if she is 40 or older), as are her chances of dying from a first-trimester abortion -- and such abortions, as reported to the Center for Disease Control, now constitute over 91% of the total. In part, therefore, *Roe* v. *Wade* represents not a recently discovered right to abortion but a quite ancient, and a universally acknowledged, *freedom from arbitrary government interference with personal survival*.

2. Roe v. Wade in addition represents a principle at least as old as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) -- the principle that "a government of laws, and not of men" is the "very essence of civil liberty." As the Court in Roe v. Wade fully recognized, the most basic human impulses are likely to prevent even the most rigid abortion laws from being strictly enforced in especially compelling cases, such as those of rape and incest involving victims who are themselves children. I quote Chief Justice Burger's conclusion: "[N]o one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion." 410 U.S. at 208 (concurring opinion). It must be stressed that this holding requires no premise that the liberty of abortion is singled out for special protection by the Constitution. For at stake in this regard is not the right to choose abortion but the right not to live under a sovereign's thumb: "[T]he very idea that one may be compelled to hold his [or her] life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another" is "intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). (See also J. Locke, Two Treatises of Government §§22-23, at 324-25 (Laslett ed. 1960).)

3. The liberty at stake is, of course, not only the pregnant woman's; it is the physician's as well. Thus, the Supreme Court in Doe v. Bolton, 410 U.S. 179, 199 (1973), struck down various state restrictions on the ground that each "unduly infringe[d] on the physician's right to practice." And the Court has subsequently invalidated still other controls over abortion not in the service of any liberty of the woman but on the ground that the state "must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti v. Franklin, 439 U.S. 379, 401 (1979). Unless government's power to regulate the professions

through personal whim and by vague command is suddenly to be freed from all constitutional restraint, a significant part of the Supreme Court's jurisprudence in the abortion field would be left untouched even if the liberty of abortion as such were excised from the Constitution and the power to regulate or ban abortions were expressly conferred upon all levels of government.

4. To the extent one views the fetus as a person, or at least as a being entitled to governmental protection even at the cost of considerable discretion and vagueness in the application of the criminal law, one may reply that these independent bases for the Abortion Decision and its corollaries seem unsatisfying. But the fact remains that they were among the grounds of the decision -- and they cannot easily be erased by an amendment that respects the Constitution's commitment to clarity and regularity in the uses of state coercion.

Moreover, even the perspective of fetal protection becomes increasingly problematic as the abortions in question occur closer and closer to the point at which sperm and ovum meet. Opponents of the Abortion Decision are usually quick to sound their approval of Griswold v. Connecticut, 381 U.S. 479 (1965), the decision taking from government the power to forbid contraception. The Court in Roe v. Wade relied heavily on Griswold -- in no small part because of the "problems . . . posed . . . by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs." 410 U.S. at 161 (footnote omitted). In his 1979 book, "A Private Choice", John Noonan approvingly quotes (at pg. 155) the observation of the contemporary biologist David Epel that, "[i]f successful interaction [of sperm and ovum] does not occur, the two cells will die within hours or at the most a few days." (D. Epel, "The Program of Fertilization," 237 Scientific American 129 (1977)). What this underscores, of course, is that the "successful interaction" popularly described as "conception" is anything but an instantaneous event; it occurs not suddenly, and at one definable "moment," but gradually, and over time. It may thus be impossible in principle, and it is certainly unthinkable in practice, to defend the liberty of the individual to avoid conception while upholding the power of the state to punish abortion from the point of conception onward. In this sense, Roe v. Wade was but a logical extension of Griswold v. Connecticut. Wherever the line ought to have been drawn -- at viability, or elsewhere -- the limits on government power declared in Griswold left the Court no alternative other than to impose some limits on abortion regulation as well.

5. The Abortion Decision involves a final set of limits on government authority quite separate from matters of individual survival, government discretion, legal vagueness, professional autonomy, and contraception. I have in mind the limits entailed by a federal structure committed to free speech and to freedom of interstate movement. Government lacked the power in 1973, and lacks the power today, to prevent doctors and clinics from advertising the availability of abortion services in places where such services are lawful, or to prevent patients from traveling to such places to take advantage of the opportunities provided there. (See, e.g., Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper advertisement of out-of-state abortion service held privileged under First Amendment); Doe v. Bolton, 410 U.S. 179 (1973) (state ban on abortions by non-residents struck down under Interstate Privileges and Immunities Clause of Article IV, §2).) Roe v. Wade came to terms with this reality by sparing desperate women the need to travel to Sweden or to New York to end their

pregnancies. Unless the freedoms of interstate and foreign travel and communication are to be rolled back as part of an anti-abortion amendment, it follows that such an amendment, in order to protect fetal life, would have to go well beyond inviting individual states to ban abortion. Absent a rollback of free speech and of freedom to travel, at least a nationwide ban would thus have to be either written into or authorized by any anti-abortion amendment -- in a sharp departure from the long tradition of the "states['] . . . responsibility [for] protecting life within their boundaries." J. Noonan, "A Private Choice" 184 (1979).

This leads me to a final inquiry about Roe v. Wade as compared with the various proposals to reverse it by amendment: which regime is more faithful to the Constitution's basic division and distribution of powers?

III. THE PLACE OF THE ABORTION DECISION, AND OF ANTI-ABORTION AMENDMENTS, IN THE CONSTITUTION'S ALLOCATION OF POWERS AND RESPONSIBILITIES.

However far-reaching and controversial it may have been, Roe v. Wade represented no departure from the Supreme Court's historic role and worked no revision in the basic allocation of powers within our constitutional scheme. As we have already seen, the Abortion Decision left intact much of the power of both the state and federal governments to protect unborn life. Moreover, the decision reflected not a new liberty but old limits on government coercion and intrusion. It is true that the decision left women with a freedom of choice in reproductive matters significantly broader than any they had previously enjoyed under the Constitution -- and this despite the absence of any explicit reference in the document to this particular sphere of freedom. But the Constitution likewise contains no explicit reference to a right to think, to believe, or to breathe. It says nothing of a right to privacy or bodily integrity as such; and it is equally silent with respect to marriage and family, and with respect to parental rights in the upbringing of children. Yet many who applaud the Supreme Court decisions finding parental and familial rights to be implicit in the Liberty Clause of the Fourteenth Amendment express dismay that the Court should have pursued precisely the same constitutional method in finding an implicit right of the woman to decide whether or not to terminate her pregnancy. See, e.g., J. Noonan, "A Private Choice" 15, 17-18, 21 (1979).

Special disagreement has been voiced with the Court's reliance, in Roe v. Wade, upon the Constitution's Ninth Amendment as an expression of the principle that important rights are not to be disparaged simply because nowhere explicitly guaranteed. See J. Noonan, supra, at 6, 9. Professor Noonan's reaction is understandable -- given his curious reading of the Ninth Amendment, which he says "declared that all powers not expressly conferred upon the national government belonged to the People, thereby leaving to the People the protection of life, liberty, and property through the legislatures and courts of each state." Id. at 6 (emphasis added). But, far from embodying Noonan's hypothesized "reservation of power to the People," id. at 9, the Ninth Amendment quite unmistakably reserves individual rights, not lawmaking powers. Quoted in full, it states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Evidently Professor Noonan's Ninth Amendment differs considerably from the Constitution's Ninth Amendment -- the one the Supreme Court invoked in the Contraception Decision as well as in the Abortion Decision. In recently affirming a basic right of the public and the press to attend and observe criminal trials with or without the consent of the parties -- a right also unmentioned in the Constitution -- the Supreme Court again relied upon the Ninth Amendment, recalling the provision's history as a measure designed "to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (plurality opinion of Burger, C.J., joined by White and Stevens, JJ., announcing judgment). The Abortion Decision was thus neither the first nor the last to protect unenumerated rights in the course of elaborating the limitations of governmental power.

Perhaps most fundamentally, the Abortion Decision worked no dislocation in the overall structure of federal-state relations. Insofar as the decision invoked federal judicial power to vindicate the substantive liberty of women under the Due Process Clause of the Fourteenth Amendment, nothing at all novel had occurred: the federal courts have played precisely this role ever since the mid-1890's, with shifting emphases and varying subjects of protection but with an unwavering presence both federal and judicial. To the extent that this presence has operated to diminish state legislative options, it has done so as an unavoidable corollary of the enforcement of the Fourteenth Amendment -- with neither more nor less intrusion upon state prerogatives than would have been entailed by federal judicial protection of fetal life from state deprivation if the Supreme Court had upheld the claims of pro-life groups instead of sustaining the arguments of pro-choice advocates. It is, in short, disagreement over the result the Court reached in Roe v. Wade, not disagreement over the role it played, that truly separates defenders of the decision from its critics.

In contrast, amendments designed to undo Roe v. Wade display an understandable tendency not simply to protect fetal life from destruction at the state's hands but (1) to insist that fetal life be protected against even purely private action, or at least (2) to demand that Congress be empowered to enact a floor of fetal protection capable of overriding any contrary principles or preferences of pro-choice states and localities. Either sort of amendment would obviously change the relationship between the federal government and the states in precisely the manner Senator Hatch has described as "revolutionary" in speaking of the proposed Equal Rights Amendment. "Traditionally," as the Senator rightly observes, "the states have regulated matters affecting the domestic or family life of their citizens," including "the care and custody of children . . . and . . . the health, safety, and welfare of the states' citizens." It need hardly be mentioned that Congress enjoys no power today to ban infanticide, to punish wife-beating, or to criminalize ordinary murder -- and the Constitution itself says nothing of such private acts of violence. For a constitutional amendment to restrict abortion, or to empower Congress to do so, would therefore mark a radical departure indeed. But, to quote Professor Noonan again, "Although [abortion] is a political, social, and moral evil, the federal system should not be distorted to overcome it." "A Private Choice" 186 (1979).

The only alternative to such distortion -- apart from simply living with Roe v. Wade itself -- is to "object[] to abortion as the taking of life and then . . . let the people of [each] state take life if they vote[] to do so," id., something Professor Noonan properly finds distressingly inconsistent. The inescapable conclusion is that undoing the Abortion Decision would distort the constitutional framework in a manner that the Abortion Decision itself cannot fairly be accused of doing.

CONCLUSION

The Constitution might obviously be amended to reverse Roe v. Wade, in part or in whole. The Constitution itself certainly permits such a course. That any such change would have repercussions far beyond abortion as such is relevant -- but is unlikely to seem decisive for those who see each theoretically preventable abortion as a monstrous evil. But for those who feel less certitude in this tragic realm, the constitutional upheaval that any such amendment would cause may well constitute a convincing reason to rely upon other alternatives, however imperfect they may seem. And even someone more single-mindedly committed to a "pro-life" position might well pause before installing a constitutional regime in which all pregnant women, and no men, are compelled to dedicate their bodies, their futures, and sometimes their very lives, to the survival of the unborn.

That pregnancy in an ideal world would never be unwelcome, and no child ever be unwanted, states a dream -- but not yet a reality. Rewriting the Constitution, many will sadly conclude, could not make that dream come true.

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

WEDNESDAY, OCTOBER 14, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:07 a.m., in room 2228, Dirksen Senate Office, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

Staff present: Tom Parry, chief counsel; Stephen Markman, general counsel; Randy Rader, counsel; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The Subcommittee on the Constitution will come to order.

This marks the second in a series of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution relating to abortion.

During our opening day of hearings last week, we heard testimony from two of the Nation's leading constitutional authorities on this subject—Prof. John Noonan of the University of California Law School at Berkeley and Prof. Laurence Tribe of the Harvard Law School.

Each of them contributed to this subcommittee's understanding of the legal and constitutional background of the present abortion controversy, although their perspectives on *Roe* v. *Wade* and subsequent cases, to say the least, were substantially divergent.

Today's hearings mark a shift in emphasis. We are privileged to have with us today four medical doctors, each of them among the most knowledgeable in the country on the subject of abortion.

Again, I believe that it is fair to suggest that they bring to this subcommittee widely varying viewpoints of this very difficult issue.

Before we begin, I would like to address one significant criticism that Senator Packwood raised last week about the specific proposed amendment that I have recently introduced, Senate Joint Resolution 110.

Unlike the other amendments that we are considering during these hearings, Senate Joint Resolution 110 would simply restore legislative authority in the States and Congress with respect to abortion. It would not create the duty or the obligation, however, in these legislative bodies to act on abortion.

Senate Joint Resolution 110 would overturn the *Roe* and *Doe* decisions by removing the abortion controversy from the Federal judiciary and putting it back in the legislative branch of Government where it existed prior to the 1973 cases.

Thus, we would be giving the power to decide this issue to elected representatives rather than unelected, appointed people.

Senator Packwood stressed at some length his view that individual rights should not be decided by majority vote. They should be subject to more permanent and enduring protections.

Whatever my differences with my good friend, Bob Packwood, on the abortion issue, I agree with him completely on this point. I do not believe that the fundamental rights of individuals should be determined by referendum.

Let me note for the record, however, that I have also been the subject of criticism from some of my friends in the pro-life movement as well.

My proposed amendment, some of them suggest, is a sellout because it leaves the issue of abortion up for grabs in 51 legislative bodies. State legislators and Members of Congress may, under my amendment, prohibit or restrict or regulate abortion, but they are under no obligation to do so.

Thus, both my distinguished colleague from Oregon and some of my friends in the right-to-life movement have taken me to task for daring to place within the democratic process an important issue of individual rights.

The problem, of course, is that they—and the Nation, for that matter—cannot quite agree on what individual rights are involved. Senator Packwood sees these as being the right of the pregnant woman to determine how her body is used, while my critics in the pro-life movement see this as the even more fundamental right of the unborn to life itself.

It will come as no surprise to most in this room that I am far more personally sympathetic to the claim of the right on the part of the unborn child. Whatever inconvenience may be borne by a mother who must carry to term an unwanted pregnancy—and I am prepared to admit that it may be a substantial inconvenience and even a traumatic experience—I simply do not believe that it can balance the loss of the unborn child's right not to be destroyed by an abortion.

I can see, however, that there does not yet exist in this country a consensus in support of my own position. I hope that it will be achieved someday, and I will continue to do whatever I can to work toward this consensus but apparently it does not yet exist.

By the same token, there is not a consensus in this country in favor of unrestricted abortions—the situation, that for all legal purposes, presently exists. Advocates of that viewpoint are also free to work to achieve that consensus if that is their desire.

What I am trying to do with Senate Joint Resolution 110 is to allow some social consensus on abortion to develop in this country—one way or the other. It simply cannot develop today because seven Justices of the Supreme Court have totally preempted the issue.

Not only have they overturned the laws of 50 States that sought to limit abortions but they have repeatedly stood in the way, on what I believe are highly dubious constitutional grounds, of more modest legislative efforts to require parental consent for abortions performed upon minors, spousal consent, limitations on late abortions, fetal protection statutes, informed consent statutes, and so forth.

There is absolutely nothing that the citizenry of this country can do to express their legislative will on this issue in my opinion.

It is fine for my colleague from Oregon, then, to talk about inalienable rights, just as it is fine for my prolife friends to do the same. I agree with. Fundamental individual rights are not determined by a nose count. The only problem today is that no one agrees on what these inalienable rights in fact are.

Until we can reach a social consensus on this threshold issue, one way or the other, I believe that it is eminently reasonable to act on an issue of this division and controversy where there may in fact be a consensus.

Where that consensus is is not sure. I am prepared to concede that it would not presently favor a virtual absolution on abortion of the sort that I would probably prefer.

I feel just as strongly that it would not favor the present environment of abortion on demand for the entire duration of the pregnancy.

Until we reach the point at which there is a broad social consensus to read some attitude toward abortion permanently into the Constitution, I would strongly reject the arguments of both Senator Packwood and a few of the prolife movement—and, I might add, relatively few of the prolife movement—that we are conceding a principle in restoring this issue to the democratic representative process.

I welcome our distinguished witnesses here today and look foward to their testimony.

We would appreciate it if our witnesses would summarize their testimony. Their full statements, without objection, will be placed in the record at the completion of each oral presentation to make a full record on this matter.

The reason I would appreciate it if they would summarize is so that we can allow more time for questions.

Our first witness today is Dr. Carl Tyler, Assistant Director of the Centers for Disease Control in Atlanta, Ga., an agency of the Federal Department of Health and Human Services.

Dr. Tyler is a widely respected obstetrician-gynecologist and has taught obstetrics and gynecology at Emery University in Atlanta. He is one of the Nation's foremost experts on the statistical details of the abortion right in the United States today.

Dr. Tyler, we will look forward to your testimony at this time.

STATEMENT OF CARL W. TYLER, JR., M.D., ASSISTANT DIRECTOR FOR SCIENCE, CENTER FOR HEALTH PROMOTION AND EDUCATION, CENTERS FOR DISEASE CONTROL, ATLANTA, GA.

Dr. TYLER. Thank you, Senator Hatch.

My title is somewhat more modest than the one you have bestowed on me, but I thank you nonetheless.

I am Assistant Director for Science of the Center for Health Promotion and Education, one of the parts of the Centers for Disease Control. Prior to taking this position, I was the director of the Family Planning Evaluation Division, a position that I held beginning in 1967.

ABORTION SURVEILLANCE

In 1969, the Centers for Disease Control recognized illnesses and deaths associated with abortion as an important public health problem. Because of the inadequacy of national statistics, CDC initiated the epidemiologic surveillance of abortion. Since then, the Center has been compiling, analyzing, and disseminating data on this topic in the United States.

The objectives of the surveillance are twofold:

One, to document the numbers and characteristics of women obtaining abortions.

Two, to identify and eliminate preventable mortality and morbidity related to abortion.

NUMBER OF ABORTIONS AND CHARACTERISTICS OF WOMEN

In 1978, the latest year for which the Centers for Disease Control has obtained statistics, all of the 50 States and the District of Columbia reported 1.16 million legally induced abortions—a 7 percent increase over 1977. The national abortion rate—that is, the number of abortions per 1,000 females aged 15 to 44—rose by 5 percent from 22 in 1977 to 23 in 1978. The national abortion ratio—that is, the number of abortions per 1,000 live births—increased by 7 percent from 325 in 1977 to 347 in 1978.

As in previous years, women who obtained abortions in 1978 were most often young, white, unmarried, and had few or no previous births. Almost two-thirds were younger than 25 and two-thirds were white. Almost three-fourths of all women obtaining abortions were unmarried at the time of the procedure and nearly 60 percent had no previous live births.

Of the medical procedures employed to perform legal terminations of pregnancy, curettage continued to be the most widely used, accounting for 95 percent of all cases carried out in 1978. Compared with the previous year, the proportion of saline instillation procedures used after 15 weeks of gestation decreased. Dilatation and evacuation procedures increased, and instillation of prostaglandin and other agents remained at the same level of use.

In 1978, women continued to seek abortions at earlier gestational ages. More than 9 out of every 10 such procedures were induced within the first 12 weeks of pregnancy. Younger women obtained abortions at later gestations than older women, and nearly half of the abortions performed after 15 weeks were for women 19 years of age or younger.

ABORTION DEATHS

The number of women who die during pregnancy from both spontaneous and induced abortions continued to decline in 1978. That year, 27 women died from abortion—8 fewer than the 35 who died in 1977. Compared with 1977, there was a decline in the annual number of deaths associated with legally induced abortions. Eleven women died after such procedures in 1978, compared with 17 in 1977.

In 1978, there were seven deaths after illegally induced abortions. By that we mean an abortion performed by someone other than a licensed physician. There were nine deaths after spontaneous abortion.

The death-to-case rate for legally induced abortions decreased from 1.4 in 1977 to 0.6 per 100,000 abortions in 1978.

MEDICAL PRACTICE OF ABORTION

There are four principal procedures used to carry out legal-induced abortions. They are sharp curettage—the classical D&C method; suction curettage—also called vacuum aspiration; dilatation and evacuation, which involves a combination of suction and sharp curettage and is used after the 12th week of pregnancy; and instillation procedures which involve the injection of substances into the amniotic fluid.

The role of pharmacologic agents which induce contractions of the uterine muscle is controversial with regard to their application to the abortion of second trimester pregnancies.

CDC evaluated the safety and effectiveness of these agents through the analysis of reports on 11,000 women who underwent such procedures. The report of this analysis stated that these agents were associated with shorter instillation-to-abortion time when used with hypertonic saline but a significantly longer time when used with prostaglandin.

For hypertonic salt solution, the use of these agents concurrently did not affect either the success rate or the major complication rate. When used concurrently with prostaglandin, the success rate was lower and there was a higher rate of major complications.

PUBLIC POLICY AND ABORTIONS

In addition to carrying out clinical studies, the Centers for Disease Control also evaluates the effect which policy decisions may have on the practice of legal abortion.

In August 1977, Federal funds for financing the abortions of medicaid-eligible women were restricted. In order to study the health impact of this policy change, CDC reviewed the medical records of women with abortion complications in three cities for 1 year before and 1 year during the restriction.

A similar analysis was done for cities where public funding for legal abortions had not been restricted. Assuming that the number of complications reflects the number of abortions, CDC found that the restriction of public funding for legal abortions had reduced the number of legal abortions obtained by poor women. In addition, this analysis showed that the restriction did not increase the number of illegal abortions obtained by these women.

CDC also initiated a hospital surveillance project in 13 States and the District of Columbia. No increase in abortion-related complications was observed in this project. No abortion deaths related to either legal or illegal abortions were detected through this surveillance system.

INTERNATIONAL COMPARISONS

An estimated 30 to 55 million abortions are performed worldwide each year, making abortion one of the most frequently used methods of fertility control. The majority of the world's population—60 percent—live in countries where abortion is permitted either on request or for social reasons.

The United States was sixth of the 18 countries reporting abortion rates and eighth of the 16 countries reporting abortion ratios.

In 1978, the United States reported one of the lowest percentages of abortions to women over 40 years of age and to women with four or more children.

Our country also had one of the highest percentages of abortions performed on never married or previously married women and on women with no living children.

Senator, that completes my prepared testimony. With your permission, I would like to submit a copy of the most recent issue of CDC's Abortion Surveillance Report so that the committee can have more detailed information at its disposal.

I am ready for questions.

Senator HATCH. That is fine. We will be happy to receive that.

Without objection, we will place a copy of your most recent findings into the record.

[Excerpts from CDC's Report follows:]

(EXCERPTS FROM CDC'S ABORTION SURVEILLANCE REPORT)

Summary Table
Characteristics of Women Receiving Abortions
United States, 1972-1978

Characteristics	Percentage Distribution[1]						
	1972	1973	1974	1975	1976	1977	1978
Residence							
Abortion in-state	56.2	74.8	86.6	89.2	90.0	90.0	89.3
Abortion out-of-state	43.8	25.2	13.4	10.8	10.0	10.0	10.7
Age							
≤ 19	32.6	32.7	32.7	33.1	33.1	30.8	30.0
20-24	32.5	32.0	31.8	31.9	32.4	34.5	35.0
≥ 25	34.9	35.3	35.6	35.0	34.6	34.7	34.9
Race							
White	77.0	72.5	69.7	67.8	66.6	66.4	67.0
Black and other	23.0	27.5	30.3	32.2	33.4	33.6	33.0
Marital Status							
Married	29.7	27.4	27.4	26.1	24.6	24.3	26.4
Unmarried	70.3	72.6	72.6	73.9	75.4	75.7	73.6
Number of Live Births[2]							
0	49.4	48.6	47.8	47.1	47.7	53.4	56.6
1	18.2	18.8	19.6	20.2	20.7	19.1	19.2
2	13.3	14.2	14.8	15.5	15.4	14.4	14.1
3	8.7	8.7	8.7	8.7	8.3	7.0	5.9
≥ 4	10.4	9.7	9.0	8.6	7.9	6.2	4.2
Type of Procedure							
Curettage	88.6	88.4	89.7	90.9	92.8	93.5	94.6
Intrauterine instillation	10.4	10.4	7.8	6.2	6.0	5.4	3.9
Hysterotomy/Hysterectomy	0.6	0.7	0.6	0.4	0.2	0.2	0.1
Other	0.5	0.6	1.9	2.4	0.9	0.7	1.4
Weeks of Gestation							
≤ 8	34.0	36.1	42.6	44.6	47.0	51.2	52.2
9-10	30.7	29.4	28.7	28.4	28.0	27.2	26.9
11-12	17.5	17.9	15.4	14.9	14.4	13.1	12.3
13-15	8.4	6.9	5.5	5.0	4.5	3.4	4.0
16-20	8.2	8.0	6.5	6.1	5.1	4.3	3.7
≥ 21	1.3	1.7	1.2	1.0	0.9	0.9	0.9
Previous Induced Abortions							
0	--	--	86.8	81.9	79.8	76.8	70.7
1	--	--	11.3	14.9	16.6	18.3	22.1
2	--	--	1.5	2.5	2.7	3.4	5.3
≥ 3	--	--	0.4	0.7	0.9	1.5	1.8

[1] Excludes unknowns

[2] For years 1972-1977 data indicate number of living children

--Not reported

Table 1
Source of Abortion Reporting, Number of Reported Abortions, and
Abortion Ratio and Rate, by Year, United States, 1969-1978

	1969	970	1971	1972	1973	1974	1975	1976	1977	1978
Number of reporting areas[1] from which data are reported by the central health agency	8	18	19	21	26	37	39	41	46	48
(Number of reporting areas which report data through the CHSS[2])									(5)	(8)
Number of reporting areas from which data are reported from individual hospitals and facilities	2	7	7	8	26	15	13	11	6	4
Total number of abortions reported to CDC	22,670	193,491	485,816	586,760	615,831	763,476	854,853	988,267	1,079,030	1,157,776
Abortion ratio (abortions per 1,000 live births)	6.3	51.9	136.6	180.1	196.3	261.6	271.9	312.0	324.5	347.3
Abortion rate (abortions per 1,000 females aged 15-44)		5	11	13	14	17	18	21	22	23

[1] Reporting areas include 49 states, Upstate New York, New York City, and the District of Columbia (52 total reporting areas).
[2] Cooperative Health Statistics System, National Center for Health Statistics

Table 2
Reported Number of Legal Abortions, by State of Occurrence, Abortion Ratios, and Abortion Rates, 1978

State	Abortions[1]	Ratios[2]	Rates[3]
Alabama	13,260[4]	220	15
Alaska	669	75	6
Arizona	6,833	158	13
Arkansas	5,014	144	11
California	171,982	483	33
Colorado	15,397	349	23
Connecticut	13,784	370	19
Delaware	3,410	393	24
Dist. of Columbia	29,786	*	171
Florida	43,884	387	25
Georgia	34,657	412	29
Hawaii	6,014	359	29
Idaho	2,107	109	11
Illinois	69,829[5]	400	27
Indiana	12,003	144	10
Iowa	5,512[4]	124	9
Kansas	9,229[5]	251	18
Kentucky	10,930	191	14
Louisiana	11,236	150	12
Maine	4,766	301	20
Maryland	24,681	446	24
Massachusetts	40,200	586	30
Michigan	43,602[4]	313	20
Minnesota	17,262	278	18
Mississippi	3,280	74	6
Missouri	15,519	213	14
Montana	3,044	225	17
Nebraska	4,837[5]	193	14
Nevada	4,734	431	31
New Hampshire	2,300	185	12
New Jersey	28,431	304	17
New Mexico	4,752	199	17
New York	153,703	657	38
(City)	(105,837)[6]	(*)	
(Upstate)	(47,866)[5]	(365)	
North Carolina	27,266	331	21
North Dakota	2,150[7]	190	15
Ohio	41,447	258	17
Oklahoma	10,072	219	16
Oregon	13,605[5]	349	24
Pennsylvania	60,639	398	23
Rhode Island	4,497	390	22
South Carolina	9,969[5]	201	15
South Dakota	1,396	114	9
Tennessee	18,889[5]	284	19
Texas	63,953	270	21
Utah	3,130	81	11
Vermont	2,588[5]	363	23
Virginia	30,442	414	24
Washington	29,848	508	34
West Virginia	2,758[4]	94	7
Wisconsin	17,764	259	17
Wyoming	716	83	7
Total	1,157,776	347	23

[1] Abortion data from central health agency unless otherwise noted

[2] Abortions per 1,000 live births (live-birth data from Vital Statistics Division, National Center for Health Statistics)

[3] Abortions per 1,000 females aged 15-44 (number of females aged 15-44 estimated by Family Planning Evaluation Division, CDC)

[4] Reported from hospitals and/or facilities in state

[5] Data from Vital Statistics Division, National Center for Health Statistics

[6] Reported from New York City Health Department

[7] Estimate

*Greater than 1,000 abortions per 1,000 live births

Table 3
Number of Abortions and Percent Change*
for Each Full Year of Reporting, Selected States,† 1972-1978

State	1972	1973		1974[1]		1975[2]		1976[3]		1977[4]		1978	
	No. Abortions	No. Abortions	% Change	No. Abortions	% Change	No. Abortions	% Change	No. Abortions	% Change	No. Abortions	% Change	No. Abortions	% Change
Alaska	1,172	1,165	-0.6	1,025	-12.0	1,248	21.8	1,213	-2.8	1,074	-11.5	669	-37.7
Arizona	. .	. .	. .	. .	. .	. .	. .	5,202	. .	6,130	17.8	6,833	11.5
Arkansas	793	1,138	43.5	1,694	48.9	1,925	13.6	3,286	70.7	2,726	-17.0	5,014	83.9
California	138,584	131,870	-4.8	135,762	3.0	142,067	4.6	142,593	0.4	164,729	15.5	171,982	4.4
Colorado	5,260	7,451	41.7	9,027	21.2	9,744	7.9	11,539	18.4	12,913	11.9	15,397	19.2
Connecticut	. .	. .	. .	. .	. .	10,820	. .	13,447	24.3	14,997	11.5	13,784	-8.1
Delaware	. .	. .	. .	. .	. .	2,322	. .	2,519	8.5	2,299	-8.7	3,410	48.3
Dist. of Columbia	38,868	40,812	5.0	22,688	-44.4	31,519	38.9	31,407	-0.4	29,545	-5.9	29,786	0.8
Florida	. .	16,156	. .	15,212	-5.8	16,745	10.1	37,340	123.0	41,571	11.3	43,884	5.6
Georgia	2,509	12,301	390.3	22,009	78.9	23,733	7.8	25,586	7.8	29,905	16.9	34,657	15.9
Hawaii	4,547	4,534	-0.3	4,158	-8.3	4,545	9.3	5,163	13.6	5,249	1.7	6,014	14.6
Idaho	. .	. .	. .	. .	. .	. .	. .	. .	. .	1,060	. .	2,107	98.8
Illinois	. .	. .	. .	50,718	. .	58,743	15.8	66,356	13.0	71,326	7.5	69,829	-2.1
Indiana	. .	. .	. .	6,029	. .	7,859	30.4	8,610	9.6	9,508	10.4	12,003	26.2
Kansas	12,248	12,612	3.0	10,171	-19.4	9,160	-9.9	9,154	-0.1	7,413	-19.0	9,229	24.5
Louisiana	. .	. .	. .	. .	. .	4,180	. .	6,350	51.9	8,644	36.1	11,236	30.0
Maryland	9,093	9,871	8.6	15,975	61.8	18,865	18.1	20,641	9.4	22,241	7.8	24,681	11.0
Massachusetts	. .	. .	. .	27,800	. .	29,940	7.7	32,801	9.6	34,382	4.8	40,200	16.9
Minnesota	. .	. .	. .	8,732	. .	10,565	21.0	14,124	33.7	15,532	10.0	17,262	11.1
Mississippi	61	96	57.4	140	45.8	315	125.0	1,510	379.4	2,446	62.0	3,280	34.1
Missouri	. .	. .	. .	. .	. .	10,244	. .	12,881	25.7	13,532	5.1	15,519	14.7
Montana	. .	. .	. .	. .	. .	1,535	. .	1,803	17.5	2,539	40.8	3,044	19.9
Nebraska	. .	. .	. .	3,094	. .	3,406	10.1	3,977	16.8	4,534	14.0	4,837	6.7
Nevada	. .	. .	. .	1,614	. .	1,807	12.0	2,382	31.8	4,297	80.4	4,734	10.2
New Hampshire	. .	. .	. .	668	. .	1,396	109.0	1,958	40.3	1,735	-11.4	2,300	32.6
New Jersey	. .	. .	. .	. .	. .	26,291[5]	. .	29,572[5]	12.5	30,702	3.8	28,431	-7.4
New Mexico	. .	. .	. .	. .	. .	. .	. .	. .	. .	4,568	. .	4,752	4.0
New York	299,891	203,358	-32.2	161,521	-20.6	147,229	-8.8	147,860	0.4	147,647	-0.1	153,703	4.1
North Carolina	8,365	11,935	42.7	16,463	37.9	19,960	21.2	23,561	18.0	25,020	6.2	27,266	9.0
North Dakota	. .	. .	. .	137	. .	812	492.7	1,752	115.8	2,005	14.4	2,150	7.2
Ohio	. .	. .	. .	. .	. .	. .	. .	37,192	. .	47,715	28.3	41,447	-13.1
Oklahoma	. .	. .	. .	. .	. .	. .	. .	. .	. .	8,220	. .	10,072	22.5
Oregon	7,143	7,447	4.3	8,794	18.1	10,641	21.0	12,590	18.3	13,163	4.6	13,605	3.4
Pennsylvania	. .	. .	. .	38,110	. .	43,319	13.7	53,425	23.3	57,880	8.3	60,639	4.8
Rhode Island	. .	. .	. .	2,867	. .	3,253	13.5	3,863	18.8	4,106	6.3	4,497	9.5
South Carolina	854	2,102	146.1	3,760	78.9	4,511	20.0	5,702	26.4	8,799	54.3	9,969	13.3
South Dakota	. .	. .	. .	1,601	. .	1,475	-7.9	1,561	5.8	1,384	-11.3	1,396	0.9
Tennessee	. .	. .	. .	7,406	. .	11,081	49.6	16,967	53.1	16,463	-3.0	18,889	14.7
Texas	. .	. .	. .	. .	. .	. .	. .	. .	. .	54,517	. .	63,953	17.3
Utah	. .	. .	. .	. .	. .	2,146	. .	2,542	18.5	3,033	19.3	3,130	3.2
Vermont	231	1,402	506.9	1,930	37.7	2,100	8.8	2,322	10.6	1,945	-16.2	2,588	33.1
Virginia	4,496	7,318	62.8	14,372	96.4	18,010	25.3	22,635	25.7	26,829	18.5	30,442	13.5
Washington	17,767	17,319	-2.5	18,185	5.0	20,963	15.3	22,790	8.7	26,939	18.2	29,848	10.8
Wisconsin	. .	. .	. .	10,920	. .	12,319	12.8	14,243	15.6	16,133	13.3	17,764	10.1
Wyoming	. .	. .	. .	. .	. .	. .	. .	. .	. .	500	. .	716	43.2

[1] Includes 17,348 abortions for 1974 reported to the CDC after publication of the 1974 Abortion Surveillance Report
[2] Includes 9,828 abortions for 1975 reported to the CDC after publication of the 1975 Abortion Surveillance Report
[3] Includes 3,284 abortions for 1976 reported to the CDC after publication of the 1976 Abortion Surveillance Report
[4] Includes 547 abortions for 1977 reported to the CDC after publication of the 1977 Abortion Surveillance Report
[5] Reported from state health department and hospitals and/or facilities in state

*Percent change over previous year
†States with data reported by central health agency (45)
. . Not applicable

Table 4
Reported Legal Abortions Performed on Out-of-State Residents, by State, 1978

State	Total Abortions Performed	No. of Abortions with Residence Known[1]	No. of Abortions on Out-of-State Residents	Percentage of Abortions (with Residence Known) Performed on Out-of-State Residents
Alabama[2]	13,260	9,595	853	8.9
Alaska	669	668	5	0.7
Arizona	6,833	6,768	149	2.2
Arkansas	5,014	--	--	--
California	171,982	--	--	--
Colorado	15,397	15,317	1,377	9.0
Connecticut	13,784	13,520	108	0.8
Delaware	3,410	--	--	--
Dist. of Columbia	29,786	28,823	15,473	53.7
Florida	43,884	--	--	--
Georgia	34,657	34,463	4,311	12.5
Hawaii	6,014	6,010	202	3.4
Idaho	2,107	2,107	116	5.5
Illinois	69,829	69,829	5,055	7.2
Indiana	12,003	12,003	240	2.0
Iowa[2]	5,512	4,455	774	17.4
Kansas	9,229	9,229	3,676	39.8
Kentucky	10,930	7,923	2,403	30.3
Louisiana	11,236	10,672	811	7.6
Maine	4,766	--	--	--
Maryland	24,681	24,681	950	3.8
Massachusetts	40,200	--	--	--
Michigan[2]	43,602	36,482	2,495	6.8
Minnesota	17,262	17,219	2,698	15.7
Mississippi	3,280	3,280	247	7.5
Missouri	15,519	15,509	2,372	15.3
Montana	3,044	3,044	117	3.8
Nebraska	4,837	4,837	1,454	30.1
Nevada	4,734	4,734	667	14.1
New Hampshire	2,300	2,263	188	8.3
New Jersey	28,431	--	--	--
New Mexico	4,752	4,752	259	5.5
New York	153,703	150,629	11,454	7.6
(City)	(105,837)	(102,763)	(7,861)	(7.6)
(Upstate)	(47,866)	(47,866)	(3,593)	(7.5)
North Carolina	27,266	26,641	1,364	5.1
North Dakota	2,150	--	--	--
Ohio	41,447	39,766	2,079	5.2
Oklahoma	10,072	--	--	--
Oregon	13,605	13,605	562	4.1
Pennsylvania	60,639	60,639	6,045	10.0
Rhode Island	4,497	4,497	362	8.0
South Carolina	9,969	9,969	269	2.7
South Dakota	1,396	1,382	537	38.9
Tennessee	18,889	18,889	3,822	20.2
Texas	63,953	--	--	--
Utah	3,130	3,113	181	5.8
Vermont	2,588	2,588	571	22.1
Virginia	30,442	30,442	2,053	6.7
Washington	29,848	29,535	3,087	10.5
West Virginia[2]	2,758	2,758	425	15.4
Wisconsin	17,764	--	--	--
Wyoming	716	--	--	--
Total	1,157,776	742,636	79,811	10.7

[1] Refers to in-state and out-of-state residence status

[2] Abortions for 1978 are reported from hospitals and/or facilities in state. Residence data are based on percentages and actual numbers as reported by hospitals and/or facilities in the state.

--Not available

Table 5

Reported Legal Abortions with State of Residence Known,*
by Census Division and State, 1978

State of Residence by Census Division	Abortions Performed in State of Residence No.	%	Abortions Performed Outside State of Residence No.	%	Total
NEW ENGLAND	(66,605)	*(96.1)*	(2,721)	*(3.9)*	(69,326)
Maine	4,766[1]	*97.3*	132	*2.7*	4,898
New Hampshire	2,075	*95.9*	88	*4.1*	2,163
Vermont	2,017	*94.3*	122	*5.7*	2,139
Massachusetts	40,200[1]	*98.2*	731	*1.8*	40,931
Rhode Island	4,135	*97.3*	116	*2.7*	4,251
Connecticut	13,412	*89.7*	1,532	*10.3*	14,944
MIDDLE ATLANTIC	(222,200)	*(95.0)*	(11,718)	*(5.0)*	(233,918)
New York	139,175	*99.4*	849	*0.6*	140,024
New Jersey	28,431[1]	*76.9*	8,536	*23.1*	36,967
Pennsylvania	54,594	*95.9*	2,333	*4.1*	56,927
EAST NORTH CENTRAL	(165,975)	*(95.2)*	(8,355)	*(4.8)*	(174,330)
Ohio	37,687	*96.8*	1,252	*3.2*	38,939
Indiana	11,763	*82.1*	2,572	*17.9*	14,335
Illinois	64,774	*95.8*	2,860	*4.2*	67,634
Michigan	33,987[2]	*98.6*	466	*1.4*	34,453
Wisconsin	17,764[1]	*93.6*	1,205	*6.4*	18,969
WEST NORTH CENTRAL	(43,270)	*(85.5)*	(7,358)	*(14.5)*	(50,628)
Minnesota	14,521	*99.8*	36	*0.2*	14,557
Iowa	3,681[2]	*71.3*	1,480	*28.7*	5,161
Missouri	13,137	*77.2*	3,883	*22.8*	17,020
North Dakota	2,150[1]	*82.5*	457	*17.5*	2,607
South Dakota	845	*52.7*	757	*47.3*	1,602
Nebraska	3,383	*92.7*	268	*7.3*	3,651
Kansas	5,553	*92.1*	477	*7.9*	6,030
SOUTH ATLANTIC	(180,226)	*(88.5)*	(23,443)	*(11.5)*	(203,669)
Delaware	3,410[1]	*79.9*	858	*20.1*	4,268
Maryland	23,731	*69.2*	10,545	*30.8*	34,276
Dist. of Columbia	13,350	*97.4*	351	*2.6*	13,701
Virginia	28,389	*85.3*	4,899	*14.7*	33,288
West Virginia	2,333[2]	*54.0*	1,990	*46.0*	4,323
North Carolina	25,277	*93.7*	1,704	*6.3*	26,981
South Carolina	9,700	*81.1*	2,264	*18.9*	11,964
Georgia	30,152	*98.3*	508	*1.7*	30,660
Florida	43,884[1]	*99.3*	324	*0.7*	44,208
EAST SOUTH CENTRAL	(32,362)	*(76.3)*	(10,079)	*(23.7)*	(42,441)
Kentucky	5,520	*52.2*	5,056	*47.8*	10,576
Tennessee	15,067	*94.6*	866	*5.4*	15,933
Alabama	8,742[2]	*84.2*	1,644	*15.8*	10,386
Mississippi	3,033	*54.7*	2,513	*45.3*	5,546
WEST SOUTH CENTRAL	(88,900)	*(98.0)*	(1,838)	*(2.0)*	(90,738)
Arkansas	5,014[1]	*85.7*	840	*14.3*	5,854
Louisiana	9,861	*95.9*	422	*4.1*	10,283
Oklahoma	10,072[1]	*97.5*	261	*2.5*	10,333
Texas	63,953[1]	*99.5*	315	*0.5*	64,268

Table 5 (Continued)
Reported Legal Abortions with State of Residence Known,*
by Census Division and State, 1978

State of Residence by Census Division	Abortions Performed in State of Residence No.	%	Abortions Performed Outside State of Residence No.	%	Total
MOUNTAIN	(37,685)	*(93.2)*	(2,748)	*(6.8)*	(40,433)
Montana	2,927	*91.4*	275	*8.6*	3,202
Idaho	1,991	*91.1*	195	*8.9*	2,186
Wyoming	716[1]	*49.5*	731	*50.5*	1,447
Colorado	13,940	*99.1*	129	*0.9*	14,069
New Mexico	4,493	*96.7*	152	*3.3*	4,645
Arizona	6,619	*97.9*	144	*2.1*	6,763
Utah	2,932	*97.3*	81	*2.7*	3,013
Nevada	4,067	*79.6*	1,041	*20.4*	5,108
PACIFIC	(217,944)	*(99.4)*	(1,401)	*(0.6)*	(219,345)
Washington	26,448	*98.3*	451	*1.7*	26,899
Oregon	13,043	*99.7*	42	*0.3*	13,085
California	171,982	*99.5*	865	*0.5*	172,847
Alaska	663	*96.2*	26	*3.8*	689
Hawaii	5,808	*99.7*	17	*0.3*	5,825
TOTAL	1,055,167[3]	*93.8*	69,661	*6.2*	1,124,828[4]

[1] Residence information not available; all abortions reported are assumed to have been performed on residents of the state

[2] Abortions reported from hospitals and/or facilities in state. Residence data based on percentages and actual number as reported by hospitals and/or facilities in the state

[3] Total number of abortions performed in state of residence is greater than total number of abortions with residence known shown on Table 4 because the 12 states with unknown residence data (see Table 4) are included in Table 5, with all abortions assumed to have been performed on residents of the state (see footnote 1).

[4] Does not agree with Table 1 because abortions with state of residence unknown are excluded

*Excludes 32,948 abortions with state of residence unknown (2,014 out-of-country residents were classified as state of residence unknown). Data problems related to abortions performed in Illinois on out-of-state women may have contributed to a change in the number of out-of-state abortions between 1977 and 1978 for some states, especially Indiana, Kentucky, and Nevada.

Table 6
Reported Legal Abortions, by Woman's Age and State of Occurrence, Selected States,* 1978

	Years of Age																	
	< 15		15-19		20-24		25-29		30-34		35-39		≥ 40		Unknown		Total	
State	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	6	0.9	176	26.3	242	36.2	146	21.8	65	9.7	15	2.2	9	1.3	10	1.5	669	100.0
Arizona	58	0.8	2,093	30.6	2,541	37.2	1,148	16.8	496	7.3	223	3.3	60	0.9	214	3.1	6,833	100.0
Arkansas	66	1.3	1,823	36.4	1,668	33.3	768	15.3	389	7.8	216	4.3	82	1.6	2	0.0	5,014	100.0
Colorado	131	0.9	4,795	31.1	5,459	35.5	2,936	19.1	1,283	8.3	501	3.3	151	1.0	141	0.9	15,397	100.0
Connecticut	96	0.7	4,066	29.5	4,790	34.8	2,385	17.3	1,344	9.8	663	4.8	214	1.6	226	1.6	13,784	100.0
Dist. of Col.	350	1.2	6,559	22.0	10,616	35.6	6,736	22.6	3,295	11.1	2,109[1]	7.1	--[1]	--	121	0.4	29,786	100.0
Georgia	600	1.7	10,370	29.9	11,785	34.0	6,679	19.3	3,290	9.5	1,354	3.9	483	1.4	96	0.3	34,657	100.0
Hawaii	32	0.5	1,241	20.6	2,138	35.6	1,414	23.5	752	12.5	275	4.6	154	2.6	8	0.1	6,014	100.0
Idaho	17	0.8	710	33.7	734	34.8	350	16.6	179	8.5	70	3.3	29	1.4	18	0.9	2,107	100.0
Illinois	703	1.0	18,759	26.9	23,419	33.5	13,006	18.6	6,685	9.6	3,415	4.9	1,354	1.9	2,488	3.6	69,829	100.0
Indiana	117	1.0	3,903	32.5	4,273	35.6	1,991	16.6	999	8.3	488	4.1	181	1.5	51	0.4	12,003	100.0
Kansas	111	1.2	3,464	37.5	2,998	32.5	1,417	15.4	676	7.3	349	3.8	150	1.6	64	0.7	9,229	100.0
Louisiana	164	1.5	3,150	28.0	3,855	34.3	2,262	20.1	1,061	9.4	530	4.7	153	1.4	61	0.5	11,236	100.0
Maryland	425	1.7	8,335	33.8	8,710	35.3	4,170	16.9	1,920	7.8	859	3.5	262	1.1	0	0.0	24,681	100.0
Massachusetts	193	0.5	11,483	28.6	14,693	36.5	7,635	19.0	3,719	9.3	1,749	4.4	588	1.5	140	0.3	40,200	100.0
Minnesota	94	0.5	6,295	36.5	6,030	34.9	2,631	15.2	1,116	6.5	559	3.2	192	1.1	345	2.0	17,262	100.0
Mississippi	63	1.9	1,085	33.1	1,138	34.7	561	17.1	247	7.5	132	4.0	53	1.6	1	0.0	3,280	100.0
Missouri	215	1.4	4,667	30.1	5,411	34.9	2,813	18.1	1,433	9.2	736	4.7	234	1.5	10	0.1	15,519	100.0
Montana	23	0.8	985	32.4	1,137	37.4	571	18.8	200	6.6	95	3.1	33	1.1	0	0.0	3,044	100.0
Nebraska	50	1.0	1,988	41.1	1,623	33.6	623	12.9	288	6.0	169	3.5	94	1.9	2	0.0	4,837	100.0
Nevada	49	1.0	1,301	27.5	1,712	36.2	938	19.8	455	9.6	208	4.4	71	1.5	0	0.0	4,734	100.0
New Hampshire	22	1.0	857	37.3	814	35.4	334	14.5	158	6.9	69	3.0	27	1.2	19	0.8	2,300	100.0
New Jersey	249	0.9	7,262	25.5	9,344	32.9	5,500	19.3	3,457	12.2	1,883	6.6	690	2.4	46	0.2	28,431	100.0
New Mexico	36	0.8	1,452	30.6	1,621	34.1	957	20.1	416	8.8	184	3.9	76	1.6	10	0.2	4,752	100.0
New York	1,267	0.8	36,157	23.5	51,084	33.2	32,345	21.0	18,798	12.2	9,532	6.2	3,144	2.0	1,376	0.9	153,703	100.0
(City)	(886)	(0.8)	(21,805)	(20.6)	(34,942)	(33.0)	(24,402)	(23.1)	(14,198)	(13.4)	(6,879)	(6.5)	(2,109)	(2.0)	(616)	(0.6)	(105,837)	(100.0)
(Upstate)	(381)	(0.8)	(14,352)	(30.0)	(16,142)	(33.7)	(7,943)	(16.6)	(4,600)	(9.6)	(2,653)	(5.5)	(1,035)	(2.2)	(760)	(1.6)	(47,866)	(100.0)
N. Carolina	465	1.7	8,921	32.7	9,397	34.5	4,519	16.6	2,163	7.9	1,068	3.9	379	1.4	354	1.3	27,266	100.0
Ohio	248	0.6	10,913	26.3	15,291	36.9	7,537	18.2	3,483	8.4	1,787	4.3	754	1.8	1,434	3.5	41,447	100.0
Oregon	106	0.8	4,443	32.7	4,743	34.9	2,528	18.6	1,153	8.5	460	3.4	139	1.0	33	0.2	13,605	100.0
Pennsylvania	642	1.1	18,931	31.2	22,098	36.4	10,558	17.4	5,078	8.4	2,386	3.9	892	1.5	54	0.1	60,639	100.0
Rhode Island	24	0.5	1,186	26.4	1,720	38.2	829	18.4	423	9.4	197	4.4	74	1.6	44	1.0	4,497	100.0
S. Carolina	155	1.6	3,405	34.2	3,423	34.3	1,694	17.0	806	8.1	371	3.7	111	1.1	4	0.0	9,959	100.0
South Dakota	5	0.4	524	37.5	499	35.7	177	12.7	78	5.6	48	3.4	22	1.6	43	3.1	1,390	100.0
Tennessee	251	1.3	6,196	32.8	6,500	34.4	3,276	17.3	1,547	8.2	746	3.9	250	1.3	123	0.7	18,889	100.0
Utah	12	0.4	687	21.9	1,172	37.4	698	22.3	276	8.8	139	4.4	47	1.5	99	3.2	3,130	100.0
Vermont	14	0.5	794	30.7	1,023	39.5	424	16.4	207	8.0	100	3.9	26	1.0	0	0.0	2,588	100.0
Virginia	404	1.3	9,957	32.7	10,524	34.6	5,142	16.9	2,707	8.9	1,281	4.2	386	1.3	41	0.1	30,442	100.0
Washington	284	1.0	10,090	33.8	10,303	34.5	5,341	17.9	2,421	8.1	1,028	3.4	372	1.2	9	0.0	29,848	100.0
Wyoming	8	1.1	245	34.2	265	37.0	113	15.8	49	6.8	18	2.5	13	1.8	5	0.7	716	100.0
Total	7,755	1.0	219,268	28.7	264,793	34.7	143,152	18.7	73,112	9.6	36,012	4.7	11,949	1.6	7,692	1.0	763,733	100.0
Abortion ratio[2]	1,149		650		370		218		235		435		788				336	

[1] Reported as ≥35

[2] Calculated as the number of legal abortions for women of a given age group per 1,000 live births to women in the same age group. "Unknown" age for each state is distributed according to known age distribution of that state.

*All states with data available (38)

Table 7
Reported Legal Abortions Obtained by Teenagers,
Selected States,* 1978

State	Years of Age < 15	15	16	17	18	19	Total
Arizona	58	144	304	404	604	637	2,151
Arkansas	66	148	294	375	544	462	1,889
Colorado	131	296	751	1,000	1,442	1,306	4,926
Georgia	600	867	1,565	1,911	3,194	2,833	10,970
Hawaii	32	84	143	200	389	425	1,273
Idaho	17	34	118	144	230	184	727
Illinois	703	1,215	2,415	3,551	5,921	5,657	19,462
Indiana	117	277	550	793	1,180	1,103	4,020
Kansas	111	291	594	783	951	845	3,575
Louisiana	164	250	402	554	1,019	925	3,314
Massachusetts	193	576	1,379	2,384	3,396	3,748	11,676
Minnesota	94	368	918	1,299	1,914	1,796	6,389
Mississippi	63	95	160	236	304	290	1,148
Missouri	215	349	775	1,021	1,245	1,277	4,882
Montana	23	62	129	167	340	287	1,008
Nebraska	50	140	320	427	528	573	2,038
Nevada	49	91	182	241	412	375	1,350
New Hampshire	22	42	143	203	231	238	879
New Mexico	36	92	187	313	446	414	1,488
New York	1,267	2,499	4,421	6,965	11,153	11,119	37,424
(City)	(886)	(1,616)	(2,700)	(4,219)	(6,484)	(6,786)	(22,691)
(Upstate)	(381)	(883)	(1,721)	(2,746)	(4,669)	(4,333)	(14,733)
North Carolina	465	763	1,417	1,737	2,630	2,374	9,386
Ohio	248	545	1,208	2,164	3,206	3,790	11,161
Oregon	106	364	720	1,003	1,209	1,147	4,549
Pennsylvania	642	1,325	2,569	3,973	5,555	5,509	19,573
Rhode Island	24	72	127	168	410	409	1,210
South Carolina	155	257	564	774	928	882	3,560
South Dakota	5	45	66	117	144	152	529
Tennessee	251	447	794	1,141	2,022	1,792	6,447
Utah	12	25	71	123	211	257	699
Vermont	14	29	91	136	259	279	808
Virginia	404	782	1,469	2,042	2,947	2,717	10,361
Wyoming	8	25	37	48	55	80	253
Total	6,345	12,599	24,883	36,397	55,019	53,882	189,125
% Distribution	3.4	6.7	13.2	19.2	29.1	28.5	100.0
Abortion ratio[1]	1,058	788	691	602	651	515	615

[1] Calculated as the number of legal abortions for women of a given age per 1,000 live births to women of the same age. "Unknown" age for each state is distributed according to known age distribution of that state.

*All states with data available (32)

Table 8
Reported Legal Abortions by Race and State of Occurrence,
Selected States,* 1978

State	White		Black & Other		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%
Alaska	459	*68.6*	208	*31.1*	2	*0.3*	669	*100.0*
Arizona	5,587	*81.8*	937	*13.7*	309	*4.5*	6,833	*100.0*
Arkansas	3,854	*76.9*	1,101	*22.0*	59	*1.2*	5,014	*100.0*
Colorado	10,955	*71.2*	1,164	*7.6*	3,278	*21.2*	15,397	*100.0*
Dist. of Columbia	10,705	*35.9*	18,555	*62.3*	526	*1.8*	29,786	*100.0*
Georgia	22,399	*64.6*	11,971	*34.5*	287	*0.8*	34,657	*100.0*
Hawaii	2,027	*33.7*	3,328	*55.3*	659	*11.0*	6,014	*100.0*
Idaho	2,026	*96.2*	62	*2.9*	19	*0.9*	2,107	*100.0*
Illinois	40,977	*58.7*	27,161	*38.9*	1,691	*2.4*	69,829	*100.0*
Indiana	9,652	*80.4*	2,187	*18.2*	164	*1.4*	12,003	*100.0*
Kansas	6,136	*66.5*	1,048	*11.4*	2,045	*22.1*	9,229	*100.0*
Louisiana	5,395	*48.0*	4,968	*44.2*	873	*7.8*	11,236	*100.0*
Maryland	14,944	*60.5*	9,406	*38.1*	331	*1.3*	24,681	*100.0*
Minnesota	14,594	*84.5*	648	*3.8*	2,020	*11.7*	17,262	*100.0*
Mississippi	1,998	*60.9*	1,270	*38.7*	12	*0.4*	3,280	*100.0*
Missouri	10,683	*68.8*	4,791	*30.9*	45	*0.3*	15,519	*100.0*
Montana	2,258	*74.2*	154	*5.1*	632	*20.8*	3,044	*100.0*
Nebraska	4,470	*92.4*	359	*7.4*	8	*0.2*	4,837	*100.0*
Nevada	4,185	*88.4*	529	*11.2*	20	*0.4*	4,734	*100.0*
New Hampshire	1,859	*80.8*	14	*0.6*	427	*18.6*	2,300	*100.0*
New Jersey	17,258	*60.7*	10,522	*37.0*	651	*2.3*	28,431	*100.0*
New Mexico	4,147	*87.3*	605	*12.7*	0	*0.0*	4,752	*100.0*
New York	94,274	*61.3*	58,363	*38.0*	1,066	*0.7*	153,703	*100.0*
(City)	(54,729)	*(51.7)*	(51,108)	*(48.3)*	(0)	*(0.0)*	(105,837)	*(100.0)*
(Upstate)	(39,545)	*(82.6)*	(7,255)	*(15.2)*	(1,066)	*(2.2)*	(47,866)	*(100.0)*
North Carolina	17,062	*62.6*	9,433	*34.6*	771	*2.8*	27,266	*100.0*
Ohio	26,389	*63.7*	9,026	*21.8*	6,032	*14.6*	41,447	*100.0*
Oregon	12,563	*92.3*	634	*4.7*	408	*3.0*	13,605	*100.0*
Rhode Island	3,607	*80.2*	355	*7.9*	535	*11.9*	4,497	*100.0*
South Carolina	5,992	*60.1*	3,971	*39.8*	6	*0.1*	9,969	*100.0*
South Dakota	1,170	*83.8*	205	*14.7*	21	*1.5*	1,396	*100.0*
Tennessee	14,732	*78.0*	4,070	*21.5*	87	*0.5*	18,889	*100.0*
Utah	2,839	*90.7*	168	*5.4*	123	*3.9*	3,130	*100.0*
Vermont	2,524	*97.5*	32	*1.2*	32	*1.2*	2,588	*100.0*
Virginia	20,997	*69.0*	9,445	*31.0*	0	*0.0*	30,442	*100.0*
Total	398,717	*64.5*	196,690	*31.8*	23,139	*3.7*	618,546	*100.0*
Abortion ratio[1]	297		497				344	

[1] Calculated as the number of legal abortions for women of a given race per 1,000 live births to women of the same race. "Unknown" race for each state is distributed according to known race distribution of that state. Excludes states reporting more than 15% of abortions as race "unknown"

*All states with data available (33)

Table 9
Reported Legal Abortions, by Marital Status
and State of Occurrence, Selected States,* 1978

State	Married		Unmarried[1]		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%
Alaska	207	30.9	453	67.7	9	1.3	669	100.0
Arizona	1,575	23.0	4,875	71.3	383	5.6	6,833	100.0
Arkansas	1,327	26.5	3,622	72.2	65	1.3	5,014	100.0
Colorado	3,838	24.9	10,880	70.7	679	4.4	15,397	100.0
Dist. of Columbia	7,984	26.8	20,825	69.9	977	3.3	29,786	100.0
Georgia[2]	8,930	25.8	25,171	72.6	556	1.6	34,657	100.0
Hawaii	1,853	30.8	4,043	67.2	118	2.0	6,014	100.0
Illinois	18,644	26.7	49,689	71.2	1,496	2.1	69,829	100.0
Indiana	2,859	23.8	8,953	74.6	191	1.6	12,003	100.0
Kansas	2,278	24.7	6,921	75.0	30	0.3	9,229	100.0
Louisiana	3,170	28.2	7,085	63.1	981	8.7	11,236	100.0
Maryland[2]	6,362	25.8	18,081	73.3	238	1.0	24,681	100.0
Minnesota	2,971	17.2	13,683	79.3	608	3.5	17,262	100.0
Mississippi	855	26.1	2,416	73.7	9	0.3	3,280	100.0
Missouri	3,873	25.0	11,577	74.6	69	0.4	15,519	100.0
Montana	587	19.3	1,840	60.4	617	20.3	3,044	100.0
Nebraska	946	19.6	3,887	80.4	4	0.1	4,837	100.0
Nevada[2]	1,217	25.7	3,481	73.5	36	0.8	4,734	100.0
New Hampshire	460	20.0	1,755	76.3	85	3.7	2,300	100.0
New Mexico[2]	1,120	23.6	3,623	76.2	9	0.2	4,752	100.0
New York[2]	42,833	27.9	109,731	71.4	1,139	0.7	153,703	100.0
(City)	(31,010)	(29.3)	(73,688)	(69.6)	(1,139)	(1.1)	(105,837)	(100.0)
(Upstate)	(11,823)	(24.7)	(36,043)	(75.3)	(0)	(0.0)	(47,866)	(100.0)
North Carolina	8,514	31.2	17,711	65.0	1,041	3.8	27,266	100.0
Ohio[2]	9,588	23.1	30,363	73.3	1,496	3.6	41,447	100.0
Oregon	3,531	26.0	9,956	73.2	118	0.9	13,605	100.0
Rhode Island	1,188	26.4	3,200	71.2	109	2.4	4,497	100.0
South Carolina	2,688	27.0	7,275	73.0	6	0.1	9,969	100.0
South Dakota	309	22.1	1,064	76.2	23	1.6	1,396	100.0
Tennessee	5,145	27.2	13,586	71.9	158	0.8	18,889	100.0
Utah	630	20.1	2,479	79.2	21	0.7	3,130	100.0
Vermont	561	21.7	2,015	77.9	12	0.5	2,588	100.0
Virginia	6,885	22.6	23,557	77.4	0	0.0	30,442	100.0
Washington	7,114	23.8	22,434	75.2	300	1.0	29,848	100.0
Total	160,042	25.9	446,231	72.2	11,583	1.9	617,856	100.0
Abortion ratio[3]	112		1,471				351	

[1] Includes never married, widowed, and divorced

[2] Distribution of live births by legitimacy status for calculation of abortion ratios from central health agency

[3] Calculated as the number of legal abortions for women of a given marital status per 1,000 live births of the corresponding legitimacy status. "Unknown" marital status for each state is distributed according to known marital status distribution of that state. Excludes states reporting more than 15% of abortions as marital status "unknown"

*All states with data available (32)

Table 10
Reported Legal Abortions, by Number of Live Births and State of Occurrence, Selected States,* 1978

State	0		1		2		3		≥ 4		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	401	59.9	127	19.0	81	12.1	40	6.0	19	2.8	1	0.1	669	100.0
Arizona	4,321	63.2	1,171	17.1	794	11.6	326	4.8	221	3.2	0	0.0	6,833	100.0
Colorado	8,568	55.6	2,364	15.4	1,644	10.7	539	3.5	317	2.1	1,965	12.8	15,397	100.0
Georgia	20,164	58.2	6,910	19.9	4,696	13.5	1,805	5.2	1,082	3.1	0	0.0	34,657	100.0
Hawaii	4,119	68.5	814	13.5	651	10.8	267	4.4	163	2.7	0	0.0	6,014	100.0
Idaho[1]	1,259	59.8	386	18.3	248	11.8	90	4.3	66	3.1	58	2.8	2,107	100.0
Illinois	36,027	51.6	13,559	19.4	10,455	15.0	5,031	7.2	4,750	6.8	7	0.0	69,829	100.0
Indiana	6,202	51.7	2,240	18.7	1,665	13.9	653	5.4	453	3.8	790	6.6	12,003	100.0
Kansas	5,848	63.4	1,495	16.2	1,094	11.9	439	4.8	286	3.1	57	0.7	9,229	100.0
Maryland	14,917	60.4	5,127	20.8	2,990	12.1	1,034	4.2	547	2.2	66	0.3	24,681	100.0
Minnesota	12,667	73.4	2,278	13.2	1,407	8.2	545	3.2	365	2.1	0	0.0	17,262	100.0
Mississippi	1,889	57.6	627	19.1	423	12.9	181	5.5	159	4.8	1	0.0	3,280	100.0
Missouri	8,550	55.1	3,090	19.9	2,219	14.3	950	6.1	704	4.5	6	0.0	15,519	100.0
Montana[1]	2,109	69.3	430	14.1	320	10.5	107	3.5	63	2.1	15	0.5	3,044	100.0
Nebraska	3,421	70.7	570	11.8	452	9.3	229	4.7	164	3.4	1	0.0	4,837	100.0
Nevada	2,892	61.1	882	18.6	589	12.4	230	4.9	125	2.6	16	0.3	4,734	100.0
New Hampshire	684	29.7	292	12.7	155	6.7	86	3.7	33	1.4	1,050	45.7	2,300	100.0
New Mexico	2,632	55.4	882	18.6	521	11.0	217	4.6	194	4.1	306	6.4	4,752	100.0
New York	73,367	47.7	29,938	19.5	23,929	15.6	10,786	7.0	7,319	4.8	8,364	5.4	153,703	100.0
(City)	(50,098)	(47.3)	(23,720)	(22.4)	(18,326)	(17.3)	(8,179)	(7.7)	(5,514)	(5.2)	(0)	(0.0)	(105,837)	(100.0)
(Upstate)	(23,269)	(48.6)	(6,218)	(13.0)	(5,603)	(11.7)	(2,607)	(5.4)	(1,805)	(3.8)	(8,364)	(17.5)	(47,866)	(100.0)
N. Carolina	14,812	54.3	5,175	19.0	3,717	13.6	1,299	4.8	913	3.3	1,350	5.0	27,266	100.0
Ohio[1]	24,779	59.8	7,869	19.0	5,389	13.0	2,117	5.1	1,278	3.1	15	0.1	41,447	100.0
Oregon	8,568	63.0	2,352	17.3	1,453	10.7	506	3.7	281	2.1	445	3.3	13,605	100.0
Rhode Island[1]	2,707	60.2	800	17.8	564	12.5	225	5.0	149	3.3	52	1.2	4,497	100.0
S. Carolina	5,735	57.5	1,943	19.5	1,312	13.2	554	5.6	417	4.2	8	0.1	9,969	100.0
South Dakota[1]	803	57.5	197	14.1	157	11.2	69	4.9	61	4.4	109	7.8	1,396	100.0
Tennessee	11,147	59.0	3,662	19.4	2,531	13.4	882	4.7	541	2.9	126	0.7	18,889	100.0
Utah	1,815	58.0	565	18.1	411	13.1	183	5.8	127	4.1	29	0.9	3,130	100.0
Vermont	1,934	74.7	265	10.2	229	8.8	93	3.6	61	2.4	6	0.2	2,588	100.0
Wyoming	464	64.8	111	15.5	84	11.7	31	4.3	19	2.7	7	1.0	716	100.0
Total	282,801	55.0	96,121	18.7	70,180	13.6	29,514	5.7	20,877	4.1	14,860	2.9	514,353	100.0
Abortion ratio[2]	446		201		307		327		291				332	

[1] Number of living children

[2] Calculated as the number of legal abortions to women with n live births per 1,000 live births to women with n live births. "Unknown" live births for each state are distributed according to distribution of known. Excludes states reporting more than 15% of abortions as number of live births "unknown."

*All states with data available (29)

Table 11
Reported Legal Abortions, by Type of Procedure and State of Occurrence, Selected States,* 1978

State	Curettage		Intrauterine Saline Instillation		Intrauterine Prostaglandin Instillation[1]		Hysterotomy/ Hysterectomy		Other[2]		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	658	98.4	--	--	--	--	--	--	3	0.4	8	1.2	669	100.0
Arizona	6,615	96.8	72	1.1	47	0.7	1	0.0	1	0.0	97	1.4	6,833	100.0
Arkansas	4,632	92.4	5	0.1	295	5.9	28	0.6	48	1.0	6	0.1	5,014	100.0
Colorado	13,911	90.3	71	0.5	1,049	6.8	39	0.3	313	2.0	14	0.1	15,397	100.0
Connecticut	12,819	93.0	218[3]	1.6	--[3]	--	6	0.0	557[4]	4.0	184	1.3	13,784	100.0
Dist. of Col.	29,074	97.6	483	1.6	--	--	1	0.0	115	0.4	113	0.4	29,786	100.0
Georgia	32,026	92.4	202	0.6	401	1.2	100	0.3	1,922	5.5	6	0.0	34,657	100.0
Hawaii	5,308	88.3	7	0.1	291	4.8	5	0.1	389	6.5	14	0.2	6,014	100.0
Idaho	2,075	98.5	1	0.0	1	0.0	4	0.2	2	0.1	24	1.1	2,107	100.0
Illinois	66,289	94.9	172	0.2	564	0.8	19	0.0	137	0.2	2,648	3.8	69,829	100.0
Indiana	11,025	91.9	--	--	--	--	6	0.0	921	7.7	51	0.4	12,003	100.0
Kansas	8,364	90.6	326	3.5	84	0.9	9	0.1	315	3.4	131	1.4	9,229	100.0
Louisiana	10,819	96.3	2	0.0	--	--	4	0.0	241	2.1	170	1.5	11,236	100.0
Maryland	23,406	94.8	518	2.1	14	0.1	33	0.1	707	2.9	3	0.0	24,681	100.0
Massachusetts	38,881	96.7	644[5]	1.6	615[5]	1.5	18	0.0	42	0.1	0	0.0	40,200	100.0
Minnesota	16,309	94.5	0	0.0	132	0.8	0	0.0	821[4]	4.8	0	0.0	17,262	100.0
Mississippi	3,237	98.7	1	0.0	15	0.5	23	0.7	3	0.1	1	0.0	3,280	100.0
Missouri	15,223	98.1	0	0.0	268	1.7	7	0.0	2	0.0	19	0.1	15,519	100.0
Montana	2,910	95.6	6	0.2	116	3.8	3	0.1	9	0.3	0	0.0	3,044	100.0
Nebraska	4,676	96.7	159	3.3	0	0.0	1	0.0	0	0.0	1	0.0	4,837	100.0
Nevada	4,656	98.4	20	0.4	1	0.0	6	0.1	11	0.2	40	0.8	4,734	100.0
New Hampshire	1,957	85.1	8	0.3	0	0.0	1	0.0	211	9.2	123	5.3	2,300	100.0
New Jersey	27,165	95.5	803	2.8	141	0.5	16	0.1	83	0.3	223	0.8	28,431	100.0
New Mexico	4,525	95.2	49	1.0	55	1.2	2	0.0	117	2.5	4	0.1	4,752	100.0
New York	138,183	89.9	11,663	7.6	1,506	1.0	110	0.1	948	0.6	1,293	0.8	153,703	100.0
(City)	(95,891)	(90.6)	(8,440)	(8.0)	(883)	(0.8)	(38)	(0.0)	(427)	(0.4)	(158)	(0.1)	(105,837)	(100.0)
(Upstate)	(42,292)	(88.4)	(3,223)	(6.7)	(623)	(1.3)	(72)	(0.2)	(521)	(1.1)	(1,135)	(2.4)	(47,866)	(100.0)
North Carolina	24,691	90.6	1,299	4.8	689	2.5	107	0.4	233	0.9	247	0.9	27,266	100.0
Ohio[6]	41,318	94.8	946	2.2	--	--	23	0.1	177	0.4	1,135	2.6	43,599	100.0
Oregon	12,868	94.6	48	0.4	494	3.6	27	0.2	139	1.0	29	0.2	13,605	100.0
Pennsylvania	57,310	94.5	1,785	2.9	598	1.0	46	0.1	893	1.5	7	0.0	60,639	100.0
Rhode Island	4,244	94.4	191	4.2	0	0.0	2	0.0	1	0.0	59	1.3	4,497	100.0
South Carolina	9,817	98.5	15	0.2	53	0.5	14	0.1	67	0.7	3	0.0	9,969	100.0
South Dakota	1,318	94.4	33	2.4	--	--	4	0.3	8	0.6	33	2.4	1,396	100.0
Tennessee	18,387	97.3	41	0.2	235	1.2	35	0.2	16	0.1	175	0.9	18,889	100.0
Utah	3,100	99.0	--	--	1	0.0	--	--	1	0.0	28	0.9	3,130	100.0
Vermont	1,698	65.6	0	0.0	4	0.2	0	0.0	885	34.2	1	0.0	2,588	100.0
Virginia	29,191	95.9	923	3.0	178	0.6	52	0.2	33	0.1	65	0.2	30,442	100.0
Washington	28,627	95.9	1,094	3.7	62	0.2	17	0.1	16	0.1	32	0.1	29,848	100.0
Wyoming	700	97.8	--	--	7	1.0	5	0.7	--	--	4	0.6	716	100.0
Total	718,012	93.7	21,805	2.8	7,916	1.0	774	0.1	10,387	1.4	6,991	0.9	765,885	100.0

[1] Includes only intrauterine prostaglandin instillation reported as a specific category (see footnote 2)

[2] Includes intrauterine prostaglandins which are not reported as a specific category (see footnote 1) or with other instillation procedures (see footnote 3)

[3] Intrauterine prostaglandin instillation included with intrauterine saline instillation

[4] Includes combination procedures

[5] Included in intrauterine saline instillation category are 622 intrauterine prostasaline instillation procedures

[6] Does not add to total abortions because of some reported combination procedures

--Not reported

*All states with data available (38)

Table 12
Reported Legal Abortions, by Weeks of Gestation*
and State of Occurrence, Selected States,† 1978

State	≤ 8		9-10		11-12		13-15		16-20		≥ 21		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	81	12.1	252	37.7	212	31.7	47	7.0	5	0.7	2	0.3	70	10.5	669	100.0
Arizona	2,938	43.0	2,150	31.5	1,073	15.7	356	5.2	130	1.9	5	0.1	181	2.6	6,833	100.0
Arkansas	3,240	64.6	948	18.9	458	9.1	106	2.1	220	4.4	28	0.6	14	0.3	5,014	100.0
Colorado	5,332	34.6	4,407	28.6	2,358	15.3	1,350	8.8	980	6.4	377	2.4	593	3.9	15,397	100.0
Connecticut[1]	6,149	44.6	4,873	35.4	2,069	15.0	106	0.8	211	1.5	16	0.1	360	2.6	13,784	100.0
Dist. of Col.	19,550	65.6	5,896	19.8	1,922	6.5	789	2.6	599[2]	2.0	151[2]	0.5	879	3.0	29,786	100.0
Georgia	15,467	44.6	10,251	29.6	4,878	14.1	1,327	3.8	1,708	4.9	1,026	3.0	0	0.0	34,657	100.0
Hawaii	3,522	58.6	1,343	22.3	575	9.6	215	3.6	310	5.2	38	0.6	11	0.2	6,014	100.0
Idaho	981	46.6	648	30.8	351	16.7	53	2.5	6	0.3	2	0.1	66	3.1	2,107	100.0
Illinois	36,681	52.5	19,056	27.3	9,445	13.5	3,137	4.5	970	1.4	182	0.3	358	0.5	69,829	100.0
Indiana[1]	8,022	66.8	2,742	22.8	899	7.5	83	0.7	16	0.1	1	0.0	240	2.0	12,003	100.0
Kansas	3,584	38.8	2,556	27.7	1,447	15.7	723	7.8	656	7.1	230	2.5	33	0.4	9,229	100.0
Louisiana	5,157	45.9	3,338	29.7	2,225	19.8	303	2.7	150	1.3	7	0.1	56	0.5	11,236	100.0
Maryland	13,311	53.9	6,398	25.9	3,046	12.3	713	2.9	1,079	4.4	134	0.5	0	0.0	24,681	100.0
Massachusetts	22,976	57.2	10,648	26.5	3,912	9.7	966	2.4	1,432	3.6	266	0.7	0	0.0	40,200	100.0
Minnesota	5,792	33.6	5,599	32.4	3,168	18.4	1,495	8.7	1,143	6.6	65	0.4	0	0.0	17,262	100.0
Mississippi	1,330	40.5	1,101	33.6	562	17.1	140	4.3	27	0.8	8	0.2	112	3.4	3,280	100.0
Missouri	5,449	35.1	5,516	35.5	3,009	19.4	875	5.6	351	2.3	79	0.5	240	1.5	15,519	100.0
Montana	1,198	39.4	1,009	33.1	462	15.2	114	3.7	41	1.3	--	--	220	7.2	3,044	100.0
Nebraska	1,377	28.5	1,654	34.2	1,159	24.0	436	9.0	181	3.7	19	0.4	11	0.2	4,837	100.0
Nevada	3,749	79.2	734	15.5	150	3.2	16	0.3	51	1.1	3	0.1	31	0.7	4,734	100.0
New Hampshire	646	28.1	888	38.6	497	21.6	63	2.7	80	3.5	4	0.2	122	5.3	2,300	100.0
New Jersey	17,208	60.5	6,179	21.7	2,897	10.2	853	3.0	898	3.2	104	0.4	292	1.0	28,431	100.0
New Mexico	2,231	46.9	1,265	26.6	556	11.7	400	8.4	171	3.6	3	0.1	126	2.7	4,752	100.0
New York	77,359	50.3	39,354	25.6	17,489	11.4	7,706	5.0	8,628	5.6	2,698	1.8	469	0.3	153,703	100.0
(City)	(55,763)	(52.7)	(25,664)	(24.2)	(11,130)	(10.5)	(5,241)	(5.0)	(5,695)	(5.4)	(2,126)	(2.0)	(218)	(0.2)	(105,837)	(100.0)
(Upstate)	(21,596)	(45.1)	(13,690)	(28.6)	(6,359)	(13.3)	(2,465)	(5.1)	(2,933)	(6.1)	(572)	(1.2)	(251)	(0.5)	(47,866)	(100.0)
North Carolina	10,366	38.0	8,170	30.0	4,122	15.1	1,539	5.6	1,285	4.7	192	0.7	1,592	5.8	27,266	100.0
Ohio	23,093	55.7	4,229	10.2	1,054	2.5	606	1.5	861	2.1	--	--	11,604	28.0	41,447	100.0
Oregon	4,917	36.1	4,685	34.4	2,556	18.8	781	5.7	562	4.1	77	0.6	27	0.2	13,605	100.0
Pennsylvania	35,403	58.4	14,991	24.7	5,976	9.9	1,674	2.8	2,147	3.5	327	0.5	121	0.2	60,639	100.0
Rhode Island[1]	2,441	54.3	1,340	29.8	494	11.0	29	0.6	186	4.1	0	0.0	7	0.2	4,497	100.0
South Carolina	4,833	48.5	2,898	29.1	1,635	16.4	477	4.8	104	1.0	20	0.2	2	0.0	9,969	100.0
South Dakota	622	44.6	265	19.0	181	13.0	154	11.0	150	10.7	21	1.5	3	0.2	1,396	100.0
Tennessee	8,619	45.6	6,031	31.9	3,231	17.1	682	3.6	215	1.1	41	0.2	70	0.4	18,889	100.0
Utah	1,409	45.0	1,056	33.7	383	12.2	242	7.7	2	0.1	0	0.0	38	1.2	3,130	100.0
Vermont	1,527	59.0	688	26.6	269	10.4	86	3.3	12	0.5	3	0.1	3	0.1	2,588	100.0
Virginia	16,315	53.6	8,628	28.3	3,157	10.4	656	2.2	1,257	4.1	156	0.5	273	0.9	30,442	100.0
Washington	15,588	52.2	8,809	29.5	3,730	12.5	491	1.6	1,036	3.5	116	0.4	78	0.3	29,848	100.0
Wyoming	366	51.1	236	33.0	73	10.2	18	2.5	13	1.8	--	--	10	1.4	716	100.0
Total	388,829	50.9	200,831	26.3	91,680	12.0	29,807	3.9	27,873	3.6	6,401	0.8	18,312	2.4	763,733	100.0

[1] Weeks of gestation based on physician's estimate

[2] Reallocation of reported abortions into comparable categories based on percentage distribution of abortions by single weeks of gestation reported from 32 states

*Weeks from last menstrual period

†All states with data available (38)

Table 13
Reported Legal Abortions, by Number of
Previous Induced Abortions, Selected States,* 1978

State	0		1		2		≥ 3		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	496	74.1	126	18.8	28	4.2	18	2.7	1	0.1	669	100.0
Arizona	5,221	76.4	1,344	19.7	218	3.2	50	0.7	0	0.0	6,833	100.0
Colorado	9,334	60.6	2,918	19.0	563	3.7	144	0.9	2,438	15.8	15,397	100.0
Dist. of Columbia	17,351	58.3	7,417	24.9	2,125	7.1	648	2.2	2,245	7.5	29,786	100.0
Georgia	22,206	64.1	6,904	19.9	1,315	3.8	317	0.9	3,915	11.3	34,657	100.0
Hawaii	2,995	49.8	672	11.2	244	4.1	98	1.6	2,005	33.3	6,014	100.0
Idaho	1,634	77.6	316	15.0	47	2.2	8	0.4	102	4.8	2,107	100.0
Illinois	49,827	71.4	15,692	22.5	3,300	4.7	1,010	1.4	0	0.0	69,829	100.0
Indiana	8,242	68.7	1,845	15.4	289	2.4	70	0.6	1,557	13.0	12,003	100.0
Kansas	7,461	80.8	1,441	15.6	204	2.2	48	0.5	75	0.8	9,229	100.0
Maryland	17,286	70.0	5,693	23.1	1,288	5.2	335	1.4	79	0.3	24,681	100.0
Massachusetts	27,577	68.6	8,456	21.0	1,728	4.3	448	1.1	1,991	5.0	40,200	100.0
Minnesota	14,044	81.4	2,741	15.9	380	2.2	97	0.6	0	0.0	17,262	100.0
Mississippi	2,845	86.7	382	11.6	42	1.3	8	0.2	3	0.1	3,280	100.0
Missouri	12,017	77.4	2,806	18.1	544	3.5	138	0.9	14	0.1	15,519	100.0
Montana	2,512	82.5	445	14.6	50	1.6	14	0.5	23	0.8	3,044	100.0
Nebraska	4,238	87.6	487	10.1	96	2.0	13	0.3	3	0.1	4,837	100.0
Nevada	3,094	65.4	1,209	25.5	293	6.2	91	1.9	47	1.0	4,734	100.0
New Hampshire	806	35.0	305	13.3	46	2.0	14	0.6	1,129	49.1	2,300	100.0
New Jersey	15,735	55.3	7,031	24.7	1,702	6.0	567	2.0	3,396	11.9	28,431	100.0
New Mexico	3,303	69.5	842	17.7	148	3.1	51	1.1	408	8.6	4,752	100.0
New York	91,907	59.8	36,174	23.5	11,607	7.6	4,909	3.2	9,106	5.9	153,703	100.0
(City)	(62,666)	(59.2)	(28,759)	(27.2)	(10,012)	(9.5)	(4,400)	(4.2)	(0)	(0.0)	(105,837)	(100.0)
(Upstate)	(29,241)	(61.1)	(7,415)	(15.5)	(1,595)	(3.3)	(509)	(1.1)	(9,106)	(19.0)	(47,866)	(100.0)
North Carolina	20,205	74.1	4,326	15.9	606	2.2	113	0.4	2,016	7.4	27,266	100.0
Oregon	9,577	70.4	2,973	21.9	690	5.1	178	1.3	187	1.4	13,605	100.0
Rhode Island	3,265	72.6	886	19.7	170	3.8	36	0.8	140	3.1	4,497	100.0
South Carolina	8,027	80.5	1,614	16.2	256	2.6	59	0.6	13	0.1	9,969	100.0
South Dakota	1,035	74.1	244	17.5	47	3.4	12	0.9	58	4.2	1,396	100.0
Tennessee	14,846	78.6	3,181	16.8	483	2.6	142	0.8	237	1.3	18,889	100.0
Utah	2,437	77.9	535	17.1	96	3.1	25	0.8	37	1.2	3,130	100.0
Vermont	2,000	77.3	435	16.8	80	3.1	20	0.8	53	2.0	2,588	100.0
Wyoming	547	76.4	147	20.5	8	1.1	9	1.3	5	0.7	716	100.0
Total	382,070	66.9	119,587	20.9	28,693	5.0	9,690	1.7	31,283	5.5	571,323	100.0

*All states with data available (31)

Table 14
Percentage of Reported Legal Abortions, by Weeks of Gestation and Type of Procedure,* 1978

Weeks of Gestation	Type of Procedure					
	Curettage	Intrauterine Saline Instillation	Intrauterine Prostaglandin Instillation	Hysterotomy/ Hysterectomy	Other	Total
≤ 8	*51.6* *(98.9)*	*1.6* *(0.1)*	*1.3* *(0.0)*	*31.4* *(0.1)*	*30.0* *(0.9)*	*49.2* *(100.0)*
9-10	*29.5* *(99.1)*	*2.1* *(0.2)*	*1.6* *(0.1)*	*17.2* *(0.1)*	*10.2* *(0.6)*	*28.1* *(100.0)*
11-12	*13.8* *(97.2)*	*4.3* *(0.9)*	*3.8* *(0.3)*	*14.2* *(0.1)*	*12.4* *(1.4)*	*13.4* *(100.0)*
13-15	*3.9* *(82.1)*	*15.0* *(10.0)*	*16.9* *(4.3)*	*13.1* *(0.3)*	*9.3* *(3.3)*	*4.4* *(100.0)*
16-20	*1.0* *(24.6)*	*59.6* *(45.6)*	*63.2* *(18.7)*	*20.3* *(0.5)*	*26.4* *(10.6)*	*3.9* *(100.0)*
≥ 21	*0.1* *(12.8)*	*17.4* *(52.8)*	*13.2* *(15.4)*	*3.8* *(0.4)*	*11.7* *(18.6)*	*1.0* *(100.0)*
Total	*100.0* *(94.3)*	*100.0* *(2.9)*	*100.0* *(1.1)*	*100.0* *(0.1)*	*100.0* *(1.5)*	*100.0* *(100.0)*

*Based on data from 32 states

Table 15
Percentage of Reported Legal Abortions, by Weeks of Gestation and Age Group,* 1978

Weeks of Gestation	Age Group							Total
	< 15	15-19	20-24	25-29	30-34	35-39	≥ 40	
≤ 8	32.7 (0.7)	40.8 (23.5)	50.6 (35.0)	56.7 (21.5)	59.7 (11.7)	59.3 (5.7)	57.5 (1.9)	50.2 (100.0)
9-10	26.0 (1.0)	29.7 (31.2)	27.8 (35.1)	26.0 (18.0)	25.1 (9.0)	24.5 (4.3)	23.8 (1.5)	27.5 (100.0)
11-12	18.3 (1.4)	16.4 (36.2)	13.1 (34.4)	10.7 (15.6)	9.8 (7.3)	10.0 (3.6)	11.0 (1.4)	13.1 (100.0)
13-15	8.7 (2.0)	6.1 (39.6)	4.2 (32.9)	3.4 (14.6)	2.8 (6.3)	3.1 (3.3)	3.6 (1.4)	4.4 (100.0)
16-20	11.2 (3.1)	5.7 (42.9)	3.4 (31.2)	2.6 (12.8)	2.1 (5.4)	2.5 (3.1)	3.4 (1.5)	3.8 (100.0)
≥ 21	3.2 (3.5)	1.4 (42.8)	0.9 (32.0)	0.6 (12.0)	0.5 (5.1)	0.7 (3.4)	0.8 (1.4)	1.0 (100.0)
Total	100.0 (1.0)	100.0 (28.9)	100.0 (34.7)	100.0 (19.0)	100.0 (9.8)	100.0 (4.8)	100.0 (1.7)	100.0 (100.0)

*Based on data from 31 states

Table 16
Percentage of Reported Legal Abortions,
by Weeks of Gestation and Race,* 1978

Weeks of Gestation	Race		Total
	White	Black & Other	
≤ 8	48.4	47.2	48.0
	(68.6)	(31.4)	(100.0)
9-10	28.4	27.4	28.1
	(68.8)	(31.2)	(100.0)
11-12	13.5	14.3	13.8
	(66.8)	(33.2)	(100.0)
13-15	4.7	5.2	4.9
	(65.9)	(34.1)	(100.0)
16-20	3.7	4.6	4.0
	(63.2)	(36.8)	(100.0)
≥ 21	1.1	1.2	1.1
	(66.8)	(33.2)	(100.0)
Total	100.0	100.0	100.0
	(68.0)	(32.0)	(100.0)

*Based on data from 26 states

Table 17
Percentage of Reported Legal Abortions,
by Age Group and Race,* 1978

Age Group	Race		Total
	White	Black & Other	
< 15	0.7 (47.6)	1.7 (52.4)	1.0 (100.0)
15-19	30.8 (73.3)	24.1 (26.7)	28.7 (100.0)
20-24	34.8 (68.6)	34.3 (31.4)	34.6 (100.0)
25-29	17.9 (64.0)	21.7 (36.0)	19.1 (100.0)
30-34	9.3 (64.3)	11.1 (35.7)	9.9 (100.0)
35-39	4.7 (65.4)	5.3 (34.6)	4.9 (100.0)
≥ 40	1.7 (68.4)	1.7 (31.6)	1.7 (100.0)
Total	100.0 (68.3)	100.0 (31.7)	100.0 (100.0)

*Based on data from 29 states

Table 18
Percentage of Reported Legal Abortions,
by Marital Status and Race,* 1978

Marital Status	Race		Total
	White	Black & Other	
Married	26.7 (67.2)	26.6 (32.8)	26.6 (100.0)
Unmarried	73.3 (67.1)	73.4 (32.9)	73.4 (100.0)
Total	100.0 (67.1)	100.0 (32.9)	100.0 (100.0)

*Based on data from 29 states

Table 19
Death-to-Case Rate for Legal Abortions, by Year,
United States, 1972-1978

Year	Deaths[1]	Abortions	Rate[2]
1972	24	586,760	4.1
1973	25	615,831	4.1
1974	25	763,476	3.3
1975	29	854,853	3.4
1976	11	988,267	1.1
1977	15	1,079,430	1.4
1978	7	1,157,776	0.6

[1] Excludes deaths from ectopic pregnancy

[2] Deaths per 100,000 abortions

Table 20
Death-to-Case Rate for Legal Abortions,
by Weeks of Gestation, United States, 1972-1978

Weeks of Gestation	Deaths[1]	Abortions[2]	Rate[3]	Relative Risk[4]
≤ 8	13	2,749,725	0.5	1.0
9-10	24	1,705,478	1.4	2.8
11-12	20	883,932	2.3	4.6
13-15	20	300,186	6.7	13.4
16-20	47	338,488	13.9	27.8
≥ 21	12	68,584	17.5	35.0
Total	136	6,046,393	2.2	

[1] Excludes deaths from ectopic pregnancy
[2] Based on distribution of 4,292,615 abortions (71.0%) with weeks of gestation known
[3] Deaths per 100,000 abortions
[4] Based on index rate for ≤8 menstrual weeks' gestation of 0.5 per 100,000 abortions

Table 21
Death-to-Case Rate for Legal Abortions,
by Type of Procedure, United States, 1972-1978

Type of Procedure	Deaths[1]	Abortions[2]	Rate[3]	Relative Risk[4]
Instrumental evacuation	71	5,550,874	1.3	1.0
Intrauterine instillation	50	400,315	12.5	9.6
Hysterotomy/ Hysterectomy	9	21,810	41.3	31.8
Other[5]	6	73,394	8.2	6.3
Total	136	6,046,393	2.2	

[1] Excludes deaths from ectopic pregnancy
[2] Based on 4,334,991 abortions (71.7%) with type of procedure known
[3] Deaths per 100,000 abortions
[4] Based on index rate for instrumental evacuation of 1.3 per 100,000 abortions
[5] Includes 2 deaths with type of procedure unknown

Table 22
Legal Abortion Deaths* by Type of Procedure
and Weeks of Gestation, United States, 1972-1978

Type of Procedure	Weeks of Gestation						Total
	≤ 8	9-10	11-12	13-15	16-20	≥ 21	
Curettage	12	22	19				53
Dilatation and evacuation				10	7	1	18
Instillation				5	36	9	50
(Saline)				(1)	(31)	(6)	(38)
(Prostaglandin)				(3)	(5)	(1)	(9)
(Other agents)				(1)	(0)	(2)	(3)
Hysterotomy/ Hysterectomy	0	2	1	3	2	1	9
Other[1]	1	0	0	2	2	1	6
Total	13	24	20	20	47	12	136

[1] Includes 2 deaths with unknown type of procedure, 1 at 13-15 weeks and 1 at 16-20 weeks of gestation

*Excludes deaths from ectopic pregnancy

Table 23
Death-to-Case Rate* for Legal Abortions,
by Type of Procedure and Weeks of Gestation
United States, 1972-1978

Type of Procedure	Weeks of Gestation						Total
	≤ 8	9-10	11-12	13-15	16-20	≥ 21	
Curettage	0.4	1.3	2.3				1.0
Dilatation and evacuation				5.6	14.1	13.5	7.7
Instillation	0.0	0.0	0.0	8.2	14.2	19.5	12.3
(Saline)	(0.0)	(0.0)	(0.0)	(2.2)	(17.6)	(17.1)	(13.9)
(Prostaglandin and other agents[1])	(0.0)	(0.0)	(0.0)	(24.8)	6.4)	(26.7)	(9.0)
Hysterotomy/ Hysterectomy	0.0	55.5	37.2	68.3	45.2	147.3	42.8
Total[2]	0.4	1.4	2.4	8.2	15.2	22.1	2.2

[1] Denominators for rates include abortions reported as type of procedure "other" (1% of all abortions with procedure known)

[2] Includes deaths with type of procedure "other" (4) and unknown (2)

*Deaths per 100,000 abortions; based on distributions of abortions with type of procedure and weeks of gestation known

Table 24
Proportion of Abortion Deaths to Which Selected Behavioral Risk Factors Contributed, by Abortion Category and Factor, United States, 1975-1977

Abortion Category	Behavioral Risk Factor	Number of Deaths	Proportion[1]	
			%	95 % Confidence Interval
Legal (n=55)				
	Delay in obtaining legal abortion until ≥ 13 weeks' gestation	26	47	33.6-61.2
	Incomplete emptying of uterus by physician	9	16	7.8-28.8
	Perforation of uterus	9	16	7.8-28.8
	Failure to refer patient to another physician when appropriate	6	11	4.1-22.2
	Use of instillation procedure instead of dilatation and extraction for abortions requested at ≤ 16 weeks' gestation	6	11	4.1-22.2
Illegal (n=10)				
	Inappropriate choice of antibiotics for septic abortion	5	50	18.7-81.3
	Patient delay in consulting a physician for obvious complication or illness	4	40	12.2-73.8
	Delay in emptying uterus after diagnosis of septic abortion	4	40	12.2-73.8
	Community failure to adequately subsidize legal abortions for poor women	2	20	2.5-55.6
	Patient refusal to admit to physician that she had illegal abortion	2	20	2.5-55.6
Spontaneous (n=41)				
	Patient delay in consulting a physician for obvious complication or illness	9	22	10.6-37.6
	Inappropriate choice of antibiotics for septic abortion	8	20	8.8-34.8
	Physician delay in diagnosing possible septic abortion	6	15	5.6-29.2
	Delay in emptying uterus after diagnosis of incomplete abortion	4	10	2.7-23.1
	Perforation of uterus	4	10	2.7-23.1
	Patient obesity	4	10	2.7-23.1

[1] The total in each category is greater than 100% because most deaths involved more than 1 factor.

Table 25
Grounds for Legal Abortion*, by Nation, 1978

Nation	Specified Grounds				
	Medical (Broad)	Eugenic (Fetal)	Juridical (Rape, Incest, etc.)	Social and Social-Medical	On Request
Bulgaria	X	X	X	X	-
Canada	X	-	-	-	-
Cuba	-	-	-	-	X
Czechoslovakia	X	X	X	X	-
Denmark	-	-	-	-	X
England and Wales	X	X	-	X	-
Finland	X	X	X	X	-
German Democratic Republic	-	-	-	-	X
Hong Kong	X	-	-	-	-
Hungary	X	X	X	X	-
Iceland	X	X	X	X	-
Netherlands	X	-	-	-	-
Norway	-	-	-	-	X
Scotland	X	X	-	X	-
Singapore	-	-	-	-	X
Sweden	-	-	-	-	X
Tunisia	-	-	-	-	X
United States	-	-	-	-	X

*For nations where abortion is legal
Source: Data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 26
Number of Legal Abortions, Abortion Rates[1], and Abortion Ratios[2], by Selected Nations and Years

Nation	Year	Number of Abortions	Abortion Rate	Abortion Ratio
Bulgaria	1977	122,900	65.6	884
	1978	127,800	68.3	-
Cuba	1977	114,800	55.9	724
	1978	110,400	52.1	-
Hungary	1977	89,100	39.2	516
	1978	83,500	37.0	512
Singapore	1977	16,400	28.3	428
	1978	17,200	28.9	428
Czechoslovakia	1977	89,000	27.9	318
	1978	92,500	28.9	-
United States	1977	1,079,430	22.2	324
	1978	1,157,776	23.1	347
Denmark	1977	25,700	24.4	413
	1978	23,700	22.3	-
German Democratic Republic	1976	81,900	23.3	392
	1977	78,000	22.0	-
Sweden	1977	31,500	19.3	333
	1978	31,900	19.4	363
Norway	1977	15,500	19.6	305
	1978	14,800	18.4	284
Tunisia	1977	21,200	17.2	103
	1978	21,000	16.5	-
Finland	1977	17,800	16.7	277
	1978	16,900	15.8	261
England and Wales	1977	102,700	10.6	179
	1978	111,900	11.4	179
Canada	1977	57,600	10.6	160
	1978	62,300	11.3	-
Iceland	1976-78 (3 Yr. Interval)	420	8.6	-
Scotland	1976	7,200	6.9	116
	1977	7,300	6.9	-
Netherlands	1977	16,100	5.4	92
	1978	15,000	4.9	-
Hong Kong	1976	2,200	2.3	27

[1] Abortion rate = number of abortions per 1,000 women aged 15-44

[2] Abortion ratio = number of abortions per 1,000 live births

Source: For the United States, CDC Abortion Surveillance 1978; for all other statistics, data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 27
Percentage Distribution of Legal Abortions, by Woman's Age,
Selected Nations and Years

Nation	Year	Age of Woman					
		≤19	20-24	25-29	30-34	35-39	≥40
Canada	1977	30.8	30.3	19.4	11.2	5.8	2.5
	1978	30.4	31.0	19.2	11.3	5.7	2.4
Czechoslovakia	1977	5.7	22.2	29.6	23.7	13.7	5.1
	1978	5.6	22.4	29.2	24.6	13.6	4.6
Denmark	1977	18.0	21.6	20.6	20.9	13.0	5.9
	1978	18.9	22.2	19.6	20.1	13.0	6.2
England and Wales	1977	27.9	23.8	18.1	15.0	10.1	5.1
	1978	27.0	24.2	18.0	15.7	10.2	4.9
Finland	1977	20.8	24.7	19.2	14.8	11.3	9.2
	1978	22.0	24.6	18.7	15.1	10.2	9.2
German Democratic Republic	1976	13.5	20.5	19.2	19.4	19.9	7.5
Hungary	1977	10.7	23.3	22.2	19.3	16.5	8.0
	1978	10.8	21.9	22.9	20.0	16.6	7.8
Iceland	1976-78	20.1	23.7	16.8	16.6	12.1	10.7
Norway	1977	24.6	24.1	18.1	16.1	10.8	6.3
	1978	25.7	23.8	17.9	16.2	10.2	6.2
Scotland	1976	29.6	23.3	16.8	12.8	11.3	6.2
	1977	29.1	24.7	16.9	13.3	10.0	6.0
Singapore	1977	8.1	27.6	27.5	17.9	11.9	7.0
	1978	8.3	28.4	28.0	17.9	11.0	5.4
Sweden	1977	21.6	22.5	20.8	18.0	11.1	6.0
	1978	19.6	21.9	19.8	19.6	12.8	6.3
Tunisia	1977	1.8	16.6	25.0	25.1	21.0	10.5
	1978	2.5	16.5	25.2	25.3	20.0	10.5
United States	1977	30.8	34.5	18.7	9.5	4.7	1.8
	1978	30.0	35.0	18.7	9.6	4.7	1.6

Source: For the United States, CDC Abortion Surveillance 1978; for all other statistics, data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 28
Percentage Distribution of Legal Abortions, by
Marital Status[1], Selected Nations and Years

Nation	Year	Currently Married	Previously Married	Never Married
Canada[2]	1978	28.4	10.2	61.4
Czechoslovakia[3]	1978	80.1	7.3	12.6
Denmark[3]	1978	45.4	10.0	44.6
England and Wales[2]	1978	37.9	11.4	50.7
Finland[3]	1978	35.5	11.5	53.0
Hungary[3]	1978	70.2	7.7	22.1
Iceland	1976-78	43.7	11.5	44.8
Norway	1978	43.8	8.0	48.2
Scotland[2]	1977	39.5	12.2	48.3
Singapore	1978	77.4	1.1	21.5
United States[2]	1978	26.4	73.6	

[1] Women of unknown marital status distributed pro rata
[2] "Separated" included with previously married
[3] "Separated" included with currently married

Source: For the United States, CDC Abortion Surveillance 1978; for all other statistics, data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 29
Percentage Distribution of Legal Abortions, by
Parity[1], Selected Nations and Years

Nation	Year	Parity					
		0	1	2	3	4	5 or more
Canada[2]	1978	61.2	16.1	14.2	5.6	1.9	1.0
Czechoslovakia[3]	1978	11.6	15.8	46.1	19.5	4.5	2.5
Denmark[2]	1978	37.3	17.3	26.7	13.2	3.8	1.7
England and Wales[4]	1978	52.1	13.0	19.1	9.9	3.8	2.1
Finland[2]	1978	49.1	17.2	19.5	9.0	3.5	1.7
Hungary[4]	1978	21.9	21.1	37.4	13.0	3.7	2.9
Scotland[4]	1977	47.6	13.1	19.4	11.6	5.2	3.1
Singapore[3]	1978	29.8	18.6	26.1	12.0	6.1	7.4
Sweden[2]	1978	40.7	18.3	25.2	11.4	3.1	1.3
Tunisia[3]	1978	7.1	10.4	15.2	14.7	16.9	35.7
United States	1978	56.6	19.2	14.1	5.9	4.2	

[1] Women of unknown parity distributed pro rata
[2] Prior deliveries
[3] Surviving children
[4] Prior live births

Source: For the United States, CDC Abortion Surveillance 1978; for all other statistics, data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 30
Percentage Distribution of Legal Abortions, by
Weeks of Gestation, Selected Nations and Years

Nation	Year	Weeks of Gestation			
		≤8	9-12	13-16	≥17
Canada	1978	24.7	59.9	11.1	4.3
Czechoslovakia	1978	56.6	42.9	0.4	0.1
England and Wales	1978	24.7	58.4	13.1	3.8
Finland	1974	29.5	59.3	9.9	1.3
Hungary	1978	68.9	30.2	0.6	0.3
Iceland	1976-78	53.3	43.8	2.1	0.8
Norway	1979	40.3	56.6	2.9	0.6
Scotland	1976	82.2		17.8	
Sweden	1977	40.7	53.3	4.3	1.7
United States	1978	52.2	39.2	4.9	3.7

Source: For the United States, CDC Abortion Surveillance 1978; for all other statistics, data prepared by Christopher Tietze for publication in the Population Council Fact Book, Induced Abortion: 1981.

Table 31
Abortion and Maternal Deaths Reported to the United Nations[1]
by Selected Nations and Years

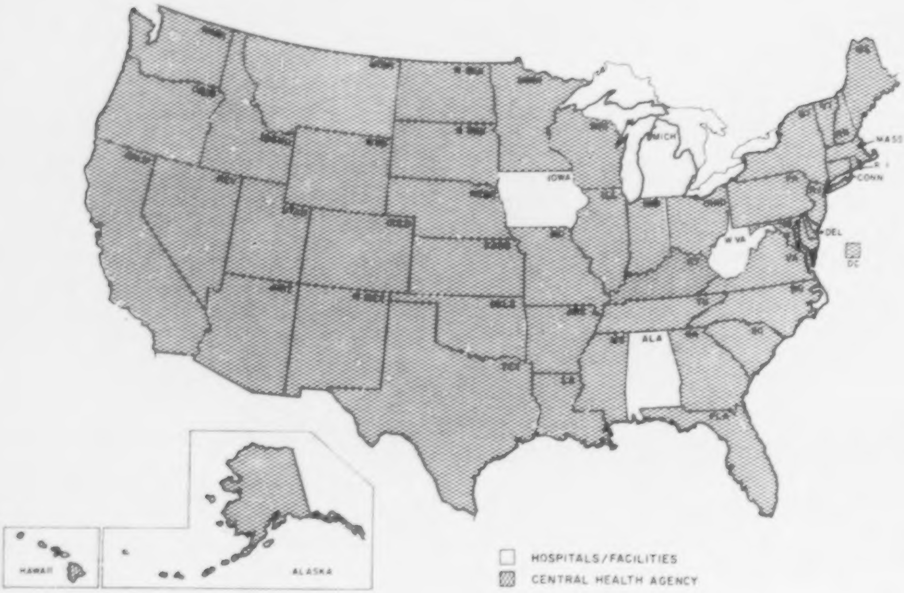
Region	Nation	Year of Deaths	Deaths: Abortion	Deaths: Maternal (Excluding Abortions)	Percent Abortion-Related Deaths[2]
Europe	Romania	1974	385	132	74
	France*	1975	16	118	12
	Italy*	1975	18	196	8
	Yugoslavia	1975	31	82	27
	Germany (F.R.)	1976	28	191	13
	England & Wales*	1975	8	69	10
	Spain*	1975	12	133	8
	Germany (D.R.)*	1975	2	37	5
	Czechoslovakia*	1975	2	53	4
	Subtotal		502	1,011	33
North America	U.S.A.	1976	16	374	4
	Canada*	1975	3	24	11
	Subtotal		19	398	5
Africa	Egypt	1975	36	934	4
	Kenya	1970	29	346	8
	South Africa	1971	29	96	23
	Mauritius	1977	23	15	61
	Subtotal		117	1,391	8
Asia	India	1973	214	1,129	16
	Philippines	1974	131	1,486	8
	Japan*	1975	21	525	4
	Thailand*	1975	140	784	15
	Subtotal		506	3,924	11
Latin America	Colombia*	1975	207	820	20
	Argentina	1977	162	155	51
	Mexico	1975	159	2,399	6
	Chile	1976	105	148	42
	Venezuela	1977	60	289	17
	Peru	1972	47	886	5
	Ecuador	1975	42	471	8
	Guatemala	1972	32	330	9
	Cuba	1971	29	152	16
	Paraguay	1977	26	123	17
	Subtotal		869	5,773	13
Total			2,013	12,497	14

[1] Source: United Nations Demographic Yearbook 1978, New York, 1979

[2] Percent abortion deaths per all pregnancy-related causes of death (abortion and maternal deaths)

*Updated from personal communication: C. Tietze; from special tabulations WHO file

Fig. 1 SOURCES OF REPORTED LEGAL ABORTION DATA, 1978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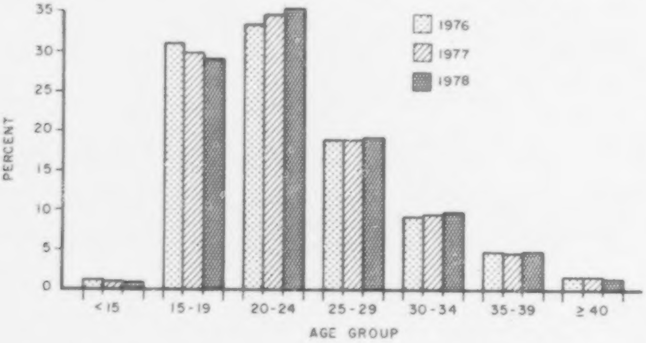
▨ CENTRAL HEALTH AGENCY

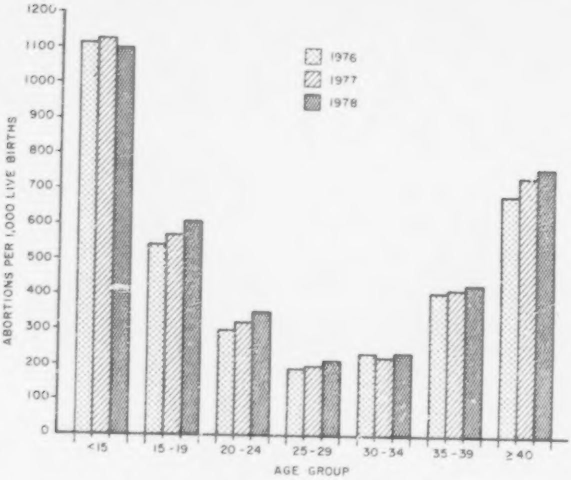
Fig. 2 PERCENT DISTRIBUTION[a] OF REPORTED LEGAL ABORTIONS, BY AGE, SELECTED STATES[b] 1976-1978



[a] BASED ON TOTAL NUMBER WITH AGE KNOWN

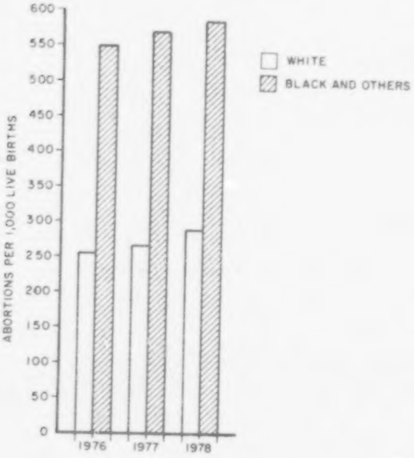
[b] ALL STATES WITH DATA AVAILABLE FOR 1976 (36 STATES), 1977 (37 STATES), AND 1978 (38 STATES)

Fig. 3 LEGAL ABORTION RATIOS, BY AGE, UNITED STATES, 1976 - 1978



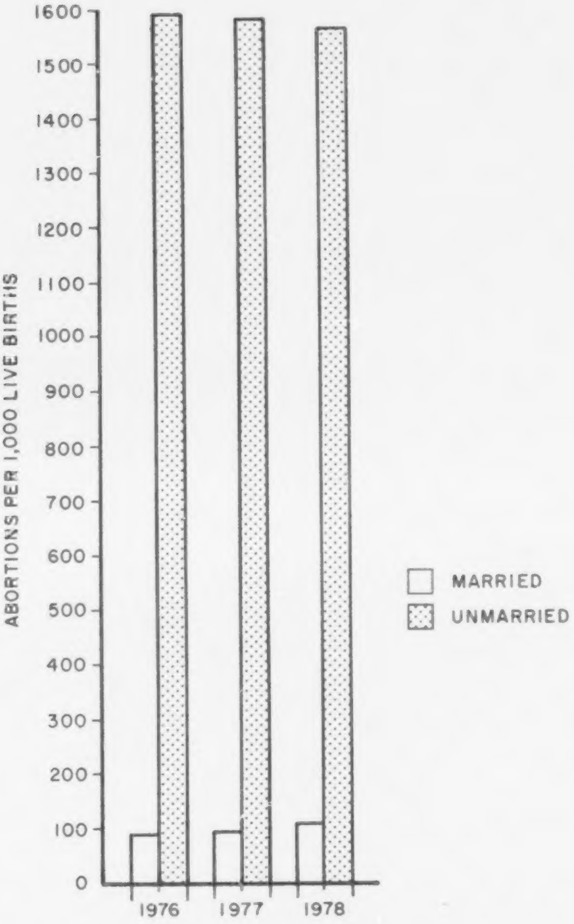
NOTE: RATIOS BASED ON PERCENT DISTRIBUTION SHOWN IN FIGURE 2 APPLIED TO TOTAL LEGAL ABORTIONS REPORTED TO CDC, 1976-1978, AND TOTAL U.S. LIVE BIRTHS BY AGE OF MOTHER, 1976-1978, FROM MONTHLY VITAL STATISTICS REPORTS, NATIONAL CENTER FOR HEALTH STATISTICS

Fig. 4 LEGAL ABORTION RATIOS, BY RACE, UNITED STATES, 1976-1978



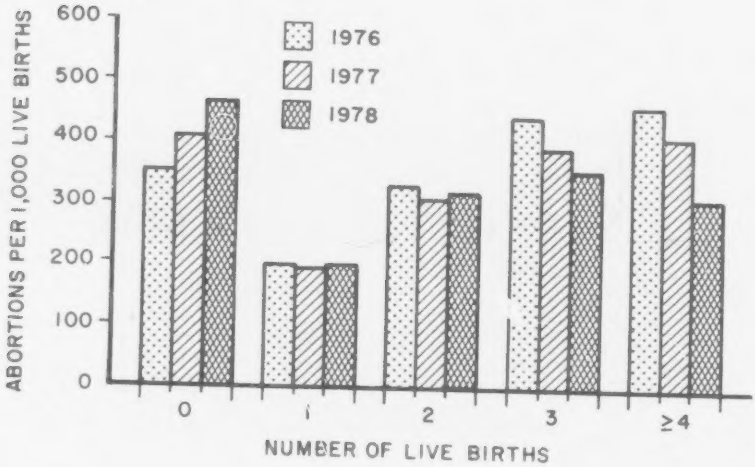
NOTE: RATIOS BASED ON PERCENT DISTRIBUTION SHOWN IN SUMMARY TABLE APPLIED TO TOTAL LEGAL ABORTIONS REPORTED TO CDC, 1976-1978, AND TOTAL U.S. LIVE BIRTHS BY RACE, 1976-1978, FROM MONTHLY VITAL STATISTICS REPORTS, NATIONAL CENTER FOR HEALTH STATISTICS

Fig. 5 LEGAL ABORTION RATIOS, BY MARITAL STATUS, UNITED STATES, 1976-1978



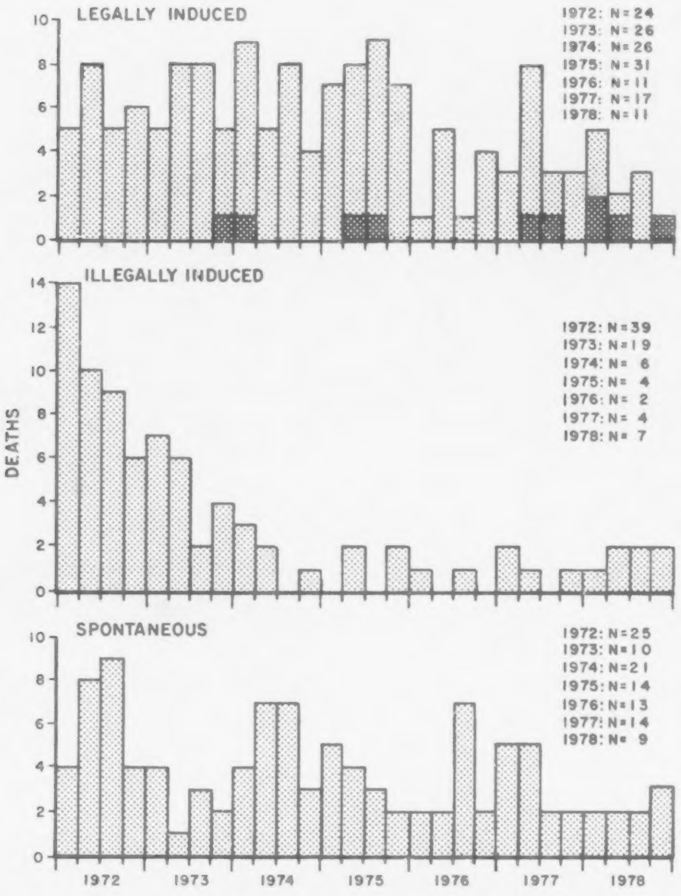
NOTE: RATIOS BASED ON PERCENT DISTRIBUTION SHOWN IN SUMMARY TABLE APPLIED TO TOTAL LEGAL ABORTIONS REPORTED TO CDC, 1976-1978, AND TOTAL U.S. LIVE BIRTHS BY LEGITIMACY, 1976-1978, FROM MONTHLY VITAL STATISTICS REPORTS, NATIONAL CENTER FOR HEALTH STATISTICS

Fig. 6 LEGAL ABORTION RATIOS, BY NUMBER OF LIVE BIRTHS, UNITED STATES, 1976-1978



NOTE: RATIOS BASED ON PERCENT DISTRIBUTION SHOWN IN SUMMARY TABLE APPLIED TO TOTAL LEGAL ABORTIONS REPORTED TO CDC, 1976-1978, AND TOTAL U.S. LIVE BIRTHS BY LIVE BIRTH ORDER, 1976-1978, FROM MONTHLY VITAL STATISTICS REPORTS, NATIONAL CENTER FOR HEALTH STATISTICS

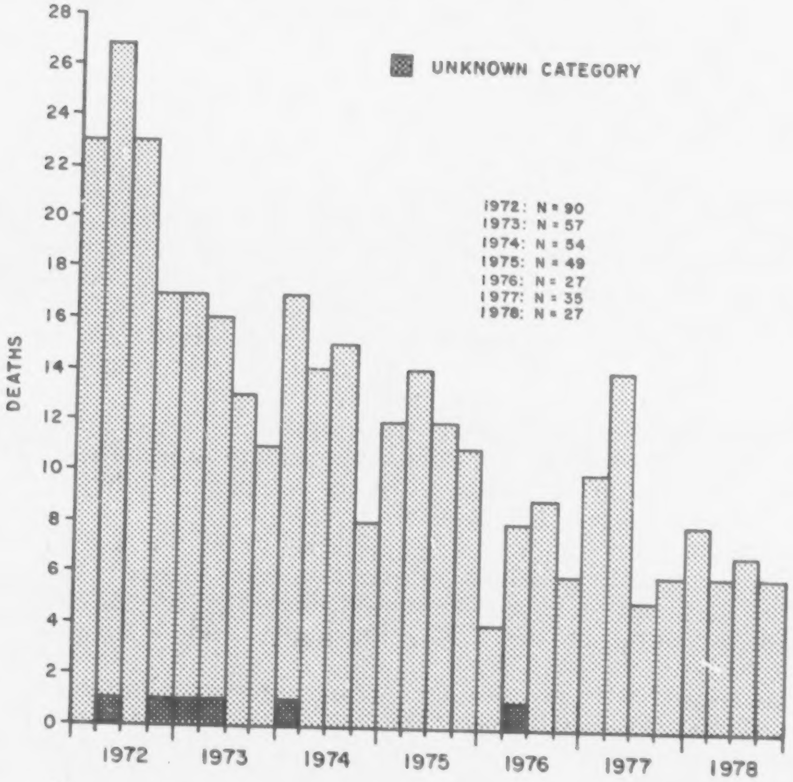
Fig. 7 ABORTION-RELATED DEATHS, BY CATEGORY* AND QUARTER, UNITED STATES, 1972 — 1978



*EXCLUDES UNKNOWN CATEGORY

▨ ECTOPIC PREGNANCY

Fig. 8 ABORTION-RELATED DEATHS,* BY QUARTER, UNITED STATES, 1972–1978



* INCLUDES LEGALLY INDUCED, ILLEGALLY INDUCED, SPONTANEOUS, AND UNKNOWN CATEGORY ABORTIONS

Senator HATCH. Prior to the so-called Hyde amendment, going into effect 4 years ago, the Federal Government, I believe, was paying for about 300,000 abortions per year under medicaid.

Shortly after this time, the Centers for Disease Control predicted that because of the Hyde Amendment, between 44 and 90 women would die within the year from botched illegal abortions. That was reported in the Washington Star on February 16, 1978. Has this prediction been borne out since then?

Dr. TYLER. The death rate associated with induced abortion has continued to decline.

What has occurred, to the best we can estimate, is that while the amendment you are referring to did restrict Federal funds, a substantial proportion of medicaid-eligible women were able to get public funds from other sources that were not Federal sources. I do not think that the Centers for Disease Control predicted that at all.

Senator HATCH. Last year, the CDC published results of a relatively sophisticated study on the impact of the Hyde amendment in Texas, a State which has not substituted State funding for the Federal funding cutoff by the amendment.

The study concluded that the absolute number of abortions among indigent women dropped approximately one-third. This occurred despite the fact that relatively inexpensive illegal abortions were available across the Mexican border.

The report concluded: "In Texas, low-income women who do not have Federal or State funds for abortion do not appear to be resorting to illegal abortions to terminated unwanted pregnancies."

That is found in the CDC "Morbidity and Mortality Weekly Report on June 6, 1980."

This seems to fly in the face of the suggestion that the illegalization of abortions will result in increased numbers of maternal deaths from abortion. Instead, it seems simply to have resulted in more live births. Would you say that is a fair conclusion from this study?

Dr. TYLER. That conclusion perhaps does not go into the detail that would be appropriate to this issue in the following sense.

First of all, we do know that there was at least one recognized illegal abortion death that occurred in connection with a Texas case. That occurred to a woman who was eligible for medicaid. To say that the restriction of medicaid funds led to no illegal abortion deaths is not precisely correct. To say that there was a serious increase in the number of illegal abortion deaths—a marked increase—would not be correct either.

The impression that we have is that there was not a complete turnabout, that is, large numbers of women did not resort to illegal abortions.

Our data permits us, by looking at abortion complications, only to make inferences. We do not have statistical information on the actual number of illegal abortions that were performed.

Senator HATCH. I am familiar with the fact that the Alan Guttmacher Institute puts out an annual survey of abortions throughout the world. In recent years, their report seems consistently to have reported the number of abortions in the United States at a level 10 to 20 percent higher than the annual Center for Disease

Control reports. Could you share with us some of your views on why this discrepancy exists?

I have heard criticisms from some individuals that even the Guttmacher report sharply understates actual abortions. Do you believe that is true?

Dr. **Tyler**. One of the issues that is an important one to settle is the issue of obtaining more precise information on the number of legal abortions performed and the characteristics of women who undergo these procedures.

The Alan Guttmacher Institute and the CDC do not use precisely the same procedures in collecting their data. The Centers for Disease Control goes through established channels and through central health agencies. In some States, it collaborates with the State to get information from hospitals and facilities.

The Alan Guttmacher Institute supplements their data collection with other direct contacts they have. I am not familiar with the details of their procedures. It would be worth asking that of them.

One of the things that does need to be done is that discrepancies of this kind do need to be reconciled. CDC has begun to collaborate with the National Center for Health Statistics to try and enlist their assistance in solving this problem. I think, however, that it will be a number of years before we had a satisfactory answer at the pace the progress is going.

Senator **Hatch**. The Philadelphia Inquirer recently published a lengthy report on third trimester abortions and on the babies who are occasionally born alive during such abortions.

In the article, your colleague, Dr. Willard Cates, Chief of the CDC's Abortion Surveillance Branch, was quoted as estimating that 400 to 500 such births occur annually during an abortion. He further observed that most such cases probably go unreported.

In this regard, he said: "It is like turning yourself into the IRS for an audit. What is there to gain? The tendency is not to report."

What are your views on Dr. Cates' figures and his comments on this subject?

Dr. **Tyler**. The issue of a pregnancy that is terminated intentionally and in which the fetus survives despite an intention to the contrary is certainly one of the most difficult issues to address in this societal concern about abortion. The Centers for Disease Control has worked with the State health department in New York and has reported this occurrence some time ago, so that it is not a new phenomenon.

Dr. Cates' estimates, I think, are realistic ones. I assume that in making estimates of this kind of abortions that occur in the late second trimester of pregnancy, or in the early third trimester are those in which this problem occurs. Such an increasing proportion of women undergo abortion in the first trimester, this problem should be one of diminishing magnitude.

Whether these cases are reported or not is difficult to say because the mechanism that is currently used to report this kind of information through Government channels would not identify those fetuses which survived an abortion from those which did not.

Senator **Hatch**. I know that you cannot be expected to speak for Dr. Cates, but I just need to ask you one question concerning his views—or at least views attributed to him.

Can you share with me what you know about Dr. Cates' suggested proposal that a sliding fee scale be adopted for abortions, based upon the length of the fetal foot?

Dr. TYLER. The principle that Dr. Cates was trying to get at was that abortions are now provided on a fee scale that is at one level for first trimester cases and a separate level for later cases. He was trying to propose a mechanism for getting a more equitable fee scale. What he wrote was a personal opinion. He and I have discussed this.

Incidentally, while that particular issue has received a lot of attention, the way it was dealt with detracts from what he was really trying to get at. He was trying to get equitable services for people, regardless of income.

Senator HATCH. You have indicated in your remarks today that the estimated number of abortions worldwide is somewhere between 30 and 35 million abortions.

Dr. TYLER. It is between 30 and 55 million.

Senator HATCH. Do you think that 55 is the high range, or are those modest estimates?

Dr. TYLER. That is the most realistic range that I know of. I think that we are in a State where when we try to make that kind of an estimate, we are in a similar situation as we were some years ago in this country when we talked about estimates for illegal abortions in the United States that ranged between 200,000 and 1,200,000.

Senator HATCH. How does the risk of mortality from abortion compare with the risk from childbirth?

Dr. TYLER. Before the 15th week of pregnancy, the information that is available to the Centers for Disease Control indicates that the risk of death from induced abortion is less than the risk of death from childbirth.

Following the 15th week of pregnancy—16 weeks and beyond—for the period of time for which we have information, which goes to 20 weeks and a little bit beyond 20 weeks, then induced abortion carries a greater risk than the risk of childbirth.

Senator HATCH. These are questions from Senator Leahy which he has asked me to question you on. He is a member of this subcommittee.

Prior to 1973, did illegal and self-induced abortions constitute a serious health problem for women? What has been the effect of legalized abortion on maternal mortality associated with pregnancy and childbirth?

Dr. TYLER. Prior to the legalization of abortion, my personal judgment is that mortality associated with illegally induced abortion was a serious health problem. I do think that the legalization of abortion has decreased the risk of mortality during early pregnancy. How it has affected mortality at the time of childbirth is something on which I do not have any information.

Senator HATCH. Does the CDC have any figures or statistics prior to 1973?

Dr. TYLER. The Centers for Disease Control began to count abortions in 1969 as best we could. We began our work on abortion mortality in 1972. Prior to that time, we rely on the vital statistics reported by the National Center for Health Statistics.

Senator HATCH. Do you have any estimates on how many abortions were being performed annually in this country prior to 1973? Given the general increase in the population of women of childbearing age, can you extrapolate how many abortions would be occurring today based on your pre-1973 numbers if there had been no change in the law?

Dr. TYLER. That is a difficult and complex question.

We have data for 1969 through 1972. Prior to the time when States began individually legalizing abortion, we would only be able to make rough estimates. Those estimates are from the Arden House conference, I believe, in 1955 where the 200,000 to 1,200,000 estimate was made.

In the State of North Carolina there was a survey done using a technique that permitted women to acknowledge having undergone abortion without revealing any confidential information. The estimate at that time, 1967, if I recall correctly, if the North Carolina figures could have been applied to the rest of the United States, that figure would have been in the range of 600,000 to 700,000 procedures.

Senator HATCH. When in the pregnancy do abortions occur? In other words, what percentage occur in the first trimester, second trimester, and third trimester? Have these figures changed over time?

Dr. TYLER. I am going to assume that we are talking about legal, induced abortions in that question.

Senator HATCH. Yes.

Dr. TYLER. The figures that we have indicate that in 1978 the proportion of legal abortions performed in the first trimester was on the order of 92 percent of the ones reported. The remainder was done mostly in the second trimester.

The issue of third trimester abortions is one on which we have information collected collaboratively with States and the National Center for Health Statistics through the cooperative health statistics system. This data set gives us enough detail that we can look at length of gestation by single weeks of the duration of pregnancy.

When we do so, we find that the proportion is very small. We are talking about a figure that is between one and seven-one hundredths of 1 percent of the numbers reported.

Those numbers have some problems with them from two points of view. From a data collection point of view, we think that some of these could be errors in data management, such as keypunch errors or transposition of digits in the transcription process. The other difficulty we have is that no information is reported to CDC about the reasons for which the procedure was carried out. The proportion is sufficiently small, however, that it seems plausible to me that these procedures could, in fact, have been the relatively small number that would be medically indicated—true therapeutic abortions, if you will.

Then the other problem that occurs is that in some States we know that procedures used to remove infants who have already died in utero are classified as abortion procedures. This does not meet the customary definition of a legal induced abortion.

Senator HATCH. Thank you.

Senator DeConcini?

Senator DECONCINI. I have no questions, Mr. Chairman.

Senator HATCH. Thank you, Doctor.

We appreciate your excellent analysis today and the statistics that you have brought to bear.

Thank you so much.

Dr. TYLER. Thank you.

Senator HATCH. Is Dr. Nathanson here?

[No response.]

Senator HATCH. I do not see him.

At this point then we will call on Dr. Irvin Cushner who is professor of obstetrics and gynecology at the UCLA School of Medicine in California.

He also teaches public health at UCLA's School of Public Health and has advanced degrees in both medicine and public health.

Dr. Cushner was formerly the Deputy Assistant Secretary for Population Affairs during the Carter administration.

Doctor, we are very happy to have you with us this morning.

We look forward to hearing your testimony.

STATEMENT OF IRVIN M. CUSHNER, M.D., M.P.H., UNIVERSITY OF CALIFORNIA, SCHOOL OF MEDICINE AND SCHOOL OF PUBLIC HEALTH, LOS ANGELES, CALIF.

Dr. CUSHNER. Thank you, Mr. Chairman.

Thank you for allowing me to participate in this. I am very appreciative.

I do want to point out, at the risk of being a bit flippant, that the copy of my statement which you have only proves clearly that someone can have expertise in reproductive health but not in typing.

I will submit a clean copy when I get back.

Senator HATCH. That will be fine.

I am sure our people can clean this one up for you, however.

Dr. CUSHNER. Thank you.

Mr. Chairman, I am a physician, as you know, and I am trained in obstetrics and gynecology and in the public health aspects of human reproduction.

I am employed full time by the University of California in Los Angeles. I divide my work between the school of public health and the school of medicine.

In the school of medicine, I now serve as director of the division of women's health which is the component of the obstetrics and gynecology department that deals with primary care.

I would like to point out that except for my term of service with the Department of Health, Education, and Welfare, I have been actively and continuously engaged in the practice of obstetrics and gynecology since I completed my training 25 years ago.

For the record, Mr. Chairman, I would like it clear that my statements before this committee are my own personal professional opinions. I speak for no organizations or groups. Specifically, I do not speak for the University of California, the UCLA School of Medicine, or the UCLA School of Public Health.

Frankly, Mr. Chairman, I wish I were not here.

From your opening comments, I sense that you and I share that same feeling.

Senator **Hatch**. I think that is a very fair statement.

Dr. **Cushner**. I wish you were not conducting this hearing; I wish we were not discussing this subject. I wish there was no need for abortion, but there is. That is the simple truth. There is a need for abortion. There always has been, at least to the extent that history so reports.

I do not see any evidence to suggest an end to that need—not so long as we humans continue to occasionally express affection through sexual intercourse and not so long as contraceptive methods remain as imperfect and as imperfectly used as they are.

These are more truths, which simple as they may sound, I submit, Mr. Chairman, bear heavily on these deliberations.

It is my intent in this statement, and I shall follow your request and summarize it.

Senator **Hatch**. I would appreciate it. You have a very lengthy and good statement.

Dr. **Cushner**. I am not going to read it all; I promise you that.

Senator **Hatch**. In spite of its policy prescriptions it is a very interesting statement.

Dr. **Cushner**. I intend to bring to the committee's attention some of the possible consequences that I think would follow if this proposed amendment to the Constitution were enacted and ratified.

Senator **Hatch**. Are you speaking about the amendment that I have proposed?

Dr. **Cushner**. The amendment you have proposed.

I want to say that I wish I could concentrate on the positive story about legal abortion, and there is a positive story, but for the sake of time I am going to deal with negatives because I sincerely believe this is what we will have to deal with.

I want to point out the impact which this new policy could have on the health—physical and mental—of women and of their families and the impact that it might have on the capability of health professionals to serve their patients and how these, in turn, might affect our society.

In making these projections, Mr. Chairman, I am willing for the sake of this morning's discussion, to assume the following:

I am going to assume that shortly after ratification of an amendment such as the one you have proposed there would be at least 50 bills introduced—one in each of the State legislatures and at least one in Congress.

All of these bills would have as their intent the restriction or the prohibition of abortion.

Some of these bills would be enacted and some would not. Of those that were enacted, some would be more restrictive than others.

I suspect that of those which are most restrictive, some might be based on a so-called human life amendment to a State constitution.

Finally, I will assume that if a State law is viewed by some as not being as restrictive as it might be, the Congress might be approached to enact legislation to insure that greater restriction.

I believe the net result of this kind of legislative activity would be at the least a pattern of public policies regarding abortion characterized by more restricted availability than now exists and regional variation in the availability of services.

I know full well that this is indeed the intention of those who propose and support this amendment. I believe that they believe sincerely, and I think you believe sincerely, that the adoption of this amendment and even of this kind of projected legislative activity would result in some societal good.

I respectfully ask which good. Which goods are actually envisioned if we leave this to the States and to the Congress? What will we have?

Perhaps you are hoping for a marked reduction in simply the numbers of abortions performed. That could be an expectation. Those who would prohibit abortion entirely would have to hope that we go from the current level you have heard about, somewhere between 1.2 and 1.5 million to zero.

For those who would allow for abortions for certain medical indications, we might hope for a drop of 1.4 million to 10,000 to 20,000.

How will that be achieved, Mr. Chairman? By what means? By what behaviors will fertile women and fertile couples achieve this rather dramatic turn?

I know of only three ways in which they could do that: more knowledge and more use of contraception, more sexual abstinence, or continuation of more unwanted pregnancies to term.

And all of this would be directed toward what? Toward what improvement—improved health? Whose? Improved women's health? Improved family health? Improved child health? Or perhaps it is all directed toward an improved society. I would ask: Improved how and for whom?

Mr. Chairman, I sincerely believe that none—not one—of these objectives will be achieved—certainly not by this proposed amendment or the legislative activity which would follow. Rather I believe that this legislation will actually bring harm—physical, psychological, and family harm—and not to just a few but to many.

Briefly, I respectfully submit that some of the real results that would follow would be as follows:

No. 1, I think, indeed, that a severely restrictive policy among the States could result in a reduction of abortions in licensed hospitals and clinics from the current level of 1 to 1.5 million to about 10,000 to 20,000. That variation would depend on whether the abortion is exclusively restricted to preventing the death of the mother or whether it includes other indications, such as rape, incest, and genetic disease.

Senator HATCH. Doctor, could I interrupt you?

You seem to be presuming that, if my amendment passes, this country would basically restrict abortions. Do you believe that is true?

Dr. CUSHNER. I am writing the worst script. I admit that.

Senator HATCH. Senator Packwood and others who are proabortion would suggest that the vast majority of people in this country share their views or are for what they call "free choice." Who is right here?

Dr. CUSHNER. I believe your amendment would allow for this to occur and that the current policy would not.

Senator HATCH. The only way that my amendment would allow this to occur is if a vast majority of the people in this country are in fact against abortion.

In other words, my amendment leaves it up to the democratic process. The human life amendment would absolutely prohibit abortion except to save the life of the mother.

My amendment makes no moral judgment other than to allow State legislatures and the Congress to make public policy decisions.

I presume from listening to you that you believe a majority of the people in this country would severely restrict abortion if my amendment to the Constitution were passed by a two-thirds vote and ratified by three-quarters of the States.

Dr. CUSHNER. Mr. Chairman, I think my bias is based on the last experience we had when it was at the States' discretion.

During the national or the various State debates over abortion law that took place between 1967 when Colorado first revised its law and 1973 when the U.S. Supreme Court decisions came down, 17 States revised their laws. We have 17 models to observe what happens to the abortion issue when it is put into the legislative political arena. Whichever side initiates it goes for broke. We will ask for a total prohibition if it is the prolife communities getting the legislation produced or we ask for abortion at request if it is the prochoice community.

In the normal, democratic, legislative process, the compromises that come through are restrictions.

Senator HATCH. You are convinced that in that process, there would be a severe restriction of abortion if my amendment passes

Dr. CUSHNER. I cannot say that I know that.

Senator HATCH. That is your belief.

Dr. CUSHNER. Yes.

I think it will be more restrictive than now.

The degree of restrictiveness, I would concede, I could not guess at.

Senator HATCH. You do suggest that if the amendment passes State legislatures and the Congress would probably restrict abortion to the point where you might have 10,000 to 40,000 abortions, compared to 1.1 million abortions a year indicated here earlier.

Dr. CUSHNER. Yes.

Senator HATCH. I just wanted to make sure of that.

Dr. CUSHNER. And I want to be clear with you that I am painting the worst scenario that I think would come of this.

Senator HATCH. Are you saying that it is one that you believe is capable of happening?

Dr. CUSHNER. It is a scenario that I believe is possible.

Senator HATCH. All right.

Dr. CUSHNER. I think that about 250,000 to 280,000 unwanted pregnancies that in today's policy would probably be terminated by abortion would indeed be continued to term.

I think the reasons these pregnancies would be continued would include excessive costs for the procedure. Incidentally, I think those costs would be excessive—not only for the poor but for middle and marginal income persons as well.

Some women will find that travel necessary is impossible, and I think that some women in fact will not wish to have a procedure which is illegal though I think there will be some continuation of pregnancies to term for those reasons.

I believe, Mr. Chairman, that the remaining 1 to 1.2 million unwanted pregnancies would be terminated by abortion in clandestine facilities. I would have to disagree with the inference that the data from Texas in the CDC study suggests that is not true.

I respectfully suggest, sir, that it probably is not appropriate to compare the experience with the withdrawal of Federal funds from those who need subsidy to the illegalization of the procedure.

I would stick to my own conviction that should there be massive restrictive policies, I think in a word that abortion will again go underground. Not only will the patients go underground, but I think you should understand that the technology will go underground.

We are not going to go back to coat hangers and catheters or plant barks. I think the technology that developed in the past decade will be used in these clandestine situations. I expect that these procedures will be performed by a variety of providers. Some of them are going to be physicians and some will not. Some will be well trained and some will not. Some will have had no training at all—like friends, or even the pregnant woman herself.

I think this entire clandestine illegal system is going to operate exclusively in facilities that are not as adequate to deal with emergency situations as are the licensed facilities today.

As a result of all of this, I expect—and with all due respect the supporters of the amendment and the supporters of restrictive abortion policy should expect—an increase in the number of deaths related to abortion—not back to the astronomic numbers of pre-1967 but a significant increase.

Let it be clear that the greater the restriction, the greater will be the number of illegal procedures and the greater will be the degree of illness and the number of deaths.

I expect a significant increase in the number of and the proportion of second trimester abortions. I think this is going to happen because of delay. Time will be spent and delay will occur searching for a facility that would offer the service.

First, I think there will be a search for a facility in which it might be legal and safest in whatever State might still offer that. If it is not found, then it will be obtained wherever it is available—illegal or not—risky or not.

I think that the current data, some of which was presented by Dr. Tyler, would make it clear, Mr. Chairman, that if we were to experience a large increase in second trimester abortions and if concomitantly that increase moves into a clandestine health system with inadequate facilities or unskilled persons, then we can expect, I think, a tragic increase in the number of women who would die from this procedure.

Finally, I expect a severe curtailment in some of the scientific endeavors now underway in those States in which there is severe restriction.

I do not know how we would be able to understand the validation and value of amniocentesis and prenatal diagnosis if couples are not permitted to elect termination of pregnancy when it is found that their infant would suffer from genetic disease.

I wonder about the remarkable progress recently achieved in human reproductive research, especially, for example, the progress and efforts at finding ways to assist infertile couples to achieve pregnancy and childbirth.

I am concerned about the future of some contraceptive research which looks promising, which may offer safer and more acceptable methods but whose science would be precluded by a policy aimed primarily at restricting abortions.

I do not include in this list of projections the serious concerns which I have and that would be working in a State in which a human life amendment would be adopted to the State constitution.

I do not know, Mr. Chairman, what would happen if the California constitution were amended in that fashion which would give primacy to the fetus. I do not know what would be expected of me and my patient of 1 month ago—a woman receiving chemotherapy for malignant disease who became pregnant despite the regular use of condoms and foams by her and her husband.

What is expected of us under the possibility that a State might amend its constitution with a human life amendment if your amendment is enacted and ratified. Of course, abortion is out of the question. She must, of course, go to term under such a policy.

What about the chemotherapy? Must she discontinue it?

I know you are saying to me that this is not a foregone conclusion.

Senator HATCH. Even the human life amendment allows the life of the mother to take precedence.

Dr. CUSHNER. I would hope so.

Senator HATCH. Under those circumstances, if she needed chemotherapy, I would think that would take precedence.

You are assuming in your hypothetical situation there could be no abortion for any reason whatsoever. I do not think even those who are the most ardent prolife supporters fail to recognize that abortion is at times acceptable where the life of the mother is involved; some even say in the case of rape and/or incest.

Dr. CUSHNER. The case is not hypothetical. I am glad to hear you say that that possible policy is hypothetical.

Senator HATCH. I think it is.

Dr. CUSHNER. In closing, Mr. Chairman, this is the scenario that I think would follow this kind of amendment.

I think we are probably going to come in this critically important national debate to ultimately deciding which set of goods we prefer. I hope we are not going to choose a pattern which engenders and suggestively condones and seems to almost prefer illegal clandestine procedures. I know that you do not prefer that. I do not prefer that.

I would not like to see the establishment of regional kinds of policies and generally restrictive policies that force a clearly expected system to move into an illegal area.

We are an imperfect species; we live in an imperfect world. My hope is that we can find some common ground in getting through this very serious dilemma. I hope that when we find it, you take into account not only our weaknesses and our frailties but our strengths and our hopes.

I am reminded of countless hours spent with patients and hours spent with inquisitive concerned medical students.

One patient said to me: "Don't they care about me at all?" One student said to me: "What will they have us do—walk away?" Where do my ethics come in?

For myself and others who feel differently about abortion than supporters of restrictive policy, I ask the same question: Where do our ethics come in?

Mr. Chairman and members of the committee, I strongly urge that this legislation not be enacted. I hope that it will not be.

Thank you very much.

Senator HATCH. Thank you, Doctor.

I appreciate your testimony and I thought it was well-delivered and well-thought out. However, you were making some assumptions that even the most vociferous pro-life people do not generally assume.

Let me just ask you this: In your experience, Dr. Cushner, why do most women want abortions to begin with? Are the reasons any different today than they were 5 or 6 years ago? Do the reasons vary depending on the stage of the pregnancy? Can we note a difference based upon age, race, or economic background of the women?

Those are a lot of questions.

Dr. CUSHNER. The data with which I am familiar would indicate that something on the order of 2 percent of all of the abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind.

The overwhelming majority of abortions in this country are performed on women who for various reasons do not wish to be pregnant at this time. Some of them do not wish to have children ever, but the overwhelming majority do not wish to be pregnant at this particular time. Their reasons are a mixture of social, economic, educational, or whatever.

The bottom line is that this pregnancy is so intensely undesired now that they wish that it would terminate.

I do not know of any correlation between reasons stated and duration of pregnancy, other than in the second trimester of the genetically caused diseases.

The correlation with which I am sure you are familiar is that a much larger percentage of second trimester abortions is done on young women who clearly, when we see them in our clinic and when I see them in my office, their delays are primarily the delays either of not knowing where to go or not knowing whether to go and confusion and fear and not having a positive decision made.

Senator HATCH. I see.

Let me ask you a question I intend to ask Dr. Nathanson.

How often, in your experience, are abortions truly necessary to save the life of the mother or to insure her physical health? Is that a compelling justification for abortion in your opinion?

Dr. CUSHNER. In this country, it is about 1 percent.

Senator HATCH. That are truly necessary.

Dr. CUSHNER. For physical health.

Senator HATCH. I see.

Dr. CUSHNER. Or at least I should say that 1 percent of the abortions being reported are being done as reported for physical health reasons.

Is that a justification for legalization of abortion—is that the second part of your question?

Senator HATCH. Right.

Dr. CUSHNER. It certainly is a justification, in my opinion, for the legalization of abortion for physical health reasons.

Senator HATCH. I think we all agree with that.

Is it a justification for the other 99 percent who get abortions who do not have physical health reasons?

Dr. CUSHNER. I can only speak for myself.

My reasons for supporting the other 99 percent have nothing to do with physical health. I think the justifications lie in other areas.

Senator HATCH. You would disagree, then, with, CDC's conclusion that there has been virtually no increase in abortion deaths resulting from the passage of the Hyde amendment?

Dr. CUSHNER. No, Mr. Chairman, I did not say that I thought there was an increase.

I thought I heard in your dialog with Dr. Tyler and the question that you put to him and your concern that the CDC material reported from a study in Texas, following the withdrawal of Federal funds, would suggest that women do not seek illegal clandestine services when services are withdrawn.

My point was that comparing the impact of withdrawal of Federal funds from people needing subsidy is not to be equated with the experience we might have from the illegalization of the procedure for everyone.

Senator HATCH. Dr. Tyler said:

> In addition, this analysis showed that the restriction did not increase the number of illegal abortions obtained by these women. CDC also initiated hospital surveillance projects in 13 States and the District of Columbia. No increase in abortion-related complications was observed in this project. No abortion deaths related to either legal or illegal abortions were detected to this hospital's surveillance system.

Let me just ask you this: I have seen evidence suggesting that induced abortion, particularly multiple-induced abortions, may have detrimental consequences on the future ability of a woman to avoid miscarriage and prematurity. Some studies have even suggested that repeated abortions may impair the ability of the woman to bear children at all.

Are you familiar with any of these studies? Could you give us your thoughts with regard to them?

Dr. CUSHNER. Yes. I am familiar with the relationship between repeat abortion and subsequent premature birth.

Our understanding of that problem is the possibility that repeat abortions would induce the syndrome known as cervical incompetence.

This suspicion first arose among several Eastern European countries who found that when the first pregnancy was terminated by abortion that subsequent pregnancies were at higher risk of premature birth and there was the supposition that the mechanism by which this happened was a weakening of the cervical wall and incompetence developed in the cervical wall so that the cervix would not remain closed during a subsequent pregnancy.

A study was mounted in this country by Dr. Kenneth Ryan at Harvard. That was reported in the American Medical Association Journal a little over a year ago.

My recollection of those findings is that they did not find a correlation with the first pregnancy order and subsequent premature birth. They did find that women with multiple repeat abortions seemed to be at higher risk of premature birth.

I, as I think you do, wish that repeat abortions were not occurring in as high a proportion of women as they are occurring.

In our institution, they represent 25 percent of the women upon whom we are performing abortions who have already had one or more. We all wish that were not the case.

I believe that repeat abortion is a function of two factors. One is the imperfections of current contraceptive methods. Second is the statistical quirk that once a woman has had one and superimposed on that contraceptive ineffectiveness by definition she is at high risk of falling into the column of repeat abortions because they are available and she will obtain them.

It does represent an adverse consequence of legal abortion that we are concerned about.

Senator HATCH. How sophisticated are our present abilities to detect fetal disease or even deformity?

What are your own views on abortions performed to avoid the birth of such children?

Does our present technology allow us to conclude with certainty that a fetus may bear such a physical impairment or simply that there is a probability of such a condition existing?

Dr. CUSHNER. The technique of amniocentesis which involves the collection of amniotic fluid and the examination of cells and enzymes, allows for the potential identification of about 200 lesions. You were more accurate than I. It allows for the identification of an increased probability.

In some of the lesions, the probability and the accuracy of the test is extremely high as in Down syndrome.

Looking at it from another vantage point, Mr. Chairman, across the country the data would indicate that 95 percent of women having an amniocentesis are ultimately informed that they have a normal child. The remaining 5 percent are the ones who are informed their child is or might be suffering a genetically caused disease.

In my value system and in my professional practice, I believe firmly that woman or a couple who are informed of the existence of a fetus that may be or is suffering a genetic disease should have the right to terminate that pregnancy.

Senator HATCH. I see.

Doctor, I would like to clarify my position to a degree.

I do not favor abortions on the basis of the health of the mother—I thought perhaps you might have misconstrued what I said—as that term has been defined. I think it has been defined by the courts, particularly in *Bolton,* to cover nothing more than the "well-being" of the mother. That is a very difficult status to determine, as you know—both physically and psychiatrically.

We appreciate your coming today, and we appreciate having your testimony.

Dr. CUSHNER. Thank you so much.

[The prepared statement of Irvin Cushner follows::]

PREPARED STATEMENT OF IRVIN M. CUSHNER, M.D., M.P.H.

Mr. Chairman, Members of the Subcommittee:

Thank you very much for your kind invitation to these hearings. I very much appreciate the opportunity to participate in them.

I am Dr. Irvin M. Cushner. I am a physician, trained in obstetrics and gynecology , and in the public health aspects of human reproduction. I am employed, full-time, by the University of California at Los Angeles, where my responsibilities are divided between the School of Medicine and the School of Public Health. Except for my term of service in the United States Department of Health, Education, and Welfare in 1978-80, I have been actively and continuously engaged in the practice of obstetrics and gynecology since I completed my training 25 years ago.

In appearing before this Committee, I speak as an individual. My statements and my points of view are my own and represent my personal professional opinions. I do not represent any organization or group. Specifically, I do not speak for the University of California, the UCLA School of Medicine, or the UCLA School of Public Health.

While I do not speak for any organization, I can report to you that the views expressed in my statement are, in fact, consonant with recent policy statements of major leadership organizations in the fields of reproductive health and women's health, such as the American College of Obstetricians and Gynecologists and the American Public Health Association. One of the major objectives for those of us who work in this health field is the improvement of pregnancy outcome; namely, that every pregnancy should ultimately end with a healthy mother, a gratified family, and a child who, at the time of its birth, is healthy and wanted. Abortion is but one service that we provide or provide for - a terribly important one, and one which is not taken or treated lightly.

Frankly, Mr. Chairman, I wish I were not here. I wish you were not conducting these hearings. I wish we were not discussing this subject. For, I wish there were no need for abortion.

But, there is. That is the simple truth. There is a need for abortion; there always has been (at least, to the extent that human history so records); and, I see no evidence to suggest an end to that need - not so long as we humans continue to occasionally communicate affection and love through sexual intercourse, not so long as contraceptive methods remain as imperfect and as imperfectly used as they are. More truths which, simple as they may sound, bear heavily on these deliberations.

It is my primary intent, in this statement, to bring to the Committee's attention some of the possible consequences which could follow, should the constitutional amendment proposed in Senate Joint Resolution 110 be enacted and ratified. I wish I could concentrate on the positive side of legal abortion. There is, indeed, a positive story to tell.

The public health and societal effects of the United States Supreme Court decisions of 1973 represent one of the most successful outcomes in the history of American public health. If measured by death prevention alone (from 235 deaths due to illegal abortion in 1965 to 4 such deaths in 1977), this would exemplify the type and degree of success for which we would hope in any program designed to improve the nation's health. There are many more such positive effects - some measureable, many more anecdotal among those of us who provide these services. Much as I wish to emphasize the positive, I elect to deal with the negatives, for, it is these negatives with which we shall deal if this proposed amendment is adopted.

In particular, I wish to point out the impact which this new policy could have on the health - physical and mental - of women and their families; the impact it could have on the capability of health professionals to provide services to their patients; and, how these, in turn, could adversely affect society.

In projecting these possible effects, I am willing, for the sake of this morning's discussion, to assume the following:

1. That shortly following ratification, there would be at least 50 bills introduced, one in each of the state legislatures, and at least one bill introduced in the Congress.

2. That all of these bills will have as their intent the restriction or prohibition of abortion.

3. That some of these bills will be enacted and some will not; of those enacted, some will be more restrictive than others; and, of those which are most restrictive, some will be based on a so-called Human Life Amendment to state constitutions.

4. That, if a state law is viewed by some as not being as restrictive as it should be, the Congress will be approached to enact legislation to ensure the greater restriction desired; and, that such Congressional legislation may or may not be enacted.

The net result of this kind of legislative activity will be, at the least, a pattern of public policies regarding abortion characterized by (1) more restricted availability than now exists in the United States, and (2) regional variation in the availability of services. I realize full well that this is, indeed, the intention of those who propose and support such an amendment. I believe that they believe - sincerely - that the adoption of this proposed amendment and the projected legislative activity which would follow will result in some societal good.

Which "good" or "goods" are actually envisioned? If we leave this to the states and to the Congress, we'll have what?

--Perhaps a marked reduction in the numbers of abortions performed annually in the United States is the expectation. Those who would prohibit abortion entirely might hope that those numbers would be reduced from the current level of 1.4 million procedures to zero. Those who would allow abortion to prevent the death of the mother would, in fact, be hoping for a reduction of from 1.4 million to about 10,000, and those who would add to the list of legal indications rape, incest, and genetic disease, would be hoping for a reduction to 20,000.

And how will that be achieved? By what means, by what behaviors will fertile women and fertile couples achieve this rather dramatic turn? I know of only three ways in which they could achieve this:

--more knowledge about and more use of effective contraception
--more sexual abstinence
--continuation of more unwanted pregnancies to term

And all of this directed toward what end? Toward what improvement?

--improved health?
--improved women's health?
--improved family health?
--improved child health?

Or perhaps all of this is directed toward an improved society.

--improved how? for whom?

Mr. Chairman, I sincerely believe that none - not one - of these objectives will be achieved - certainly not by this proposed amendment and the state and federal legislation which is assumed will follow. Rather, I believe that this legislation will actually bring harm - physical harm, psychological harm, family harm, and not to just a few, but to many.

I respectfully submit that some of the real results will be as follows:

1. I expect the number of abortion procedures performed in licensed hospitals and clinics to, indeed, be reduced from the current level of 1.4 million annually. The actual numbers will depend on whether the policy restricts abortion exclusively to prevent the death of the mother, or whether it also includes rape, incest, and genetic disease as legal indications.

2. I expect that about 250,000 to 280,000 unwanted pregnancies, which today might be terminated by abortion, will indeed be continued to term. The reasons for continuing will include: excessive costs (excessive not only for the poor, but also excessive for many middle and marginal income persons); necessary travel which will be felt to be impossible; and, instances in which the women do not wish to have a procedure which is, in fact, illegal.

3. I expect that of the remaining unwanted pregnancies - many will be terminated by abortion in clandestine facilities - that is, by illegal abortion. In a word, Mr. Chairman, abortion will again go underground. The experience in this country prior to 1967 and the experience following the withdrawal of federal funds in 1977 make it perfectly clear that most women and couples in need of abortion find the services and find the means to obtain them.

4. Not only will the patients go underground; so will the technology. No, I do not expect a return to coat hangers, catheters, or plant barks. I expect that the technology which has developed in the past decade, the techniques which, in and of themselves, contributed to the remarkable decline in abortion-related mortality, will be used in these clandestine situations.

5. I expect that these clandestine abortion procedures will be performed by a variety of providers. Some of them will be physicians, some will not. Some will be well-trained, some will not. Some of them will have had no training at all - like friends, or the pregnant woman herself.

6. I expect that this clandestine, illegal health system will operate exclusively in facilities which are not as adequate to deal with emergency situations as are the licensed facilities of today.

7. As a result of all of the foregoing, I expect - and with all due respect, the supporters of this amendment should expect - an increase in the number of deaths related to abortion; probably not back to the astronomic numbers of pre-1967, but a significant increase. Let it be clear that the greater the restriction, the greater will be the number of illegal procedures, the greater the number of women who will suffer post-abortal illness, and the greater the number of women who will die.

The basic problem here lies not in abortion *per se*, but in pregnancy-the biologic nature of pregnancy itself and the nature of its termination. Pregnancy, with its vastly increased blood flow to the pelvis, creates enlarged organs with soft, blood-filled, easily injured tissues. Its termination requires the physical separation of one extremely vascular organ (the placenta) from another (the uterus) - regardless of whether termination is by abortion (natural or induced), or by normal delivery, or by Cesarean section. When this separation occurs, blood vessels are opened, and this is what allows for the risk of hemorrhage or the risk of infection, or both. These risks are inherent in the state of, and in the termination of pregnancy, regardless of when. The only variable is in the degree of the risk. All current data point to four factors which affect those risks: duration of pregnancy, type of termination, the skill of the attending professional, and the adequacy of the facility to deal with medical emergencies. Even legal abortion is not without its risks, anymore than is normal delivery. Current data make it clear that early legal abortion is safer than any other comparable surgical procedure - and, in fact, associated with a lower mortality rate than childbirth. But, move that safe procedure to an unsafe environment, with an unskilled provider, and you ask for illness and death. And if not death, consider this sequence: a postabortal infection, with confusing insidious symptoms at first, getting progressively worse, in a woman who is embarrassed and fearful about having had an illegal abortion, who delays diagnosis and treatment, and who ends up sterile - either by tubal occlusion or by surgical removal of her infected organs. If, perchance, the biomedical does not move you, consider the health care costs associated with these complications - the drugs, the surgery, the hospitalization - as compared with those of early, uncomplicated abortion. Is this really a societal good?

8. I expect a significant increase in the number of and proportion of second trimester abortions. This will come about as a result of the severely restricted availability and the regional variations. Time will be spent (and delay will occur) searching for facilities which provide the service - first, to find the facility in which the service is legal and safest; absent that, to one in which it is, at least, available: illegal or not, risky or not. Current data make it very clear that if we were to experience both a large increase in second trimester abortions and their performance in facilities inadequate to deal with operative complications, or by persons not adequately experienced to do them, we shall see in this country a tragic increase in the number of women who will die as a result of this procedure; a health service, if you will, which under other circumstances, they might very well have survived.

9. Finally, I expect severe curtailment in some of the scientific endeavors now underway: service and research programs directed toward a greater understanding of human reproduction and toward assisting couples to achieve their reproductive goals. It will be difficult to understand the validation and value of amniocentesis and prenatal diagnosis, if couples are not permitted to elect termination of a pregnancy when it is found that their infant would suffer from severe genetic disease. I wonder about the future of the remarkable progress recently achieved in human reproductive research - especially, for example, those efforts at finding ways to assist hopelessly infertile couples to achieve the pregnancy and birth and parenthood which they so fervently seek. And I am concerned about the future of some of the current contraceptive research, which promises safer and more acceptable methods but which could be precluded by a state or federal policy aimed primarily at restricting abortion.

Mr. Chairman, I have limited my projections to those changes which I believe will be induced by any severe legal constraints in the providing of abortion services. I have not included the many realistic concerns about problems which would follow a state law based on a so-called Human Life Amendment to a state constitution. This type of policy approach, which could place primacy on the fetus, would lead to extremely serious problems for women, families, relationships, physicians, and in my opinion, for society in general. It could tumultuously disrupt long-established, deeply rooted, and generally expected legal, societal, and medical precepts. For example (and but one of many), if the California constitution had been amended in this fashion, what would have been expected of me and of my patient of one month ago - a woman receiving chemotherapy for a malignant disease, who became pregnant despite the regular use by her and her husband of condoms and spermicidal foam? What would be expected of us? Abortion would, of course, be out of the question. She must, of course, continue to term delivery, despite our fears about the drug's teratogenecity. Her life is not endangered by the pregnancy, but the fetus is endangered by her cancer therapy. Must she now discontinue the chemotherapy because, albeit of potential benefit to her, it is indeed hazardous to the fetus?

Do I draw an excessively hard case? Do I exaggerate? Not about this case, in particular, I assure you. And, if my understanding of this proposed amendment is correct, I do not believe that I exaggerate the possibility that some of the state legislatures could move in this direction. I ask the supporters of this amendment: How far will you go in the name of "states' rights"? Just how much freedom for state legislatures are you really prepared to accept? Where do already-born persons fit in this philosophy?

This, then, is my "scenario" of what could follow adoption of this proposed amendment. In my mind, I know and in my heart, I feel that it will not come to the "goods" expected by its supporters. We shall probably come, in this critically important national debate, to ultimately deciding which set of "goods" we prefer. Will we choose a society which engenders, suggestively condones, seems to almost prefer, illegal and clandestine health services? Do we want to encourage a flouting of the law, a contempt for government and order? Is this the implied message we wish to bequeath to those who follow us? Haven't we had enough of that?

Clearly, we are an imperfect species living in an imperfect world. My most sincere hope is that we can find some common ground which takes into account not only our weaknesses and our frailties, but our strengths and hopes, as well. I hope that we can find our way through this very distressing dilemma, by way of compassion for and a realistic understanding of all its competing aspects. I am reminded of the countless hours spent with confused and anxious patients, hours spent with inquisitive and concerned medical students. One patient recently asked: "Don't they care about me - at all"? One student recently asked: "What will they have us do? Walk away? Where do my ethics come in"?

For myself and for others who feel differently about abortion than do the supporters of this legislation, I ask the same question: "Where do our ethics come in"?

Mr. Chairman and Members of this Committee, I strongly urge you to vote against this proposal.

Thank you again for the opportunity to discuss this with you.

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October 29, 1981

Senator Orrin Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Thank you so much for your letter of October 19. I am most grateful for having had the opportunity to testify before your Subcommittee. I am particularly appreciative of the dialogue in which we were able to engage.

As you requested in your letter of invitation, I am enclosing 50 copies of my statement. Again, I apologize for the rather rough copy which I submitted at the time of my testimony. Time constraints required that I type it myself. I think you will find the enclosed copies more reasonable.

I look forward to receiving the transcript and shall return it to you as soon as possible.

I take this opportunity to clarify two points which you raised in your questions to me.

You asked why the pro-choice community is projecting large numbers of restrictive state laws, when we claim widespread public support for legal abortion. The public support for the United States Supreme Court decisions of 1973 is clear and is, indeed, widespread. What is not as clear is whether the final vote in any legislative body will reflect the desires of the majority of its citizens. Clearly, that is not always the case. In your opening statement on October 14, you agreed that abortion is too important an issue to be settled by a "nose count" in state legislatures.

In discussing the case of my patient who was receiving chemotherapy for malignant disease, you pointed out that most persons identified with the pro-life community favored the availability of abortion to prevent the mother's death. Perhaps, I did not present the issue clearly enough. My patient's life was not endangered by the pregnancy; it is endangered by the malignant disease for which she is being treated. At the same time, the well-being of the fetus is endangered by the fetotoxic effects of the therapy being given to the mother. Under a Human Life Amendment to a State Constitution, abortion would not be permissible; but, would it also be required that the mother discontinue her treatment if fetal rights are declared to be paramount to all rights of all others? This is but one example of the kinds of realistic concerns many of us feel about the potential effects of your proposed amendment on women and on the ability of health professionals to practice, using their best clinical judgment.

I know that we differ widely on the subject of abortion. I believe that we both seek the best way out of this dilemma. I realize that, theoretically, your proposed amendment allows for the possibility of pro-choice laws being enacted by some of the states. However, I remain concerned about the possibility that the rights of many women and many health professionals in some areas of the country will be severely curtailed, if not eliminated. The extreme effects of extreme laws are outcomes which, in my opinion, carry the principle of "states' rights" too far, particularly when public support for such laws does not exist.

Thank you for the very commendable way in which you are conducting the hearings and, again, for the chance to participate.

Sincerely,

IM Cushner

Irvin M. Cushner, M.D., M.P.H.
Professor
Chief, Division of Women's Health

IMC:sv
Enclosures

Senator HATCH. I am going to call on Dr. Nathanson in about 3 minutes. I would like to recess briefly to make a phone call. I will be right back.

[Recess taken.]

Senator HATCH. Our next witness is Dr. Bernard Nathanson, a distinguished obstetrician and gynecologist from New York City.

Dr. Nathanson was chairman of the Medical Committee of the National Association for Repeal of Abortion Laws prior to the Court's *Roe* decision, later renamed the National Abortion Rights League. He was a founding member of this organization.

From February 1971 to September 1972, he was the Director of the Center for Reproductive and Sexual Health which was at the time the world's largest abortion clinic.

His views, to say the least, have been altered substantially from that time.

Dr. Nathanson has taught obstetrics at Cornell University and is the author of an important book published by Doubleday, entitled "Aborting America."

I have read this book and have found it extremely interesting. We are delighted to have Dr. Nathanson with us today. If you will take the witness chair at this time, we would appreciate it.

STATEMENT OF BERNARD NATHANSON, M.D., OBSTETRICS AND GYNECOLOGY, NEW YORK CITY

Dr. NATHANSON. Thank you, sir.

I am a board-certified obstetrician and gynecologist practicing in New York City. I am also a senior attending physician at the St. Luke's Roosevelt Hospital Center in New York and assistant clinical professor of obstetrics and gynecology at the Cornell University Medical College.

As you mentioned, I was a founder of the National Abortion Rights Action League which was the first political action group to work for repeal of all abortion laws in the United States, and I was instrumental in the striking down of the restrictive abortion statutes in New York State in 1970 and in many other States as well.

I was, in part, also responsible for the *Roe* v. *Wade* decision of the U.S. Supreme Court in 1973 which, in effect, nullified all existing abortion laws throughout the Nation, in that I organized and directed the Center for Reproductive and Sexual Health in New York City, the largest abortion clinic in the world.

This clinic performed 60,000 abortions in the 2 years of my hegemony and compiled an enviable safety record which was in fact cited in the U.S. Supreme Court decision.

I have performed 5,000 abortions in my own practice, have supervised 10,000 others where I was director of gynecology at a major hospital and was responsible for the 60,000 abortions performed at my own clinic.

Thus, I have 75,000 abortions in my life. I submit that I know the face of abortion perhaps better than anyone in the United States.

After several years of working as director of a fetology or perinatology unit at a major university hospital in New York, I experienced a change of mind regarding the ethical and moral acceptability of permissive abortion and have since rejected the abortion ethic.

I am the author of this book, "Aborting America," which is the paperback edition, in which I explain the metamorphosis in my thinking on this subject.

With those facts in mind, I will presume upon your time for a few moments and try to dispel certain myths regarding abortion which seem to have gained considerable credibility—not on their objective merits but merely through mindless and uncritical repetition. To wit:

Myth: If an amendment is passed proscribing abortion, doctors will become detectives investigating each woman who has a miscarriage and women will be jailed en masse.

Reality: We practiced obstetrics and gynecology for 140 years under the old restrictive abortion laws until 1973. In that span of time, no licensed physician was ever jailed for performing an abortion and no woman was ever jailed for submitting herself to one.

Myth: If abortion were to be proscribed in this country tomorrow, women would find themselves again falling into the bloody hands of drunken back alley abortionists wielding filthy coat hangers. The toll would rise again to the level of 5,000 or 10,000 deaths annually from botched abortions.

There has been a good deal of chiliastic fustian written about this.

The reality is that the toll before *Roe* v. *Wade* never exceeded 388 deaths per year, and that was in 1948, the worst year. It averaged about 250 deaths per year.

Further, we now have one proven widely used abortifacient drug called prostaglandin which is inexpensive, easily utilized, safe and efficient.

There is another drug, by the way, on the horizon called azastene presently being tested by the Sterling Winthrop Laboratories which also promises to be an efficient, safe, and cheap abortifacient drug.

If abortion were once more prohibited, women would not submit themselves to dangerous criminal abortions but would in each case purchase these drugs, probably under the counter, from the local drug store, take them home, and have a swift, private, and safe abortion in the bathroom.

I do not advocate this conduct, as I do not advocate any abortion except where the life of the mother is in danger.

I am simply indicating to you that although I doubt the legislation will prevent abortions, those women who are bent on transgressing the law will not do so at the risk of their lives.

Myth: A fetus is not a human being until:

(a) It is born.

(b) It is viable.

(c) It is 20 weeks along in pregnancy.

(d) Its brain begins to function.

(e) All of the above.

Reality: None of the above.

The fetus is a human being theoretically at conception and practically at implantation of the fertilized egg into the uterine wall at 8 days following conception, when I, as a practising obstetrician, can pick up the chemical signals in the mother's bloodstream which announce that it is there. It has at this point established a biological interface with the outside world.

The proabortionists have expended a great deal of effort dithering endlessly and ineffectually about when life begins.

However, with the advent of new technology, such as real-time ultrasound which has enabled us to watch the fetus moving at 5 weeks and its brain beginning to function in a recognizable human pattern at 6 weeks, even they have backed away from the birth line and now mumble evasively about personhood and meaningful life.

Why they are so arrogantly certain about the acceptability of permissive abortion and so humbly uncertain about when life begins in the face of all this modern technology escapes my understanding.

Myth: There are no late adverse effects from abortion.

The reality is that the obstetrical literature now appears to suggest that if women were to conceive within a year following a termination of pregnancy, they are more likely to have a miscarriage than other women who have not had a termination.

Further, cancers of the breast and uterus are much less common in women who have carried a child to term. In some mysterious manner, apparently, pregnancies carried to term may have a strong protective effect against cancer.

Myth: In this era of widely practiced contraception and especially permissive abortion, every child will be a wanted child.

The reality is that we are now sadly aware that child battering and child abuse are strikingly on the rise.

I have with me a clip taken out of this morning's Daily News from New York about some gentleman who threw his niece off a roof in the Bronx. In the body of the clip, it states that this "laundry worker was the fourth person to be charged with the murder of a child here in New York in recent weeks."

Myth: Enforcement of the Hyde amendment would result in a precipitous rise in deaths from criminal abortions.

The reality is, according to Dr. Willard Cates of the Abortion Surveillance Branch of the Centers for Disease Control in Atlanta, that since this amendment went into effect in 1978 the number of federally financed abortions was reduced by 99 percent from 600,000 annually to 6,000 annually. There has been, in fact no corresponding rise in illnesses and deaths from bungled abortions.

Myth: A constitutional amendment or other legislation banning abortion would lead to proscription of such birth control measures as the IUD and the oral contraceptive medication.

In reality, we do not know how either the pill or the IUD work. Certainly in the pre-*Roe* v. *Wade* era when we practiced under extremely restrictive abortion laws, there was never a suggestion that these measures be restricted or banned.

I personally am strongly in favor of contraception, and I am unalterably committed to more and better contraceptive research.

Myth: Statistically, abortion is safer than childbirth. This one has also gained a great deal of credibility through some juggling of statistics. The reality is that this is tricky and misleading as a statement.

If we break down pregnancy into two equal halves, pregnancy and spontaneous miscarriage are safer in the first 20 weeks of pregnancy than an abortion is. In the second 20 weeks of the pregnancy, a delivery at term is safer than an abortion done in those weeks.

Hence, the totality of pregnancy and delivery is safer for all 9 months than abortion.

Myth: Without permissive abortion, women will be denied control of their own bodies.

The reality is that I am strongly supportive of each individual's right to control his or her own body, but modern immunology now teaches us that the pregnant woman's body recognizes that the fetus is not self. It is an invader—a foreigner in a sense—and the white blood cells of the pregnant woman mount a concerted attack on the fetus in an attempt to expel it.

The fetus in most instances has evolved a protective mechanism to repel the attack and survive until birth. However, it is now quite clear that the fetus is very early recognized as another—an alien—in the body of the woman and is at best only an uneasy tenant for 9 months. It is not a part of the mother's body and, therefore, she may not have unrestricted sovereignty over it to the extent of casually destroying it.

Myth: Abortion is a matter between a woman and her doctor.

The reality is that in virtually every instance when a woman presents herself to the doctor, her mind is already made up. The doctor is nothing more than an instrument of her will.

In that there are only very few medical reasons for abortion, the vast majority of abortions are decided upon for financial, emotional, or situational reasons.

There is no physician input into the decisionmaking process in permissive abortion. It can be likened best to cosmetic surgery where a woman will visit the plastic surgeon and tell him what she wishes to have done. The physician is not involved in decision making here.

Myth: The Government has no business regulating private matters involving a woman's body. Even granting that the fetus is a human being from conception, it is her fetus and she can do with it what she likes.

The reality is that we still enforce laws regulating human bodies. We cannot sell them or mutilate them or inject narcotics into them.

Further, Government has a compelling interest in guiding and in some cases restricting the autonomy of parents vis-a-vis their children.

We are compelled by law to educate our children until the age of 16, and child labor laws sharply restrict parents from hiring out their children.

The obvious scientific conclusion now ineluctably established with the use in the last decade of this fantastic technology available to us is that the fetus is an independent human entity. The obvious moral conclusion is that the destruction of the fetus cannot be justified unless the mother's life is clearly at stake as a result of the pregnancy.

A life is a sound moral basis on which to sanction the destruction of another's life—nothing else is.

Senator HATCH. Thank you, Dr. Nathanson.

For many years, the National Abortion Rights League, of which you were an original founder, has claimed that 5,000 to 10,000 women died annually from the complications of illegal abortions prior to legalization. Could you comment upon this claim?

Dr. NATHANSON. Yes, Mr. Chairman.

That was pure politics and propaganda. Even at the time we were preaching this line, those of us who were most involved in the selling of the line knew, in fact, that it was a fabrication. However, it was a powerful and compelling line, and we used it shamelessly.

Senator HATCH. If abortion were again made generally illegal, what could we expect in the way of serious complications and deaths relating to illegal abortions? What would have happened to most of the women, for example, who found their way into your office when you were personally performing abortions?

Dr. NATHANSON. As I indicated, the technology has changed immensely. We do now have these drugs which are immensely effective in producing even first-trimester early abortions. They are very easy to take; they are used as vaginal suppositories.

These drugs, I am certain, would gain enormous circulation throughout the United States under the counter. They are inexpensive; they are simple to use; and they are relatively safe.

I do not think, as I said, there would be any return to any old back alley abortions.

Senator HATCH. I cannot resist asking you this question because of the discussion in your book on this subject.

Over the years, pro-choice groups have stated and re-stated their views that abortion is a "religious" issue, particularly a "Catholic" issue. What are your views with regard to these claims?

Dr. NATHANSON. I am in the process, as a matter of fact, of writing another book of which one chapter is devoted to the selling of the abortion line in the late sixties. One of the potent weapons that we in the National Association used was the anti-Catholic line. It was a powerful weapon. It summoned all the forces that had gained a great deal of strength during the Vietnam war years.

As you remember, we were in a politically tumultuous era. A rally and a fight against what we conceived to be the real enemy, the Catholic church, was a most appealing line in those years.

I have a considerable amount of documentation to these charges, but probably the most effective tactic that we used to sell the permissive abortion ethic was the violent and poisonous attack on the Catholic hierarchy.

Senator HATCH. How often, in your view, are abortions truly necessary to prevent the death of the mother or to insure the mother's health?

Dr. NATHANSON. I do not think there are really any abortions designed for the mother's health. There are abortions which are necessary to preserve the mother's life as a result of the presence of a pregnancy.

To give you some example of how rare these are, I have a very busy private practice in New York. In the past 4 years, I believe, I have done one abortion. That was on a woman who was terminally ill with cancer of the breasts. She was pregnant, and the chemotherapy we were giving her was having no effect because of the pregnancy.

The pregnancy was terminated; I terminated it. She lived another 6 or 8 months following that. That pregnancy was spewing out an enormous load of female hormones which were driving this tumor to multiply. Until we got rid of the pregnancy, we could not save this mother's life with chemotherapy.

That is the only one I have done in 4 years.

Senator HATCH. Given that even late abortions can be performed where the mother's "health" is at stake, what legal barriers are there presently to late abortions in your view? If there are any, have they proven to be an effective barrier to most late abortions?

Dr. NATHANSON. There are at present no legal barriers at all, except perhaps the fiction of a therapeutic abortion committee in various hospitals to pass on these late abortions for the mother's health.

I, myself, had a very unfortunate run-in with authorities at one of the hospitals I work at when I placed myself in the doorway, literally, against a woman who was being admitted for a 33-week abortion, simply because the child was proven to be a dwarf and had very little prospects for living following its birth.

Even so, I absolutely resisted the abortion. As a result, I was severely disciplined for it.

Senator HATCH. Please respond if you will to what may be another myth.

It was expressed this week in a New York Times editorial that stated: "Abortion cannot be stopped by law—only legal abortions can be."

Dr. NATHANSON. This is a playing with words.

We will never, and I have admitted this in my statement, stop abortion any more than we will change human nature in any fundamental way.

The only thing a law does, Mr. Chairman, in my view is to make a statement regarding the health of the morality of any society. The laws of any society reflect that society's health.

I think if we make a statement that abortion is wrong and translate that into law, we have substantiated a decent moral position in our own society. We will not, as I say, prevent abortion any more than we will prevent cheating on our taxes or breaking the speed limit.

Senator HATCH. Doctor, prior to your arriving at your present state of mind with regard to abortions when you were very active in performing abortions, how many total abortions did you and your close associates perform?

Dr. NATHANSON. I, myself, performed as I said with my own hands about 5,000. I supervised or was present at another 10,000 in those years. Therefore, I have 15,000 personal abortions and, as I said, those 60,000 that I was ultimately responsible for at the clinic which I ran.

Senator HATCH. You mentioned the dwarf fetus experience. What has been your experience with regard to eugenic abortions?

Dr. NATHANSON. Eugenic abortions are by and large a tiny, insignificant and vanishingly small fraction of the total number of abortions done in the United States. I personally am opposed to them.

I feel that this country and our society need these handicapped and, to use the euphemistic term, disadvantaged children. They give a certain texture to our society which we need. They evoke in us the best qualities that human beings can have—pity and compassion, sympathy and understanding.

There are all too few things in our society now which allow us to develop these qualities. They are all too rare these qualities.

I believe these children are necessary to us.

When I was in New Zealand, I had lunch one day with Dr. William Liley who is considered the father of perinatology or fetology. He told me that he and his wife had had four children. They had all grown up and gone away. Then he and his wife adopted a mongoloid—a Down syndrome child. He was at this time 60 or 62 years old. He said that he and his wife never enjoyed a child of their own as much as they enjoyed having that Down syndrome child.

Senator HATCH. We have a Senator—one of my dearest friends in the Senate—who has a child with Down syndrome. He would not trade that child for anything in this world and neither would his wife.

Dr. NATHANSON. Yes; I know.

There was a television feature recently about a family who have adopted three or four Down syndrome children.

Senator HATCH. We will have order in this room. We will show respect to all witnesses, regardless of point of view.

We are certainly showing great respect for those who have an alternative point of view to mine, and I expect those who have an alternative point of view to Dr. Nathanson to show respect as well.

Doctor, this is a tough question, but it is one which I think is fair.

What would you advise the young woman who comes to you and says that she believes that her right of choice is precedent here and that if your viewpoint prevailed and abortions were restricted her individual rights would be violated.

What would be your advice to her? How do you justify your position in light of the fact that she believes she should have this right of choice?

Dr. NATHANSON. Freedom of choice is basic to this society of ours, but this is always predicated on the ethical acceptability of the various alternatives in the choice.

Let me illustrate: If I do not like what the next witness is saying here, theoretically I have a perfect choice—either to leave this room or to walk up and punch him. That is not, in fact, an ethical choice. Violence, Mr. Chairman, is not an ethical part of any choice and, therefore, invalidates the choice.

Abortion without any question is violence, irregardless of how you interpret it. It is a violent act.

In that sense, there is no choice once one becomes pregnant. Now there are lots of choices before you become pregnant. There is sterilization or contraception or abstinence or any number of things; but once you become pregnant, the choice is no longer there.

Senator HATCH. You indicated that you had personally performed 15,000 abortions and your group had performed some 60,000 abortions.

Dr. NATHANSON. Yes.

Senator HATCH. What brought you to the opinion that you have today? Could you share that with us?

Dr. NATHANSON. When I left that abortion clinic at the end of 1972, I assumed a position as director of a perinatology or fetology unit at a major university hospital in New York City.

Fetology, or the study of the fetus, was in its infancy, if you will. We began to get in all this complicated fantastic technology—real time, ultrasound, fetcscopy, and very sophisticated electronic fetal heart monitoring devices. Amniocentesis was just then developing—all sorts of incredible, mind-boggling technology.

I sat for 4 years working with that fetus through these technologies and in intimate contact with it every day—diagnosing it, observing it, and even treating its illnesses.

It became to me just another patient and just another person. At the end of those 4 years, it became inescapably clear to me that that patient was a human being—a person. We were all there once. It is another person like anyone else.

The science of fetology has progressed to such an extent that there are now whole books devoted to this. Here is a book recently published by a Dr. Goodwin. It is called "Care of the Fetus." Dr. Goodwin is at the University of California in Sacramento. This is a 500-page or so book. Chapter 16 is all on fetal point.

I might say that this is not some fly-by-night publication. Dr. Goodwin is a very widely respected obstetrician and gynecologist. Yet here is a whole book on the care of the fetus.

This is the state of the art today, Mr. Chairman.

Senator HATCH. I certainly have been interested in what you have had to say. I think it has been very helpful to me and, hopefully, to others on this committee.

You discuss at some length in your book those contentions of the prolife movement which you find most specious and irrelevant. Where do you differ with the mainstream of the prolife movement on how best to debate this issue?

Dr. NATHANSON. Since the book was written, of course, I have continued to evolve my thinking. I do think the prolife movement—and I am, as you know, not a member of any orthodox organization against abortion; I am an independent person in my own right—perhaps has not stressed enough the importance of contraception and contraceptive research and so on. I do not think that you can back women into a corner by denying them the contraception which they need and which we, as males, may very well need for that matter.

I do think that with the prolife movement there are no excuses and no reasons to destroy a human fetus except where the mother's life is in danger.

Again, the prolife movement, or at least some dissident factions of it, have split off and have decided there are no reasons for abortion. Again, I cannot agree with that dissident faction. I do believe that where the mother's life is in danger, she should be entitled to terminate the pregnancy.

Senator HATCH. Then, after being on both sides of this issue, and studying fetology, your bottom line is that you do not believe there should be abortions except to save the life of the mother.

Dr. NATHANSON. That is absolutely correct.

Senator HATCH. Would you extend that to rape and/or incest?

Dr. NATHANSON. Yes; I would. I do not believe there are any reasons for abortion other than where the mother's life is in clear and present danger.

Senator HATCH. What suggestions would you have as to how this subcommittee can best contribute to an intelligent or rational debate on this issue in the Senate?

How could we achieve this and get members to listen to one another?

Dr. NATHANSON. As you know, Mr. Chairman, this is an extraordinarily incendiary issue.

Senator HATCH. It sure is.

Dr. NATHANSON. Everybody has an expert opinion in it.

I suppose that the first thing you have to do is examine very carefully those statements which pass for argument but, in fact, are nothing but slogan and shibboleths. Examine them extremely carefully, because most of them are hollow.

I have pointed out some of them in my little statement to you—that a woman's right to control her own body is a slogan. It has become empty now because of the recent advances in immunology.

The whole argument now has proceeded past all those 1960 rallying cries that we used. I have attempted in this book, as you know, to examine those passwords and slogans very carefully.

The state of the art today is so different from what it was in 1966 and 1967 and 1968 when I and a few others sold abortion to the American public that this is what one must concentrate on—where the state of the art, fetology, and parinatology are today in 1981.

It is no good dredging up those old 1960-ish myths and slogans. We are long since past that, and I do not think we should allow ourselves to be stuck in that mire any more.

Senator HATCH. Thank you, Dr. Nathanson. I think your testimony has certainly been enlightening. Again, I highly recommend your book, "Aborting America."

Dr. NATHANSON. Thank you, sir.

[Material follows:]

[From the Chicago Sun-Times, Dec. 11, 1979]

SCIENCE HAS DISPROVED MY PRO-ABORTION VIEWS

PERSONAL VIEW

(By Bernard N. Nathanson[1])

Why do I, once owner of America's largest abortion clinic and the first physician in the leadership of the National Assn. for Repeal of Abortion Laws, now believe that abortion-on-request should be illegal?

From the propaganda of my former "pro-choice" colleagues, one might assume that some epiphany had led me to the feet of the Pope of Rome. As it happens, I remain a resolute atheist.

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[1] Dr. Bernard N. Nathanson, a New York obstetrician-gynecologist, chronicles his changing ideas in his new autobiography, "Aborting America."

The seeming paradox has to do simply with biological science. In January, 1973, the month that the U.S. Supreme Court ordered abortion on request for nearly six months of pregnancy, I became the chief of obstetrical service at a large New York hospital. There we established an up-to-date unit for study and treatment not only of the newborn baby, but also of the fetus within the womb.

Oddly, while the abortion revolution was occurring, science was expanding our knowledge of the embryo-fetus through such techniques as ultrasonography scanning, which uses sound waves to construct TV-like pictures of fetal motions. Next came fetos-copy, which allows direct visual observation with the womb, and electronic fetal monitoring. Earlier data from embryology had shown that the heartbeat, the traditional way to define death (and hence the boundary of life) begins 24 days after conception.

Through electroencephalography we had learned that brain waves, the more recent criterion for life and death, appear in the 43d to 45th day.

The future field of emphasis will be biochemistry. As soon as the tiny embryo burrows into the wall of the womb, it lets us know of its existence through the pregnancy hormone HCG, which can now be picked up even before the mother misses her first period. We also know that the embryo seizes the initiative (fulfilling the dictionary definition of life) by overruling the chemical-immune attack that the mother's body mounts against this foreign invader. So much for the "only part of the mother's body" argument.

My change of mind will seem incredible to some. I knew the basics of embryology when I was crusading to legalize abortion, and during the months my Center for Reproductive and Sexual Health grew into the busiest abortion clinic in the world. But I began to open myself up to the data as new findings constantly accumulated. The destination is foreordained: Science is pushing us relentlessly further back into the womb.

I would willingly advocate abortion in numerous cases, we all would, were it not for the fact that a life is at stake. Only a life—that of the mother—can justify the taking of another life. But the mother's medical self-defense must be defined with obstetrical sophistication, and we must offer birth control and voluntary sterilization for women who do not wish to become pregnant. At these points, the official Roman Catholic policy is unacceptable to me. I have other intellectual objections to the anti-abortion right-to-life movement, Catholic and non-Catholic. But biology requires any civilized society to react with revulsion at the Supreme Court's policy of abortion on request for any reason when the embryo or fetus is there—alive—an inescapable part of the human community.

Even so, the activists will object: What about the women who will die or have their insides mutilated by "back-alley butchers" and self-inflicted, coathanger abortions if the operation is made illegal again? This, more than any other factor, impelled me to join the pro-choice forces in late 1960s. The tragic deaths of women, totaling perhaps 500 a year, must be weighed against the 1 million lives in the womb that are currently extinguished each year.

However, it is now possible to avoid carnage and death, thanks to two medical developments of the 1970s. With suction curettage in wide use, even non-physicians could perform underground abortions with high safety in the first three months of pregnancy. And prostaglandin suppositories offer a foolproof method for a woman to produce an apparent miscarriage in the first three months.

Cynical, perhaps. But women need not die if and when anti-abortion laws are reinstated, and those laws would affirm society's commitment to the unique value of each life.

Aborting America

Bernard N. Nathanson, M.D.
with Richard N. Ostling

DOUBLEDAY & COMPANY, INC.
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THE SPECIOUS ARGUMENTS AGAINST ABORTION

One need not question the motives of the anti-abortionists to feel qualms about their movement. There *is* a "Catholic issue," for one thing. Not the way it is usually framed by the opposition, but rather the bishops' willingness to accept the death of the mother as the price for protecting the fetus (what about the *mother's* "right to life"?) and their opposition to two major alternatives to abortion: artificial birth control and voluntary sterilization. The Right-to-Lifers always seem to avoid confronting these issues, probably to appease the Catholic traditionalists in their ranks. The rest of us simply cannot accept this silence. The movement is also off-putting for its shallowness. This is not the War of the Roses, and it will not be settled by handing flowers to legislators, any more than youths settled Viet Nam by stuffing flowers into the barrels of the rifles of Pentagon guards.

Many of the arguments commonly used by anti-abortionists do not hold water if examined carefully:

1. *The Vanishing Cases that Have Not Vanished.* The "anti" authors repeatedly state that medicine has removed the classic conflict between the mother's life and alpha's life. They have in mind mainly the famous dispute in which the popes of Rome

ruled that alpha should not be killed by crushing its skull to save the mother's life in obstetrical instances in which that choice could not be avoided. Protestants and Jews sided with the mother in such cases. This indeed is no longer a medical issue. However, there are a number of complex problems in modern obstetrics that raise the same life-vs.-life quandary. These will be examined below in detail.

Some anti-abortionists also treat rapes that result in pregnancy as non-existent. As we will see, this is not so, either. Though not common statistically, these cases are very real for the individual women who are victimized, and cannot be avoided.

2. *Profiteering.* The conservatives in Right-to-Life who rarely bestir themselves over, say, corporate profit margins have an unseemly interest in abortion income. Doctors are "only in it for the money," we are told, as though abortion were a marvelous road to riches. If anything, this cuts on the pro-abortion side; there is a bit *more* money to be made (albeit at greater risk) if abortion is illegal and it need not be declared on income tax returns. But the whole point is muddleheaded. The rates I paid doctors at CRASH were denounced in many a hospital locker room as "windfall profits." I did pay well: $90 an hour for supervisors and $70 an hour for other doctors. This enabled me to build a staff with a remarkably good safety record, while we still offered abortion at modest fees. I recall a conversation I had at that time with John Cole, a prominent obstetrical colleague at New York Hospital, whom I overheard using these terms one day in the attendings' dressing room. I asked,

"Johnny, how do you define profiteering?"

Cole, a charming man with a sophisticated sense of humor, replied:

"Bernie, that's when *you* make more money than *I* do."

In those early days following the legal breakthrough in New York, the medical profession's attitude was: It's not so much that what you are doing is wrong, but you are making a ton of money out of it, too. So were surgeons in other specializations, but we never heard talk of "profiteering." Medical costs are an important question, too complex to bog us down here, but abortion should not be singled out for particular scrutiny as though it were different from the cost of other medical procedures.

3. *The Slippery Slope.* It is contended that once society accepts open abortion, physicians are turned into callous and bloodthirsty people, and increased suicide will be next. Sometimes V.D., child abuse, and rising illegitimacy are also blamed on this all-purpose target of abortion. Where is the evidence that abortion produces a generally lowered regard for life in democratic societies? Sweden has both high suicide rates and liberalized abortion, but there are other nations where the two do not go together, including Austria, England, and the United States. If there *is* a connection, it could be that the same social ethic that fosters suicide also fosters abortion, but not that abortion itself produces increased suicide rates. Child abuse statistics have increased since legal abortion became widespread in the U.S., but this is a complex area; formerly abuse was not reported as frequently. Only *reported* abuse has risen, which could be a sign of *increasing* regard for life. The linkage with mercy-killing, also common, does not credit human intelligence with the ability to distinguish between two issues that are separable and highly complicated on their own terms. These efforts all simplify abortion, and in abortion, simplicity is simply not there. The anti-abortionists end up trivializing the abortion problem.

Strangely, they seldom mention the one instance in which abortion may produce a slide down the moral slope: the question of infanticide, which will be taken up below.

4. *The Slippery (Nazi) Slope.* This is a favorite means for scumbling the debate. Anti-abortion authors cannot restrain themselves from dragging Adolf Hitler out of the grave. A society that accepts abortion, we are told, is doing what the Nazis did when they killed off the handicapped, the retarded, the gypsies, and the Jews.

The facts are these. The German Nazis had strict anti-abortion policies—for "Aryans." Jews were encouraged to abort, as part of Hitler's racial purity madness. Abortion, even abortion to eliminate alphas with genetic diseases, is not the same thing as genocide. The aim in eugenic abortion is physically pure newborns of all racial groups, not the purity of one racial group as demanded by an overarching ideology. (Strange that Right-to-Lifers do not make more of the fact that the pioneer in liberal abortion was not Hitler but V. I. Lenin, in 1920. The Soviet Union is not exactly one's ideal of a humanitarian, life-valuing state, either.)

It is much less obvious to the society at large what we are doing in abortion than what Germany did regarding genocide. If you were a German and your Jewish next-door neighbor disappeared one night and never came back, the result of Nazi policy was obvious, unless you chose not to see it. When a neighbor gets an abortion, you rarely know about it. The community is dimly aware, if at all, that on the average in our nation one alpha is legally extinguished every thirty seconds, hour upon hour, day in and day out.

Above all, I must protest that the waving of the Nazi flag raises the temperature of the discussion intolerably. It is a pejorative tactic that is inexpressibly unfair to pro-abortion citizens and to my former colleagues. They are not Nazis. And as a Jew, I cannot remain silent at this facile use of the Nazi analogy, though I realize that some anti-abortion Jews use it. If this argument is so compelling, why do Jews remain generally favorable toward abortion? The Nazi experience was so utterly shattering that it defies any analogy, and it defiles the memory of the Holocaust to bring it into this discussion.

5. *Blood and Gore.* Anti-abortionists seem to delight especially in printing graphic descriptions of what abortion does to alpha. Usually these tracts are as inaccurate as they are purple in prose. (Salting-out, for example, does not barbecue alpha's skin, or shrivel it like a prune.) In any event, who wants to read graphic accounts of amputation, either? Any surgical procedure so described plays upon the squeamishness of the lay public. The physician is no butcher or ghoul when he takes the bloodiness of abortion matter-of-factly. This is the first step toward ability to perform as a doctor. If your own physician gets squeamish over such things, I sincerely advise you to take your business elsewhere. We should debate fairly whether the decision to abort is moral and just, not whether, once the decision is made, abortion is bloody.

6. *The Phenotype Argument.* Similarly, Right-to-Lifers continually show photographs of aborted alphas. The physical facts of alpha are part of the data, and we will soon turn to these, but a favorite ploy is to show an alpha of sixteen or twenty-six weeks, when it is fully formed and approaching babyhood. Few abortions, relatively speaking, occur even by sixteen weeks, and hardly any as late as twenty-six weeks. The argument is raging mainly about the hundreds of thousands of alphas aborted at six, eight, or

ten weeks when alpha does not look like a newborn baby, except in a very general sense. This is as silly as arguing mercy-killing of the aged by showing photos of robust toddlers. We do not identify alpha based upon its exact physical identity with a baby; it is an entity on its own terms.

7. *Medical Scare Tactics.* One after the other, anti-abortion writers raise the specter of abortion as a clear and present danger to the mother's health. This is a Right-to-Life red herring. Abortion has hazards, of course, and these should be part of the "informed consent" that the woman gives prior to the procedure, but she should be informed of the facts minus scare tactics. In general, the medical statistics cut against the anti-abortionists. The death rate for early abortion (which is always to be preferred) is well below that for live births, and will continue to be: 1 abortion-related death per 100,000 early abortions and nearly 20 maternal deaths per 100,000 live births.

The rates of morbidity ("complications") and sequelae (long-term effects) are more difficult to assess, but these are also low. The pregnant woman contemplating abortion should be informed that, for reasons that are not medically known, a certain number of women statistically will have only one successful pregnancy in their lives. The patient should be aware of the remote chance that she is destroying the only offspring that she will ever bear. The question here, however, is whether abortion contributes to sterility or to other medical problems. I would reject any decisions based upon studies from Eastern Europe, often cited by Right-to-Lifers, because the medical and social situations are not parallel. Likewise from Japan, which has a higher rate of subsequent cervical pregnancy after abortion but where doctors tend to do abortions at any stage, even by late D and C into the twenty-sixth week. Britain would seem to be a close parallel, and the two studies often cited from there (Stallworthy *et al.* at United Oxford Hospitals, 1971, and Richardson and Dixon at Bristol Maternity Hospital, 1976) report—by U.S. standards—an unbelievably high incidence of perforated uteruses, of required blood transfusions, and of subsequent fetal loss. I must assume that their technique is not the same as ours, or not as good. Also, the populations studied in these papers are too small for drawing any statistical conclusions or for fixing policy.

What matters is what is occurring in the United States, where we now have many years of mass abortion experience. Regarding "complications," I can cite my own study, the first using a large sample, on 26,000 cases at our New York clinic. These were first-trimester ambulatory abortions using paracervical-block (local) anesthesia. There were no known deaths (nor were there throughout the 60,000 cases under my tenure). The total "complication" rate was 22 per 1,000 cases. From the 26,000 women, we had 36 perforations, 12 of which required surgery for suture and one of which required a hysterectomy. There were 391 noteworthy infections after the abortions, and in 49 of these the women were hospitalized. The total of hemorrhages was 54.

As for the longer-range effects, we have a good study of December 1977, by Daling and Emanuel, of 4,896 obstetrical patients in Seattle, Washington, of whom 571 had histories of prior abortion. To remove statistical factors other than abortion that affect pregnancy, the women were matched with control groups for age, order of pregnancy, socioeconomic status, and other criteria. The researchers found that "when confounding maternal variables are controlled, there is no relation between an induced abortion and subsequent abnormal outcome of pregnancy." They report the same in nine carefully controlled statistical studies in the U.S. and overseas, and also claim that "national vital statistics from several countries support this conclusion." Unfortunately, the latter point is not documented.

All of the risks are of an acceptable order of magnitude. After twelve weeks, the patient will have to weigh the increase in risks as it is reported to her. This must be an area of continued monitoring, and long-range studies may show up more problems than are now evident, but none of the purely medical considerations provides any reason whatsoever for *outlawing* abortion.

8. *Psychiatric Scare Tactics.* The anti-abortionists also like to dwell upon the negative psychological impact of abortion on women. Some speak of "severe guilt reaction" in a certain percentage of cases. This is another instance of the movement's abuse of language. Abortion may produce feelings of regret, perhaps even remorse, but this is not a clinical syndrome of psychopathology. Sadness is not sickness. Guilt reactions do relate to the care of the individual patient, and in some instances may provide a clinical

reason not to abort. But in the professional literature of the '60s and '70s in the United States, there is no solid evidence that psychopathology is either induced or appreciably worsened in the general run of cases.

A 1978 summary of findings by Stephen F. Pariser *et al.* at Ohio State University reports that the pendulum has swung away from emphasis on the negative psychiatric impact or trauma since the '40s and '50s. They summarize: "Post-abortion psychiatric complications are not common. There are no unequivocal psychiatric contraindications for termination on a psychiatric basis. The risk of exacerbation or precipitation of a major psychiatric illness is small and unpredictable. However, there seem to be women in higher risk categories." All these points should be borne in mind in diagnosis and care of the individual patient; they are not the basis upon which society should limit abortion.

In each of these arguments, and in others, the anti-abortion forces sidestep the only issue in abortion: what is alpha, and should it be valued and protected? The Right-to-Lifers trivialize this fundamental human question when they dredge up these lesser issues, particularly when the lesser issues do not stand up to hard analysis. They compound this by trivializing, or ignoring altogether, the pressures that childbirth can place upon women under trying circumstances. They take their cause beyond the scope of reasonableness if they do not allow contraception and voluntary sterilization as choices to those women who do not wish to become pregnant.

Senator HATCH. We will now call our last witness, Dr. Thomas Hilgers, who is a certified obstetrician/gynecologist and presently on the staff of the Creighton University Medical School in Omaha, Nebr.

Dr. Hilgers is also a professor of obstetrics and gynecology at the Creighton Medical School and Director of the University's Natural Family Planning Education and Research Center.

He is an editor of a recently published book, "New Perspectives on Human Abortion," a copy of which I have here. I have not had an opportunity to fully read it yet, but it appears to me to be an extremely thorough examination of some of the medical, legal, and philosophical aspects of the abortion controversy.

Like the other physicians to whom we have listened today, Dr. Hilgers, we are very happy to have you here. We think this has been a very enlightening discussion up until now, so there is a lot of pressure on you.

We are happy to have you with us.

STATEMENT OF THOMAS W. HILGERS, M.D., ASSOCIATE PROFESSOR, DEPARTMENT OF OBSTETRICS AND GYNECOLOGY, CREIGHTON UNIVERSITY SCHOOL OF MEDICINE, AND DIRECTOR, CREIGHTON UNIVERSITY NATURAL FAMILY PLANNING EDUCATION AND RESEARCH CENTER, OMAHA, NEBR.

Dr. HILGERS. Thank you very much, Senator Hatch.

I appreciate the opportunity to be here and to share some of the work that we have been doing in this whole area related to induced abortion in the United States.

My prepared testimony will be submitted to you with a number of appended documents which support the conclusions basically which I will be discussing this morning.

I am an obstetrician and gynecologist in active practice and research at the Creighton University School of Medicine. My major area of expertise and interest is in the field of human reproduction—and, from a clinical point of view, reproductive medicine.

There are three areas that I would like to address with the subcommittee this morning. One is the area of abortion-related maternal mortality which we have heard some of already this morning.

Second, I would like to address the question of criminal abortion and what we might be able to anticipate if abortion were restricted again.

Finally, I would like to show the subcommittee a short video tape, using real time ultrasound to show the embryo and fetus in utero. That will be the last part of my presentation.

The whole question of abortion-related maternal mortality is one which has been discussed for many years, as Dr. Nathanson already alluded to.

The phrase that abortion is safer than childbirth has made it into some of the most elite of legal documents and has certainly been made a fairly common password in the media and in common discussion of the abortion debate.

It is, however, an issue that does not hold up to basic scientific scrutiny. Based upon recent studies which are contained in the book which you mentioned, we have been able to find the following:

First of all, with the introduction of abortion on demand throughout the United States, there has been no significant change in what was an already-existing downward trend in the maternal mortality rates. And that is the maternal mortality rate in general that I am referring to here and not specifically related to abortion.

Clearly, there has been no positive effect of the current induced abortion policy which could be identified from an evaluation of this data.

Second, in analyzing the trend in maternal deaths due to induced abortion, it has been shown that while maternal deaths stemming from criminal abortion appear to be decreasing, they have been replaced almost one for one by maternal deaths due to legal abortion.

The results of this study indicate that there has been no significant impact on the relative frequency of abortion-related maternal death due to the introduction of induced abortion.

Indeed, relatively speaking, the number of women who die from induced abortion today is equal to that which occurred prior to the days of legalized abortion. The only difference really is that the deaths today are from legalized abortion, whereas prior to this time they were due to illegal abortion.

That may sound somewhat contradictory to what Dr. Tyler said—and it is and is not.

There has been an ongoing downward trend in maternal deaths due to abortion from all causes which started in the early 1960's. Actually there have been a couple of trends. One started in the early 1940's. There was a second trend that began in the 1960's. The latter trend was well-established prior to the legalization of abortion. That downward trend has continued.

The only impact the legalization of abortion has made is that the maternal deaths now are due to legal abortions as opposed to prior to legalization when they were due to illegal abortions.

Third, in comparing the relative risk of natural pregnancy versus that of legal abortion, natural pregnancy was found to be safer in both the first and the second 20 weeks of pregnancy—the only two time periods that are actually legitimately comparable with known and existing data.

The data used in this comparison are thought to be more accurate than any previously compiled comparisons done in a more traditional fashion.

Indeed, the often-made claim then that abortion is safer than childbirth was not found to be true and did not stand up to close scrutiny.

The question of illegal or criminal abortion has also been one which has been discussed from the very beginning of this debate in the middle 1960's.

On the one hand, the claim was made that between 5,000 and 10,000 maternal deaths were due each year to illegal abortions. Second, the claim was usually made that there were approximately 1 million illegal abortions in the United States on a yearly basis.

Those statements, incidentally, go back to the pre-*Roe* v. *Wade* days—prior to 1973—and even back to the mid-1960's when the original debate started.

We have developed the first objective model for accurately estimating the number of criminal abortions which have been performed in the United States on a yearly basis.

With the data generated from this model, trends in criminal abortions could be analyzed. The effect of the current legal abortion policy on these trends could be evaluated.

In addition, the effects of any future restrictions on abortion could also be predicted.

The conclusions of this study are the following:

No. 1, in the 25 years prior to the Supreme Court decision, the largest number of maternal deaths related to criminal abortion in any single year was 388. This was in 1948 as already stated. Estimates that there were between 5,000 and 10,000 maternal deaths due to criminal abortions each year in the United States prior to the legalization would appear to have been grossly exaggerated.

I just might add here sort of an important statement, I think. That is that I think it is important for people to realize that any maternal death, whether it is from pregnancy-related causes or whether it is from an induced abortion that is legal or from an induced abortion that is illegal, should be viewed as a tragedy and something that no individual is in favor of.

I think that sometimes this debate makes people out as if they might be in favor of such occurrences. In fact, the opposite is true. We have a great concern about those deaths and trying to reduce them.

As to the means by which they might be eliminated, however, perhaps differing opinions exist.

No. 2, in spite of the current legal abortion policy, maternal deaths related to criminal abortion have not been eliminated. That Dr. Tyler referred to this morning. Maternal deaths due to illegal abortion still occur in this country.

No. 3, estimates of the number of criminal abortions per year in the United States have previously been grossly exaggerated. A reasonable estimate for the actual number of illegal abortions per year in the prelegalization era were, as a result of our studies, from a low of 39,000 back in 1950 to a high of 210,000 in 1961. The average on a year-by-year basis for the 20 or so years before legalization was about 98,000 per year.

No. 4, in addition, it is not true that legal abortion simply replaces criminal abortion. With legalized abortion there has been an exponential increase in the total number of abortions each year in the United States. There has been an increase in the range of six to elevenfold in the total numbers of abortions that occur in the United States from the preexisting numbers prior to legalization. This increase should be directly attributable to the legalization of abortion.

No. 5, likewise, if abortion were legally restricted again, one could anticipate a six to elevenfold reduction in the total number of induced abortions each year in the United States. One would not have to fear that massive use of illegal abortion would develop as the result of such restrictions.

No. 6, our data also suggests that the legalization of abortion in the United States has resulted in a modest decrease in the number of criminal abortions. This decrease began between the years of

1971 and 1972—actually before the legalization by the Supreme Court—and continued until the year 1974—shortly after the legalization, at which time a plateau was reached.

For the years 1974 through 1977, the last year in which this study could follow through with the data available, there was no additional reduction in the numbers of illegal abortions in spite of a continued increase in the numbers of legal abortions.

No. 7, the decline in the number of illegal abortions did not begin until the legal abortion ratio—that is the number of legal abortions per 1,000 live births—reached 160 per 1,000 live births. It did not reach its plateau until it reached 250 abortions per live birth.

With the continued increase in the abortion ratio, up to 325 in 1977, no further reduction was observed.

No. 8, there was a 130-fold increase in the number of legal abortions and nearly a 170-fold increase in the legal abortion ratio to produce a relatively modest fourfold decrease in the number of illegal abortions.

For each criminal abortion which has been eliminated, there have been over 18 legal abortions performed.

The estimated annual reduction in the number of criminal abortions in the United States as a result of this study, thus, was 53,000 per year. In comparison, the public policy of legal abortion during the period of this study had generated an estimate of 970,000 legal abortions per year.

As a result of this, we also did a cost-benefit analysis and found that eliminating one criminal abortion was costing at a very conservative figure about $3,600. It was also proposed that programs could be developed. That adds up to a total program of $200 million a year which I am sure is very conservative.

With a program at that extent, we could probably do as well without abortion in terms of reducing criminal abortions if a positive public health program were developed.

My final area of testimony today is the ultrasound evaluation of the living unborn human being. Diagnostic ultrasound has been used for several years now in obstetrics. It is used daily in the management of obstetrical patients.

Ultrasound is a technology which uses very high frequency sound waves, much beyond the capacity of the human ear to hear, in the range of 2 million to 10 million cycles per second.

A very small amount of this sound is allowed to transmit into the tissues. The echo that the sound creates is picked up by the machinery and translated by the use of computer technology into visual images.

Real time ultrasonography is a special form of ultrasound technology which allows for the ongoing monitoring of motion. In effect, it allows for the development of live action motion pictures to be taken.

This type of real time ultrasound technology has been available for the last 5 or 6 years, but there have been tremendous improvements made in this form of technology. In fact, improvements continue to be made.

We have in our institution two real time machines at the present time. The one we are going to show you—not the machine but the results of our work—this morning comes from actually the older technology. The newer one should be even better.

I would like to take a few moments and show this video tape. It is only 10 minutes. There is no sound with the tape, so I will narrate as we go along.

Senator HATCH. Before we do that, could I ask you a few questions and then go into your tape?

Dr. HILGERS. Yes.

Senator HATCH. In your recently edited book, there is an outstanding summary of the maternal mortality issue that you have written yourself. I would like to place that chapter in the permanent hearing record of this committee.

Without objection, that will be inserted after your prepared statement in the hearing record.

Senator HATCH. In addition, I would like to ask you to summarize your conclusions with respect to the health and safety implications of legal and illegal abortions, as well as between abortion generally and childbirth.

We hear a great deal about illegalization of abortion leading inevitably to coat hanger abortions, unsanitary abortion mills, and increasing maternal mortality. Would you comment on this?

Dr. HILGERS. It seems to me there were several questions in that one question.

The question of the safety of abortion, first of all: I think that it is clear that if one really does a careful evaluation with the existing data, natural pregnancy left by itself under reasonably good medical care is safer than the artificial interruption of pregnancy which occurs with abortion. That conclusion is reached after an extensive evaluation of the known data which allows for a proper comparison to be made. It is at loggerheads with the current assertion that abortion is safer than childbirth.

Senator HATCH. You have done a great deal of work on the incidence and frequency of abortion before and after legalization.

Would you take issue with Dr. Tyler on any of his major conclusions about the impact of *Roe* v. *Wade* and the absolute number of abortions performed on an annual basis?

Dr. HILGERS. Dr. Tyler really did not answer the question except by alluding to the preexisting data. There was a planned parenthood conference in the late 1950's which estimated that there were between 200,000 and 1.2 million illegal abortions in the United States. That was the study which Dr. Tyler referred to.

The Centers for Disease Control, Abortion Surveillance Branch, has very limited data prior to the year 1972. They do have some back to 1969 but nothing of and by itself that would allow an answer to that question.

Our analysis goes back, using a specific model which we have developed, to 1940 and allows for comparison of the trends which have been in existence since that time.

In effect, what we have been able to show is that the number of illegal abortions was probably around 100,000 on an average per year prior to the introduction of abortion on demand in the United States.

The annual reduction in the number of abortions resulting from legalization is probably around 50,000. There continues to be an ongoing number of illegal abortions in spite of legalization.

The comparative safety between legal and illegal abortions is also a difficult question to answer, except that I think most people would agree that illegal abortion is probably not as safe as legal abortion.

However, it is an impossible question in some ways to answer.

Part of our ability to produce this model was based upon a predication that illegal abortion was more dangerous actually than childbirth. Most people, regardless of what position one holds on abortion, would agree that illegal abortion is more dangerous.

The overall number of illegal abortions is small.

Senator HATCH. Let me give you the same question that I put to Dr. Cushner. That is: Is there any evidence of which you are aware that suggests that abortion, legal or illegal, may have short or long-term impact upon the ability of a woman to bring future pregnancies to term?

Dr. HILGERS. Literally, the whole weight of the world's medical evidence suggests that artificially terminating a pregnancy, especially in the first 12 weeks of pregnancy, holds with a variety of long-term complications or sequelae. This has been known at least since the mid-1960's.

This is based upon the Eastern European data which Dr. Cushner referred to. However, it has not been limited now to the Eastern European data. There are data in the Western Hemisphere, including the United States, that now support this contention.

Basically, there are several things that can happen. Probably one of the most important is the incidence of premature delivery or subsequent early delivery after having had a first trimester abortion.

The first trimester abortion is performed by dilating the cervix with a metal instrument. That dilating process has a tendency to injure the cervix in some patients—not all patients. As a result, the cervix is not as competent to hold a subsequent pregnancy that results in an early delivery.

We estimated at one time that this may be resulting in anywhere from 15,000 to 30,000 premature deliveries in the United States. This was a couple of years ago when the number of abortions was less than currently.

The current estimates are that there are about 1.5 million legal abortions in the United States every year. It has gone up each year since *Roe* v. *Wade* on a curve that is incredibly steep. It is almost like it is never stopping.

Senator HATCH. Let me pursue briefly the issue of third trimester abortions. I have been frequently told that such abortions are no serious medical or public health problem because they occur with such infrequency. First of all, is that true—that they seldom occur at all? Second, could you discuss with us some of the motivations for late termination of pregnancy? Finally, what has been your own experience with respect to live births during such abortions?

Dr. **Hilgers**. The CDC data on late abortion indicates that between 80 and 85 percent of abortions are performed during the first 12 weeks. The remaining 15 to 20 percent are done in the 2d trimester or after the 12th week of pregnancy. Then it is subsequently broken down into stages.

My recollection is that only 1 or 2 or 3 percent—something in that range—are performed after the 24th week of pregnancy.

When you are at the 24th week of pregnancy, there are several different ways in which abortions can be done. One is by the introduction of salt solution. One is by the introduction of prostaglandins—this is in the amniotic fluid—which allows then for a normal labor and delivery process to occur and the delivery usually of a dead infant. There have been several live infants reported after both of those types of procedures—probably higher with prostaglandin-type abortions than with saline abortions.

The third way in which an abortion of this kind is performed is by hysterotomy. Hysterotomy is an operation like a Caesarean section in which the infant is surgically removed from the mother's abdomen and uterus.

With the hysterotomy type of abortion there is no chemical that is inducing fetal death. When the surgeon enters the uterus, the baby is still alive.

I do not know how many hysterotomy abortions are being performed each year in the United States. It is very low—certainly less than 1 percent.

I would take issue with the estimate of 400 or 500 live births. Although that may be a number which makes it out of the womb alive, with every hysterotomy abortion the standard procedure is to open the uterus and either separate the placenta so that the infant dies of asphyxia prior to delivery or to crush the skull which is probably the more common procedure prior to delivery of the fetus at which time the infant is born dead.

This has been done primarily because the physicians and nurses involved in this have a difficult time dealing with a live fetus—psychologically and mentally.

Senator **Hatch**. Dr. Tyler indicated 500 to 600. Do you think it is that or less?

Dr. **Hilgers**. I do not know. What I was trying to say is that the potential is much higher.

Whenever a hysterotomy abortion is done, once the uterus is opened, that fetus is still alive. What the physician does with it prior to its actual delivery, whether crushing the skull or separating the placenta, obviously will reduce the number of live-born infants but would be much higher than 500 because there are more than 500 hysterotomy abortions.

Five hundred is a number which I cannot argue with one way or another, because I do not know where it derived from or on what basis it was derived.

Senator **Hatch**. You are indicating it is a modest number.

Dr. **Hilgers**. Yes.

Senator **Hatch**. Modest, but important?

Dr. **Hilgers**. Yes.

Senator **Hatch**. What has been your experience with respect to eugenic abortions and with respect to third trimester abortions?

Many individuals have suggested that there are few, if any, legal barriers placed upon such abortions. Is that the case, in your opinion? How frequent would you estimate such abortions to occur?

Dr. HILGERS. You are talking about third trimester abortions?

Senator HATCH. Right.

Dr. HILGERS. I do not think that third trimester abortions occur very frequently.

When you talk about a third trimester abortion, you are talking about the premature delivery of a child that is fully capable of living outside the mother's womb and with good neonatal care can survive. It certainly entertains all of the difficulties with which that presents itself.

The question about eugenic abortion I would like to address for a moment.

I would agree with Dr. Nathanson in the sense that it is a small number of the total number of abortions. I think we ought to realize that the overwhelming number of abortions are not being performed for any medical reasons. They are being performed for social indications or economic indications of some sort. The number of eugenic abortions is very small.

However, I am deeply concerned about those because of the ethic which surrounds the performance of eugenic abortion.

In effect, what we are doing with the use of amniocentesis in these situations is that we are drawing the fluid from around the baby to make a diagnosis on the baby but not for the benefit of that child but for ultimately the destruction of the child.

It is true that a lot of amniocenteses will produce a normal result and you can reassure the mother and the father that the child is normal and therefore they will not get an abortion. However, usually at least in my experience with good genetic counseling you can do the same type of reassurance. You can also prevent the potential for dangers from the amniocenteses.

I have seen normal infants spontaneously aborted as a result simply of the amniocentesis procedure, so there are risks associated with it.

The thing that really concerns me, which I think is important in these deliberations is what I view to be a very prejudicial attitude toward handicaps at this early stage of development.

In effect, what we are trying to do is make a diagnosis—not for the help of the person but for the ultimate destruction of that individual. That is a major change in medical ethics which has not received a great deal of discussion nor a great deal of publicity. The American people are not that familiar with it I do not think.

Senator HATCH. Thank you.

Let us go to your video presentation, Doctor.

Dr. HILGERS. We are going to have to have all of the lights off I am afraid, because people who are unfamiliar with looking at ultrasound will find that it is not like using a 35 millimeter Minolta.

The person who is running this projector today, incidentally, is Mr. Mark Muilenburg. Mark is the Director of Ultrasound at St. Joseph Hospital in Omaha. He is the technician who has done all of these.

[Tape presentation.]

Dr. **Hilgers.** This particular tape begins at 34 days after fertilization and continues through 69 days after.

Because of the type of patients we are doing this on, we have very accurate dating of when they conceived.

We start the tape at fetal age of 34 days where the heart beat is observed.

To give you an idea of where we are looking, that is the gestational sac. That small white area is the embryo.

The real time now moves. In the white area you can see a regular beating within the box. It comes and goes because of the form of technology we are using, but you can see it now well. That is the fetal heartbeat at 34 days.

We thought when we put this together that was the earliest we observed and perhaps had ever been observed. Yesterday Mark identified a fetal heartbeat on a 31-day embryo.

Here he measures the length of the embryo. The two dots electronically measure at 1.4 centimeters. That is about two-thirds of an inch at this stage. This is highly magnified, of course, using this form of technology.

We have moved 1 week further now. Fetal age is 41 days. That is from fertilizations. The arrow points to the heartbeat which will start when the action begins.

The regular large movements are the patient's breathing. Actually, she was very excited to see this. It was tremendously reassuring and exciting to her.

We move one additional week further to view the heartbeat. We are at 48 days. Again, as you can see, the embryo is getting larger each week. At the point of the arrow when the action starts, there is the heartbeat.

Now we are going to 48 days. It is the same time period but we are seeing spontaneous body motion. You have to look very carefully at the arrow that says "body motion" where Mark is pointing. You will see ever such slight movement.

There it is. You will see it again. There it is again.

It comes up a few more times.

This is only less than 7 weeks after fertilization.

That is spontaneous motion.

We now move approximately one more week—54 days—it is about 7½ Weeks. We are just seeing limb movement. There is the head and the torso—the heartbeat. The legs are up at the upper portion on the left, and the arms will be where they are labeled.

There is a fist that came up there.

At this point we are at less than 8 weeks actually of fetal age—7½ weeks in this. It is now a fetus really fully developed in terms of arms and legs, moving spontaneously with no instigation here—just moving and rolling.

Now we are taking the same age but we are going to show you fist sucking. You can see the movement. It will stop when the fist goes to the mouth there.

The fist is where Mark is pointing, and the head is right next to it. That is fist sucking.

When the tape starts again, you will see fist release. It will pop off from the fetus' head.

Fist release is coming up here.

Now it goes back to the mouth and begins to suck.

When you are really good at looking at these, you can actually see fingers on that hand. You have to be a little bit better than the lay person might be.

The fist will pop off again. There it goes.

Here is stop action for a moment to let you see the fist and the head again. It will pop off, I think, one more time.

There it is.

In this final segment, we have moved a full 2 weeks further to 69 days. We are going to show you fetal slumber and fetal awakening.

Here is stop action of the head and the body and the limbs on the lefthand side at 69 days. Now it is moving. This baby is not moving a whole lot. It needs to be aroused, so Mark is going to arouse him by gently jiggling the maternal abdomen. This baby then starts to move.

For the remainder of the tape which is another 30 or 40 seconds, you will see this young fetus move spontaneously and do a complete rollover.

On the left are the limbs. The limbs are going to go all the way over to the right side.

The head is down and the baby is sort of facing us. Now he is doing a complete roll—he or she. I do not know if it has quite made it yet.

There is a stop action there.

Here we are measuring the length of the fetus. Up at the top it is now 5.8 centimeters, which is about 2½ inches—almost 3 inches—in its growth pattern.

That is a limb off to the left which is moving so much—probably a foot, although it could be an arm. I guess I cannot tell for sure.

The heart is continuing to beat through all of this.

Now comes the rollover pretty soon.

I guess it did the complete rollover already and I missed it, but it was there.

[Pause.]

Senator HATCH. Thank you, Doctor.

This has been a remarkable film and an outstanding day of hearings. All four witnesses have been excellent, giving their respective points of view. I feel that this has been very helpful to the committee, and we appreciate the efforts that you have put forth.

Do you have anything further that you would care to say?

Dr. HILGERS. I just would like to emphasize that all of these motion pictures were taken during the first 12 weeks of pregnancy. The last that you saw was just at about the 12th week.

This is not an advanced pregnancy. This is the very early stages of pregnancy.

Ultrasound—real time ultrasound especially—has really for the first time allowed us in a noninvasive way to take a look at what used to be known as the strange, silent, and unknown world of the unborn. I hope that it will be of some help in your deliberations.

That video tape I wish to make a part of the official record of my testimony.

Thank you.

Senator HATCH. Thank you.

[The prepared statement and material submitted by Thomas Hilgers follows:]

PREPARED STATEMENT OF THOMAS W. HILGERS, M.D.

Mr. Chairman, members of the Subcommittee, my name is Thomas W. Hilgers, M.D. I am an associate professor in the department of obstetrics and gynecology at the Creighton University School of Medicine, Omaha, Nebraska. In addition, I am the director of the Creighton University Natural Family Planning Education and Research Center. My major area of expertise and research has been in the field of human reproduction and, clinically, reproductive medicine. I am here today to present testimony in three broad areas as they relate to the question of human abortion. My testimony today relates specifically to research which we have recently completed.

The three broad areas of testimony include the following:

I. Abortion Related Maternal Mortality

II. An Evaluation of Criminal Abortion and its Implications for Public Policy

III. A Real-time Ultrasonographic Study of the Living Unborn Human

In January, 1973, the United States Supreme Court legalized abortion on demand throughout the entire course of pregnancy. Since the legalization of abortion at that time, the total numbers of induced abortions have risen exponentially. The most recent estimate for the past year is that 1.5 million induced abortions are being performed yearly in the United States.

In the summer of 1971, the American College of Obstetricians and Gynecologists filed an Amicus Curiae brief before the United States Supreme Court as an intervention in the constitutionality hearing of the Georgia abortion statute (Doe v. Bolton). In this brief, the claim was made that "The medical procedure of induced abortion... is potentially 23.3 times as safe as the process of going through ordinary child birth." Later, when the United States Supreme Court issued its now historic abortion decision, it accepted as "established medical fact" the contention that in the first three months of pregnancy, "mortality in abortion is less than mortality in normal childbirth." Since the 1973 Supreme Court decision, Cates et al, of the Family Planning Evaluation Division at the Atlanta Center for Disease Control, have taken up this form of argument although their claims have been less extravagent. This one issue continues to be prominent as the subject of abortion is debated over the years.

I. ABORTION RELATED MATERNAL MORTALITY

Maternal mortality rates are generally expressed as the number of maternal deaths which occur - during the entire course of pregnancy and during the first three to six months following completion of the pregnancy - per 100,000 live births.

The maternal mortality related to abortion, on the other hand, is expressed according to the type of abortion procedure or the gestational age of the pregnancy per 100,000 abortions. In the latter case, the denominator is, in essence, the number of cases in which a particular procedure is carried out. With maternal mortality rates, this is not so. When the denominator is live births, a number of cases of pregnancy are automatically excluded from the denominator, while their associated maternal deaths are included in the numerator. All traditional comparisons which have been made between the maternal mortality related to natural pregnancy and the maternal mortality related to induced abortion have been prejudiced by these fundamental flaws. We have recently investigated the impact of legalized abortion on maternal mortality related to childbirth and to induced abortion and the comparisons between abortion related and nonabortion related maternal deaths. The traditional comparisons, which have been widely publicized, have been seriously flawed by comparing incomparable data.

We have recently completed a reevaluation of the comparisons that have been made between maternal mortality related to legal abortion and maternal mortality related to pregnancy, childbirth and the puerperium. In our study, adjustments were made so that accurate reflections of the "cases of pregnancy" could be made and compared. In addition, appropriate adjustments for maternal deaths were also made, allowing a more accurate comparison between the mortality associated with legal abortion and that associated with natural pregnancy. The following conclusions were reached as a result of this study:

1. With the introduction of abortion on demand, no significant change in the already existing downward trend in the maternal mortality rates was detected. Clearly, no positive effect of the current induced abortion policy can be identified from an evaluation of this data.
2. In analyzing the trend in maternal deaths due to induced abortion, it was shown that while maternal deaths stemming from criminal abortion appear to be decreasing, they have been replaced, almost one for one, by maternal deaths due to legal abortion. The results of this study indicate that there has been no significant impact on the relative frequency of abortion related maternal death due to induced abortion since the legalization of abortion. Indeed, relatively speaking, the number of women who die from induced abortion today is equal to that which occurred prior to the days of legalized abortion. The only difference is that the deaths today are from legalized abortion whereas before they were related to illegal abortion.

3. In comparing the relative risk of natural pregnancy versus that of legal abortion, natural pregnancy was found to be safer in both the first and second twenty weeks of pregnancy. The data used in this comparison are thought to be more accurate than any previously compiled comparisons done in the traditional fashion. Indeed, the often made claim that "abortion is safer than childbirth" was found not to be true.

The results of this study relative to maternal death and abortion seriously question just how successful the current American legal abortion policy has been. The often stated concept that abortion is safer than childbirth has not stood well the scrutiny of careful evaluation. The hoped for reduction in maternal deaths due to criminal abortion has been observed in part, but only at the cost of a proportionate increase in the number of maternal deaths due to legal abortion. All in all, the legal abortion policy has had a neutral effect in relation to maternal death. It can be concluded that the legal abortion policy, which has resulted in well over 5 million legal abortions from 1971 to 1977, has had no measurable beneficial effect. Indeed, our study suggested that such a policy on abortion should be completely reevaluated.

II. CRIMINAL ABORTION AND ITS IMPLICATIONS FOR PUBLIC POLICY

Over the years, one of the major arguments in favor of legalized abortion has been the existance of criminal abortion. Since criminal abortion was presented as being both prevalent and dangerous, it was argued that legalizing abortion would provide a safe alternative and thereby eliminate criminal abortion altogether. It has often been alleged that, prior to the legalization of abortion, there were at least 1 million criminal abortions per year in the United States, resulting in 5,000 to 10,000 maternal deaths.

One of the great dilemmas which has plagued scientists for years has been how to determine the number of criminal abortions. At the first international conference on abortion, held in Washington, D.C., in 1967, the conclusion was reached that the figures on the number of criminal abortions in the United States are "based on personal estimates" and that "no way has yet been found of obtaining reliable statistics that would give an exact figure for the total population." In 1958, a Planned Parenthood Conference on abortion in the United States concluded that "A plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1.2 million... there is no objective basis for the selection of a particular figure between these two estimates..." The actual number of criminal abortions each year in the United

States has, therefore, been elusive. Up to this time, there has been no objective basis for claiming any number of criminal abortions, high or low.

Recently, we developed the first objective model for accurately estimating the number of criminal abortions yearly in the United States. With the data generated from this model, trends in criminal abortion could be analyzed and the effect of the current legal abortion policy on these trends could be evaluated. In addition, the effects of a future restriction on abortion could also be predicted.

This study presents data on the number of criminal abortions eash year in the United States and the trends in criminal abortion both before and after legalization of abortion on demand. The value of the study lies in its reliance upon a thoroughly objective model, based on available data, for generating the estimated number of criminal abortions. If anything, the number of criminal abortions has been overestimated. Such an overestimate was built into the assessment model so that an analysis could be made without the risk of understating the problem. From this evaluation, the following conclusions were derived:

1. In the 25 years prior to the Supreme Court decision, the largest number of maternal deaths related to criminal abortion in any single year was 388, occurring in 1948. Estimates that there were between 5,000 and 10,000 maternal deaths due to criminal abortion each year in the United States prior to the legalization of abortion would appear to have been grossly exaggerated.
2. In spite of the current legal abortion policy, maternal deaths related to criminal abortion have not been eliminated.
3. Estimates of the number of criminal abortions per year in the United States have previously been grossly exaggerated. a reasonable estimate for the actual number criminal abortions per year in the pre-legalization era would be from a low of 39,000 (1950) to a high of 210,000 (1961) for a mean of 98,000 per year.
4. It is not true that legal abortion simply replaces criminal abortion. With legalized abortion, there has been an exponential increase in the total number of abortions each year in the United States, in the range of 6- to 11- fold from the prelegalization era. This increase is directly attributable to the legalization of abortion.
5. Likewise, if abortion were legally restricted again, one could anticipate a 6 to 11 fold reduction in the total number of induced abortions

each year in the United States. One would not have to fear that massive use of illegal abortion would develop as the result of such restrictions.

6. Our data suggests that the legalization of abortion in the United States has resulted in a modest decrease in the number of criminal abortions. This decrease began between 1971 and 1972 and continued until 1974, at which time a plateau was reached. For 1974 through 1977, there has been no noticeable reduction in spite of a continued increase in the number of legal abortions.
7. The decline in the number of illegal abortions did not begin until the legal abortion ratio reached 160 (the number of abortions per 1,000 live births) and did not reach its plateau until the abortion ratio was 250. With a continued increase in the abortion ratio up to 325 in 1977, no further reduction in criminal abortion was observed.
8. There has been an over 130 - fold increase in the number of legal abortions and a nearly 170 - fold increase in the legal abortion ratio to produce a relatively modest 4 - fold reduction in the number of criminal abortions. For each single criminal abortion which has been eliminated, there has been over 18 legal abortions.
9. The estimated annual reduction in the number of criminal abortions in the United States has been 53,000. In comparison, the public policy of legal abortion during the period of this study had generated 970,000 legal abortions per year.
10. A conservative estimate of the cost of eliminating one criminal abortion has been calculated to be in excess of $3,600.

The results of this study have significant implications for our current public policy on abortion. What was previously thought to be a simple solution to criminal abortion is clearly a nonsolution. The current legalization of abortion in the United States is a highly inefficient program requiring an incredibly top-heavy number of legal abortions to result in a very modest reduction in criminal abortions: to perform more than 18 legal abortions to eliminate one criminal abortion is contrary to good common sense. This invasion of the healthy fetal-maternal unit is destined to have other ecologically harmful effects as well.

In addition, we cannot escape the monetary expense of the current abortion policy. Our estimate of over $3,600 to eliminate one criminal abortion is undoubtedly conservative. One cannot help but conclude that a positive public health program which is based on education, counseling, medical assistance, financial and spiritual guidance and is funded with an annual appropriation of $200 million would be as effective, if not more so, in reducing criminal abortions. It should be stated ever so emphatically that everyone has a concern about criminal abortion but that individuals and groups differ on how to eliminate it as a public health problem. Our study indicates that legal abortion has failed and that now it is time to try a new approach.

III. ULTRASOUND EVALUATION OF THE LIVING UNBORN HUMAN

Diagnostic ultrasound has been used in modern obstetrics for several years now. Its use in the evaluation of fetal development, well being and gestational age is common. It is a noninvasive procedure which is acceptable to most patients and, since its introduction in the early 1950's, there has been no evidence of harm to the patient or the fetus. Epidemiological surveys have been conducted and research continues to further assure its safety.

Ultrasound uses high frequency sound waves to depict the anatomy and tissue characteristics of organs and structures within the body. While the human ear is capable of hearing frequencies between 16 and 20 thousand cycles per second, frequencies of 2 million to 10 million cycles per second are typically used in ultrasound. Ultrasound imaging involves the transmittal of ultrasound (20,000 cycles per second or above) into the body 0.1 percent of the time and recording the returning echoes 99.9 percent of the time. A component referred to as a transducer transmits the ultrasound and detects the returning echoes which are then recorded to construct images. The time it takes for echoes to return gives information about the depth and relative locations of the internal structures reflecting the sound waves. The structures reflecting the echoes are displayed through different intensities or exposures in the images; this combination of the return time of the echoes and amplitudes of reflected echoes forms the final image.

There are two types of systems which are commonly used in producing ultrasound images: the compound or B- mode and real-time systems. B- mode scanning provides fine detail in nonmoving images and employs one transducer which transmits and receives the ultrasound waves. Real-time involves one transducer that moves mechanically or else numerous transducers side by side which transmit and receive waves in sequences, allowing movements of structures under the transducers to be seen and recorded simultaneously. It is the real-time system which allows live action video tape photographs to be taken of the living unborn human.

At Creighton University School of Medicine, the use of ultrasound to explore the silent quarters of the early human embryo and human fetus has been underway the past two to three years. This work has been accomplished through the cooperation and assistance of Mark I. Muilenburg, B.S., R.D.M.S., Instructor, Department of Radiology, Creighton University School of Medicine and Director, Department of Diagnostic Ultrasound, St. Joseph Hospital, Omaha, Nebraska and Dr. Allen D. Dvorak, Assistant Professor, Department of Radiology, Creighton University School of Medicine. These studies have allowed us to take a look into the very beginnings of human life. Previously referred to as the "silent and unknown world of the unborn", the new technology of real-time ultrasonography has allowed us to look into that world and confirm the existance of the dynamic and fully alive human embryo at the very earliest days of his or her development.

As part of my testimony today, I would like to present a short video tape entitled The Living Unborn Human: From Thirty Four Days After Fertilization. This video tape uses the fullest capabilities of live-motion real-time ultrasound video tape to explore the beginnings of human life.

The video tape begins with the detection of a visible heartbeat in an embryo which is just 34 days past the time of conception. The time of fertility is known with a high degree of accuracy because of the patient's utilization of natural family planning to time the beginning of pregnancy. It has been known for some time that fetal heart activity begins approximately 18 days following conception (fertilization). At 34 days, with the use of real-time ultrasonography, this is the earliest live-motion heartbeat ever to be recorded in a living human being whose destiny is to be born.

The sequence in the tape continues at 41 days with continued heart motion and again at 48 days after fertilization. In addition, spontaneous body movement is first detected in these tapes at the 48th day. Undoubtedly, both heart action and spontaneous body movement begin earlier but real-time ultrasound allows us the earliest observation currently possible.

At 48 days, the embryo is just under seven weeks fetal age and nine weeks gestational age. The mother has just missed her second menstrual period and now begins to think of herself as being pregnant. It is also at this time that the question of abortion is usually brought up. In fact, it is at this time and the ensuing few weeks that most of the abortions are performed in the United States.

The tape continues at 54 days post-fertilization. At this time, limb and body motion is very evident. The full form of the very early fetus is clearly visible. A dramatic presentation of fist sucking and fist release is provided. Such activity, often presumed to be a function uniquely of the newborn child, actually had its origins seven to seven and a half months earlier from the very earliest stages of human development.

The final sequence which is shown in the video tape is taken at 69 days after fertilization or approximately 10 weeks fetal age and 12 weeks gestational age. Here, fetal slumber is followed by fetal awakening. Upon awakening, the fetus is found to roll gently in its mother's womb and exhibit tumbling and rolling motion. Throughout the course of these events, the fetal heart beat is clearly visible.

There are many issues which are of importance in the abortion debate but none takes precedence over the fundamental issues involved in this video tape. While it is important to the committee who must deliberate over these questions to know that natural pregnancy is safer than induced abortion and that a dramatic reduction in the total numbers of abortion should be anticipated if abortion restriction occurs, there is no more fundamental issue in this question than the right to life of the unborn child. Common sense dictates that all human rights are predicated upon a fundamental right to live.

APPENDIX

1. Hilgers, TW and O'Hare, D.: Abortion Related Maternal Mortality: An In-Depth Analysis. In: New Perspective on Human Abortion. Hilgers, TW, Horan, DJ, Mall, D. Editors. University Publications of America, Frederick, Maryland, 1981, page 69.
2. Syska, BJ, Hilgers, TW and O'Hare, D: An Objective Model for Estimating Criminal Abortions and its Implication for Public Policy. In: New Perspectives on Human Abortion. Hilgers, TW, Horan, DJ, Mall, D. Editors. University Publications of America, Frederick, Maryland, 1981, page 164.
3. Muilenburg, MI and Dvorak, AD: Human Characteristics of the Early Fetus: A Sonography Demonstration. In: New Perspectives on Human Abortion. Hilgers, TW, Horan, DJ and Mall, D. Editors. University Publications of America, Frederick, Maryland, 1981, page 1.
4. The Living Unborn Human: From Thirty Four Days After Fertilization. Produced by Creighton University Natural Family Planning Education and Research Center, Hilgers, TW, Director. 1981.

COMMENT ON STATEMENTS BY THOMAS W. HILGERS, M.D.

BY WILLARD CATES, CENTER FOR DISEASE CONTROL

On October 14, 1981, Thomas W. Hilgers, M.D. presented testimony to the United States Senate Subcommittee on The Constitution which stated "the legal abortion policy (in America) . . . has had no measurable beneficial effect," largely because the decline in illegal abortion deaths was offset by an increase in legal abortion deaths (1). To supplement his introductory testimony, Dr. Hilgers submitted a chapter from a book he recently edited (2), which presents the data upon which his inference was drawn. His statement does not agree with those of CDC epidemiologists for the following reasons:

(1) Neglect of Risk for the Last Half of Pregnancy - Dr. Hilgers attempts to compare the mortality risks of induced abortion and "natural pregnancy" in the first and second 20 week periods of pregnancy. He then concludes "natural pregnancy was found to be safer in both the first and second 20 weeks of pregnancy (p. 90)." Unfortunately, this statement fails to consider that the woman who has successfully completed the first 20 weeks of her "natural pregnancy" is still at risk of death in the next 20 weeks. A woman obtaining an induced abortion in the first 20 weeks (when over 99 percent of abortions are obtained) is not subject to the risks of continuing her "natual pregnancy" to term. When the first and second halves of "natural pregnancy" are considered together, Hilgers' data demonstrate induced abortion in the first 20 weeks is approximately five times safer than "natural pregnancy".

(2) Provisional 1978 Data - Dr. Hilgers plotted mortality data from the National Center Health Statistics (NCHS) for abortion and non-abortion maternal deaths on an arithmetic scale, to portray differences in secular trends between 1960 and 1978. However, he used provisional NCHS data for 1978, based on a 10% sample of death certificates. Dr. Hilgers entered this provisional estimate of 50 abortion-related

deaths into Table 7 and Figures 5 and 6 along with the final numbers for previous years; he then inferred there was "an abrupt increase" (p. 74) in abortion-related deaths in 1978. The final number of abortion deaths reported by NCHS for 1978 was 16, less than one-third of the provisional estimated number. Dr. Hilgers' use of provisional data was both inaccurate and misleading.

(3) Selection of Inappropriate States and Time Intervals - Dr. Hilgers chose ten states which had supposedly legalized abortion prior to 1970, and examined trends of aggregated maternal mortality before and after legalization. He concluded (p. 74) that there was no favorable pattern of decline in maternal mortality after "abortion on demand". Yet, the states he included, and the time intervals of "abortion on demand" he designated, are misleading. For example, Georgia was categorized as having "abortion on demand" in 1968, yet its law was part of the basis of the 1973 Supreme Court decisions declaring restrictive abortion laws unconstitutional. Even in 1972, more Georgia residents were obtaining abortions outside the state than within it. This inappropriate selection of states and time intervals would create the misimpression of no effect.

(4) Lack of Awareness of the Most Appropriate References - Dr. Hilgers cites a Centers for Disease Control (CDC) reference published in January 1977 as an example of data showing that abortion is safer than childbearing. He then raises minor methodologic problems with that analysis, even though subsequent publications (3, 4), appearing in March and September 1978, had already addressed his main concerns. Hilgers' non-use of these publications apparently was not due to his analysis being performed before they were published; he cites a September 1979 reference in his chapter. Had Hilgers read and/or cited the appropriate references, many of his allegations would have been answered.

Contrary to the statements by Dr. Hilgers, the availability of legal abortion has had a measurable impact on deaths to American women of reproductive age. The attached reference documents the effect of legal abortion on both abortion and non-abortion pregnancy-related deaths (4).

REFERENCES

(1) Hilgers TW. Testimony given before the United States Senate Subcommittee on the Constitution. Washington, D.C., October 14, 1981.

(2) Hilgers TW, O'Hare D. Abortion related maternal mortality: An indepth analysis. In: Hilgers TW, Horan DJ, Mall D, eds. New Perspectives in Human Abortion. Frederick, Maryland: Aletheia Books, University Publication of America, Inc. 1981: 69-91.

(3) Cates W Jr, Tietze C. Standardized mortality rates associated with legal abortion: United States, 1972-1975. Fam Plan Perspect 1978;10:109-12.

(4) Cates W Jr, Rochat RW, Grimes DA, Tyler CW Jr. Legalized abortion: Effect on national trends of maternal and abortion-realted mortality (1940-1976). Am J Obstet Gynecol 1978;132:211-4.

New Perspectives on Human Abortion

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7

Abortion Related Maternal Mortality: An In-Depth Analysis

INTRODUCTION

In the summer of 1971, the American College of Obstetricians and Gynecologists filed an *amicus curiae* brief before the United States Supreme Court as an intervention in the constitutionality hearing of the Georgia abortion statute (*Doe* v. *Bolton*).[1] In this brief, the claim was made that "the medical procedure of induced abortion . . . is potentially 23.3 times as safe as the process of going through ordinary childbirth." Later, in 1973, when the United States Supreme Court issued its now historic decision regarding abortion,[2] it accepted as "established medical fact" the contention that in the first three months of pregnancy "mortality in abortion is less than mortality in normal childbirth." Since the 1973 Supreme Court decision, Cates et al., of the Family Planning Evaluation Division at the Atlanta Center for Disease Control, have taken up this form of argument although their claims have been less extravagant.[3] This one issue continues to be prominent as the subject of abortion is debated over the years.

Maternal mortality rates are generally expressed as the number of maternal deaths which occur—during the entire course of pregnancy and during the first three to six months following completion of the pregnancy—per 100,000 *live births*. The maternal mortality related to abortion, on the other hand, is expressed according to the type of abortion procedure or the gestational age of the pregnancy per 100,000 *abortions*. In the latter case, the denominator is, in essence, the *number of cases* in which a particular procedure is carried out. With maternal mortality rates, this is not so. When the denominator is live births, a number of cases of pregnancy are automatically excluded from the denominator, while their associated maternal deaths are included in the numerator. This automatically strains the traditional comparison between the maternal mortality in natural pregnancy and that in abortion. Such comparisons lack statistical accuracy.

There has been a need for a comprehensive reevaluation of abortion related mortality since all traditional comparisons have been prejudiced by such fundamental flaws; it is particularly important if the discussion of induced abortion is to be placed in its proper perspective. The purpose of this report is to examine the effects of the legalization of abortion on maternal mortality and the comparison between abortion related and nonabortion related maternal mortality.

Maternal Mortality Data

In Table 1, the maternal mortality rates in the United States for the years 1960 through 1978 are listed. There has been a continued and steady decline in the maternal mortality rate over these 19 years. These data are graphically displayed in Figure 1.

There have been three major events in the last 19 years regarding the legalization of abortion: they occurred in 1968, 1970, and 1973. The first noticeable increase in the number of legal abortions was observed in 1968, stemming from the early legalization of abortion in several individual states. A marked increase in the number of legal abortions was noted in 1970; this was the direct result of the legalization of abortion on

Table 1. The maternal mortality rate for the United States, 1960-1978.

UNITED STATES MATERNAL MORTALITY RATE, 1960-1978

Year	*Rate*	*Year*	*Rate*
1960	37.1	1969	22.2
1961	36.9	1970	21.5
1962	35.2	1971	18.8
1963	35.8	1972	18.8
1964	33.3	1973	15.2
1965	31.6	1974	14.6
1966	29.1	1975	12.8
1967	28.0	1976	12.3
1968	24.5	1977	11.2
		1978 (est.)	9.9

Data from: Monthly Vital Statistics Report. Provisional Statistics. Annual Summary for the United States, 1978. U.S. Dept. HEW, Office of Health Research, Statistics and Technology, National Center for Health Statistics. 27:9, 1979.

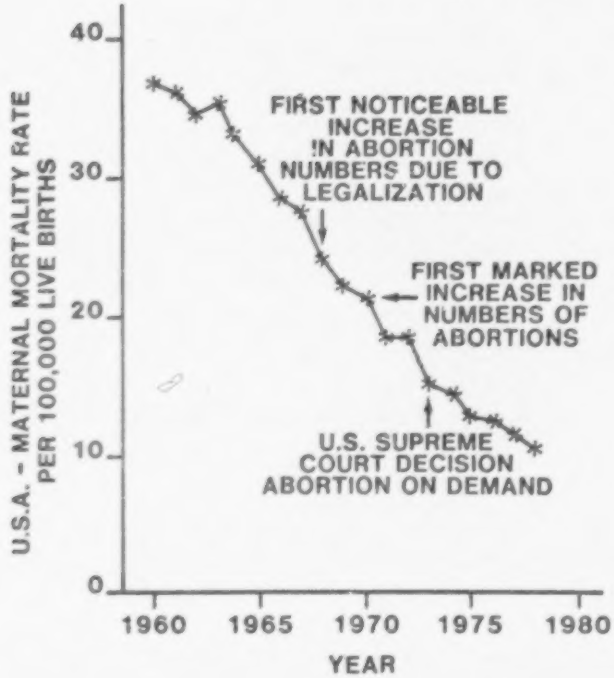

Figure 1. The maternal mortality rate per 100,000 live births, 1960-1978. The first noticeable increase in abortions due to legalization (1968), the first marked increase in the number of abortions (1970), and the Supreme Court decision for abortion on demand (1973) are marked.

demand in Alaska, Hawaii, New York, and Washington and the de facto abortion on demand which existed in California.[4] In 1973, the Supreme Court decision allowed abortion on demand to become the national policy. In Figure 1, these three dates are indicated. The significant point about the trend in maternal mortality in the United States is that there has been no significant change of any kind resulting from the legalization of abortion in the already well-established pattern of decline. While many would have thought that legalization would have produced an abrupt reduction in the maternal mortality rate because deaths due to criminal abortion would have been eliminated, no such change has been observed. The declining trend has remained essentially the same. If anything, the trend has been a slight increase in the maternal mortality rate from what might have been expected had the rates continued without influence from the legalization of abortion.

Maternal Mortality Data: 10 Selected States

On a national scale, data on legalized abortion have only been available for four to five years. In order to test whether or not legalized abortion has had an impact on maternal mortality rates, the 10 states which legalized abortion prior to 1970 were studied. These 10 states and the years in which each legalized abortion are listed in Table 2. Each state's department of health was contacted and asked to provide demographic data on abortion for its state. By studying these states, a trend could be established for the eight years immediately prior to the year of legalization and compared to the eight years immediately following.

The total numbers of live births and maternal deaths for each of these states and for the United States as a whole from 1960 through 1977 are listed in Table 3; the respective numbers of live births are graphically indicated in Figure 2. The estimated total number of legal abortions for each of the selected states and for the United States as a whole from 1963 to 1977 is listed in Table 4. Clearly, the general pattern of live births is similar for the 10 states and for the nation.

In Figure 3, the number of legal abortions per year for the United States in the years 1963 to 1977 and the number of legal abortions per year for the 10 selected states from 1967 to 1977 are displayed. One can easily see the exponential rise in the number of legal abortions that occurred beginning in 1968 both on a national scale and for the 10 selected states.

There was a total of 1,657,684 legal abortions for these states from 1967 through 1977. For the entire United States, there were 5,673,363 legal abortions from 1963 through 1977. In the years 1967 through 1977, the 10 selected states contributed 29.4 percent of the total legal abortions in the United States. Therefore, the 10 states selected for study have actually contributed more than the number of abortions which would

Table 2. The 10 states which legalized abortion prior to 1970 and their year of legalization.

STATES LEGALIZING ABORTION PRIOR TO 1970
AND THE YEAR OF LEGALIZATION

Arkansas	1969
California	1967
Colorado	1967
Delaware	1969
Georgia	1968
Kansas	1969
Maryland	1968
New Mexico	1969
North Carolina	1967
Oregon	1969

Data from J. A. Lampé, "The World in Perspective," in *Abortion and Social Justice*, ed. T. W. Hilgers and D. J. Horan (New York: Sheed and Ward, 1972).

Table 3. The total number of live births and maternal deaths for the selected state of occurrence and for the United States, 1960-1977.

TOTAL NUMBER OF LIVE BIRTHS AND MATERNAL DEATHS FOR
SELECTED STATE OF OCCURRENCE AND THE UNITED STATES, 1960-1977

	1960		*1961*		*1962*		*1963*		*1964*		*1965*	
	LB[1]	MD[2]	LB	MD	LB	MD	LB	MD	LB	MD	LB	MD
Arkansas	41,006	23	41,559	24	42,316	14	41,846	23	41,650	20	37,568	10
California	371,799	107	381,198	100	378,547	110	380,505	108	374,567	104	355,074	104
Colorado	42,905	10	44,648	12	43,594	9	42,179	13	40,537	7	36,851	10
Delaware	11,636	4	11,873	7	11,583	1	11,489	3	11,371	3	10,529	3
Georgia	99,707	61	100,444	52	99,047	47	99,360	30	100,581	57	94,336	48
Kansas	49,199	9	49,988	13	48,725	10	45,991	16	43,333	8	39,178	12
Maryland	77,496	26	78,190	33	76,325	19	78,146	20	79,003	21	74,137	27
New Mexico	30,747	13	30,009	19	29,226	16	27,820	10	26,862	13	24,352	9
North Carolina	109,732	59	111,721	55	109,549	51	107,322	60	106,061	37	97,656	39
Oregon	38,347	13	37,475	8	36,983	7	34,863	6	33,500	4	32,955	1
United States	4,257,850	1,579	4,268,326	1,573	4,167,362	1,522	4,098,020	1,416	4,027,490	1,343	3,760,358	1,189

	1966		*1967*		*1968*		*1969*		*1970*		*1971*	
Arkansas	34,460	19	33,285	3	32,575	11	33,921	12*	33,301	8	33,313	14
California	337,623	71	336,584	95	339,221	67	352,937	72	362,652	77	329,826	52
Colorado	34,899	4	35,166	9	36,842	5	39,189	5	41,480	8	40,360	6
Delaware	10,195	2	9,965	3	9,840	2	10,124	1	10,481	0	9,866	3
Georgia	89,376	42	86,469	28	87,322	28	90,195	25	95,584	34	93,180	26
Kansas	36,190	11	34,901	7	35,496	8	37,172	4	38,215	5	36,006	5
Maryland	72,117	22	69,726	16	68,104	15	69,128	12	69,336	15	65,399	11
New Mexico	22,363	10	21,243	5	20,346	7	21,460	4	22,098	5	22,200	3
North Carolina	92,727	23	92,600	30	92,632	36	93,882	28	98,454	25	95,522	26
Oregon	32,446	3	31,466	3	32,136	2	33,834	3	35,353	3	33,344	4
United States	3,606,274	1,049	3,520,959	987	3,501,564	859	3,600,206	801	3,731,386	803	3,555,970	668

	1972		*1973*		*1974*		*1975*		*1976*		*1977*	
Arkansas	31,617	6	31,247	8	32,261	3	32,066	2	31,112	8	34,502	—
California	306,375	54	297,834	47	311,688	47	317,318	47	332,105	42	338,716	—
Colorado	38,585	2	38,507	3	39,036	7	40,148	5	40,978	3	43,056	
Delaware	8,876	2	8,284	0	8,439	5	8,242	—	8,087	—	8,771	—
Georgia	87,366	20	85,285	17	83,652	—	79,951	—	79,282	16	84,432	—
Kansas	33,176	2	31,972	4	32,712	—	33,707	—	35,278	—	36,827	—
Maryland	58,310	10	53,642	3	53,075	6	52,732	10	52,714	5	47,909	3
New Mexico	20,749	6	20,843	3	21,319	—	21,036	—	22,054	—	22,433	—
North Carolina	88,894	12	85,727	12	84,244	18	80,864	18	80,542	14	84,560	10
Oregon	31,308	4	30,902	1	32,506	3	33,352	3	34,840	0	37,467	5
United States	3,258,411	612	3,136,965	477	3,159,958	462	3,144,198	403	3,167,788	390	3,313,000	310

*Underlining indicates the initial year of abortion legalization.

1. Number of live births.

2. Number of maternal deaths.

3. The dash indicates that there were no reported maternal deaths in the year reported.

be anticipated (the 10 states represent only 21.4 percent of the total population—1970 census data).

The maternal mortality rates for these states, adjusted in each case for the year in which abortion was legalized, are listed in Table 5. In Table 6, the cumulative maternal mortality rates from the 10 selected states, adjusted according to the year of legalization, are also presented. These data have been graphically displayed in Figure 4.

The trend in the maternal mortality rate for the 10 selected states during the eight years before legalization was clearly downward. The trend in the maternal mortality rate after legalization appears to be a continuation of that in existence prior to abortion legalization. These data are highly significant. They allow for the evaluation of a full eight years after abortion legalization in a very sizable subpopulation of the United States, and indicate that the legalization of abortion has had no effect on the already existing downward trend in the maternal mortality

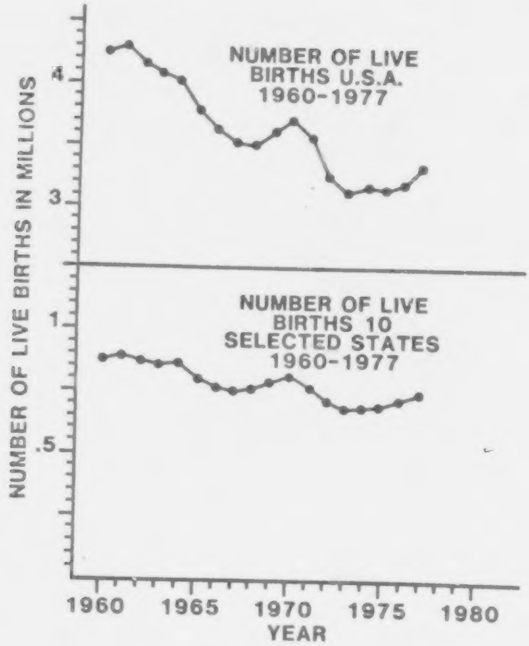

Figure 2. The number of live births for the United States and for the 10 selected states, 1960-1977.

rate. Certainly, no favorable pattern of decline can be identified which could be attributed to the legalization of abortion on demand. These figures, which are observed in a subgroup of 10 selected states within the United States, mirror the national data which have been presented. They allow us to predict that in the next several years no favorable impact should be observed nationally in this area.

Trends in Abortion Related Maternal Deaths

The actual numbers of maternal deaths in the United States due to abortion related and nonabortion related causes from 1960 through 1978 are listed in Table 7. These data are graphically displayed in Figure 5. There has been a steady decline in maternal deaths due to "other" causes since 1960. At the same time, abortion related maternal deaths have also fallen. In Figure 6, the abortion related maternal deaths are shown. This downward trend is observed to be well established prior to abortion legalization. However, since 1973, there has been a definite change in the trend. First there was a stabilization and then, in the latest year for which data were available (1978), there was an abrupt increase in the number of abortion related maternal deaths. This trend from 1973 through 1978 is clearly a change from the downward trend which

Table 4. The estimated total number of legal abortions by year, selected state of occurrence, and the United States, 1963-1977.

ESTIMATED TOTAL NUMBER OF LEGAL ABORTIONS[1] BY YEAR, SELECTED STATE OF OCCURRENCE, AND UNITED STATES, 1963-1977

	1963	*1964*	*1965*	*1966*	*1967*	*1968*	*1969*	*1970*
Arkansas	—	—	—	—	—	—	—	—
California[2]	—	—	—	—	—	5,031	15,476	65,529
Colorado	—	—	—	—	140	497	990	2,581
Delaware	—	—	—	—	—	71	560	
Georgia	—	—	—	—	—	73	168	705
Kansas	—	—	—	—	—	—	—	—
Maryland	—	—	—	—	—	—	2,134	5,530
New Mexico	—	—	—	—	—	—	—	—
North Carolina	—	—	—	—	218	—	505	1,357
Oregon	—	—	—	—	—	—	1,407	4,991
Selected States Totals					358	5,601	20,551	81,253
Total Number of States	—	—	—	—	(2)	(3)	(7)	(7)
United States	5,204[3]	9,503[3]	7,256[3]	6,346[3]	9,116[3]	18,170[3]	22,670[4]	193,491[4]

	1971	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	Totals
Arkansas	637	793	1,138	1,694	1,925	3,286	2,726[4]	12,199
California[2]	116,749	138,584	131,870	135,762	142,067	142,593	164,729	1,058,390
Colorado	3,889	5,383	7,451	9,027	10,466	11,539	12,913[4]	64,876
Delaware	1,129	1,342	1,957	2,150	2,322	2,519	2,299[4]	14,349
Georgia	1,579	2,509	12,301	22,009	23,733	25,586	29,905[4]	118,568
Kansas	9,472	12,248	12,612	10,871	10,860	11,597	10,898	78,558
Maryland	7,757	9,136	9,960	15,975	18,864	20,641	22,241	112,238
New Mexico	—	—	—	—	4,195	5,008	4,568[4]	13,771
North Carolina	4,378	8,365	11,935	16,463	19,960	23,561	25,020	111,562
Oregon	6,997	7,143	7,447	8,794	10,641	12,590	13,163	73,173
Selected States Totals	152,587	185,503	196,671	222,745	245,033	258,920	288,462	1,657,684
Total Number of States	(9)	(9)	(9)	(9)	(10)	(10)	(10)	
United States	485,816[4]	586,760[4]	615,831[4]	780,824[4]	864,679[4]	988,267[4]	1,079,430[4]	5,673,363

1. Abortion data are from central health agency unless otherwise noted.

2. Does not include abortions performed in private physicians' offices.

3. Estimated from the abortion ratio per 1,000 live births as experienced in PAS hospitals during the years 1963-1968 and the number of live births in the United States 1963-1968 (C. Tietze: Therapeutic abortions in the United States, 1963-1968. *Stud. Fam. Plan.* 59, November 1970).

4. Data from *Abortion Surveillance Reports*, Center for Disease Control, HEW, Atlanta.

existed prior to that time. We would think it significant that this deviation from the existing pattern came at the time of the 1973 Supreme Court decision on abortion. Such a plateau has not been observed for nonabortion related maternal deaths (Figure 5); they have persisted in their downward trend through 1978.

Data collected by the National Center for Health Statistics on abortion related maternal deaths have been classified according to different systems over the years. From 1968 until the present, the NCHS listed these maternal deaths in the following six categories: 1) abortion induced for medical indications; 2) abortion induced for other legal indications; 3) abortion induced for other reasons; 4) spontaneous abortion; 5) abortion not specified as induced or spontaneous; and 6) other abortions.

The total number of maternal deaths due to abortion (all causes) for a given year is the sum of these six subgroups. Categories 1 and 2 have been combined into "abortions induced for legal reasons" and categories 5 and 6 have been combined as "other and unspecified abortions" in Table 8. An estimate of the total number of maternal deaths due to induced abortion would be represented in the sum of the group "abor-

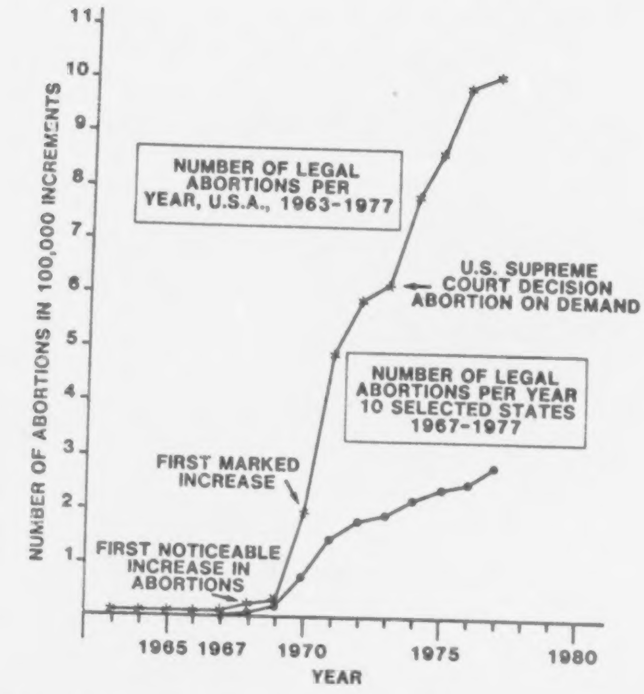

Figure 3. The total number of legal abortions per year in the United States, 1963-1977, and the number of legal abortions per year in the 10 selected states, 1967-1977.

tions induced for legal reasons," "abortions induced for other reasons," and "other and unspecified abortions." The estimated number of maternal deaths due to criminal abortion would be the sum of those maternal deaths classified as "induced for other reasons" and "other and unspecified abortions."

From 1949 to 1967, the NCHS classified the abortion related maternal deaths differently, in three main classifications: "abortion without mention of sepsis or toxemia," "abortion with sepsis," and "abortion with toxemia, without mention of sepsis." For each of these three main classifications, the following four subcategories were used: 1) spontaneous or unspecified; 2) induced for medical or legal indications; 3) induced for other reasons; and 4) other.

With this classification the number of maternal deaths due to spontaneous abortion is not specifically known, since they are grouped with the "unspecified" abortions. To estimate the number of maternal deaths related to spontaneous abortion for these years, the relative frequency of spontaneous abortion deaths of the two categories "spontaneous abortion" and "abortion not specified as induced or spontaneous" was calculated for 1968 and 1969, the years least likely to be

Table 5. The maternal mortality rates for the 10 selected states, adjusted for the year of abortion legalization.

MATERNAL MORTALITY RATES FOR 10 SELECTED STATES,[1]
ADJUSTED FOR YEAR OF ABORTION LEGALIZATION

	AR	CA	CO	DE	GA	KS	MD	NM	NC	OR
- 8	57.7	—[2]	—	59.0	—	26.0	—	63.3	—	21.3
- 7	33.1	29.0	21.0	8.8	52.0	20.5	42.2	54.7	—	18.9
- 6	55.0	26.0	27.0	26.1	48.0	34.8	24.9	35.9	50.0	20.1
- 5	48.0	29.0	21.0	26.4	53.0	18.5	25.6	28.6	51.0	11.9
- 4	26.6	28.0	31.0	28.5	57.0	30.6	26.6	36.9	59.0	3.0
- 3	55.1	28.0	15.0	19.6	52.0	30.4	36.4	44.7	39.0	9.2
- 2	9.0	29.0	24.0	30.1	46.0	20.0	30.5	23.5	39.0	12.7
- 1	33.8	21.0	11.0	20.3	32.0	22.5	22.9	34.4	36.0	9.3
Year of Legalization	35.4	28.0	26.0	9.9	34.0	10.8	22.0	18.6	30.0	11.8
+ 1	21.0	20.0	14.0	0.0	32.0	13.1	17.4	22.6	36.0	14.1
+ 2	38.8	20.0	15.0	30.4	38.0	13.9	21.6	13.5	30.0	15.0
+ 3	22.1	21.0	22.0	22.5	27.0	6.0	16.8	28.9	29.0	16.6
+ 4	25.6	16.0	20.0	0.0	22.0	12.5	17.1	14.4	30.0	3.2
+ 5	9.3	18.0	10.0	59.2	20.0	—	5.6	—	18.0	9.2
+ 6	6.2	16.0	10.0	—	32.0	—	11.3	—	14.0	9.0
+ 7	25.7	15.0	18.0	—	24.0	—	19.0	—	18.0	—
+ 8	—	15.0	12.5	—	20.0	—	9.5	—	20.0	13.3

1. Data are from central health agencies in each state.

2. The dash indicates that the data are not available or were not obtained.

3. The data are expressed as maternal deaths per 100,000 live births.

Table 6. The cumulative maternal mortality rates for the 10 selected states, adjusted according to the year of legalization.

CUMULATIVE MATERNAL MORTALITY RATES FOR 10 SELECTED STATES, ADJUSTED ACCORDING TO THE YEAR OF LEGALIZATION[1]

	No. of States	*Cumulative No. Live Births*[2]	*Cumulative No. Maternal Deaths*[3]	*Cumulative Maternal Mortality Rate*
- 8	7	348,107	158	45.4
- 7	10	871,703	309	35.4
- 6	10	874,948	291	33.3
- 5	10	865,712	288	33.3
- 4	10	854,172	294	34.4
- 3	10	825,312	268	32.5
- 2	10	781,934	238	30.4
- 1	10	751,837	172	22.9
Year of Legalization	10	756,287	201	26.6
+ 1	10	767,466	166	21.6
+ 2	10	785,857	183	23.3
+ 3	10	787,191	167	21.2
+ 4	10	734,632	130	17.7
+ 5	8	645,987	99	15.3
+ 6	6	540,561	70	12.9
+ 7	6	553,632	90	16.2
+ 8	6	607,793	96	15.8

1. Data from central health agencies in each state.
2. Cumulative number of live births for the listed number of states adjusted relative to the year of abortion legalization.
3. Cumulative number of maternal deaths for the listed number of states adjusted relative to the year.

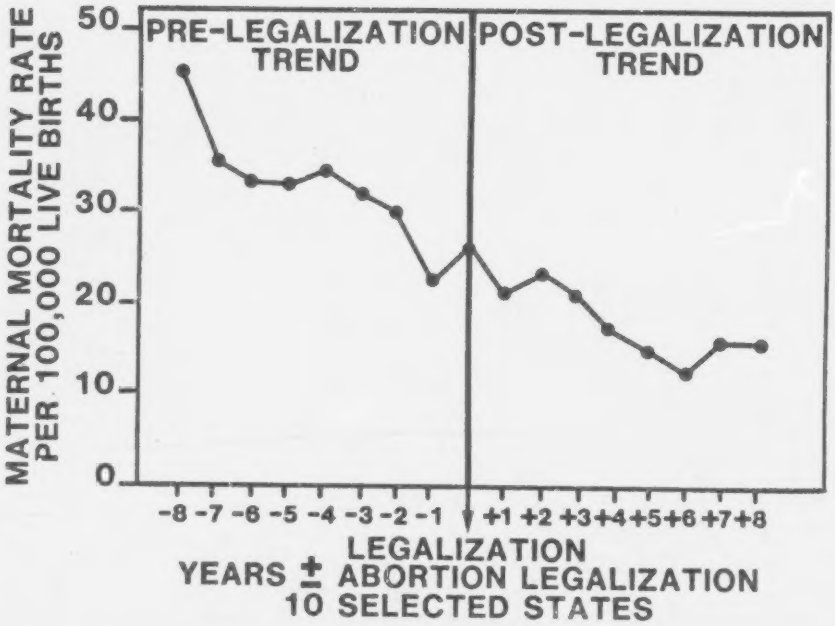

Figure 4. The prelegalization and postlegalization trends in maternal mortality rates for the 10 selected states. The data have been adjusted for the year of abortion legalization.

influenced by abortion on demand. The frequency was 0.258. By multiplying the maternal deaths classified as "spontaneous or unspecified" by 0.258, a reasonable estimate of the number of maternal deaths due to spontaneous abortion for each of the years 1949-1967 could be reached. The category in Table 8, "other and unspecified," is then the sum of the remaining maternal deaths plus those classified as "other."

Prior to 1949, the classification system was considerably different, making it impossible to make such a direct estimation. Therefore, a reasonable estimate was obtained by calculating the mean relative frequencies of the four categories listed in Table 8 for the 10 years immediately after 1948 (1949-1958). These mean relative frequencies were then applied to the total number of maternal deaths due to abortion for each of the years 1940-1948 in order to obtain a reasonable breakdown of the number of maternal deaths due to abortions in the four subcategories.

While it has often been stated that there were between 5,000 and 10,000 maternal deaths due to criminal abortion each year in the United States prior to legalization of abortion,[5] this analysis indicates otherwise. The largest number of maternal deaths due to criminal abortion observed in this study was 1,313, in 1940. However, for the 25 years

Table 7. The number of maternal deaths in the United States subdivided by those which were abortion related and those due to "other" causes, 1960-1978.

NUMBER OF MATERNAL DEATHS
IN THE UNITED STATES, 1960-1978[1, 2]

Year	*Total Number Maternal Deaths*	*Total Abortion Related Maternal Deaths*	*Total "Other" Maternal Deaths*
1960	1,579	289	1,290
1961	1,573	324	1,249
1962	1,522	305	1,190
1963	1,416	280	1,186
1964	1,343	247	1,096
1965	1,189	235	954
1966	1,049	189	860
1967	987	160	827
1968	859	133	726
1969	801	132	669
1970	803	128	675
1971	668	99	569
1972	612	70	542
1973	477	36	441
1974	462	27	435
1975	403	27	376
1976	390	16	374
1977	373	20	353
1978	320 (est.)	50 (est.)	270 (est.)

Data from:

1. Vital Statistics of the United States: Vol. II, Mortality, Part A, 1960-1977.
2. Monthly Vital Statistics Report. Provisional Statistics. Annual Summary for the United States, 1978. HEW, Office of Health Research, Statistics and Technology, National Center for Health Statistics, Hyattsville, MD 20782.

immediately preceding the 1973 Supreme Court decision, the largest number of maternal deaths due to criminal abortion in a single year was 388. This occurred in 1948, 25 years before the Court's decision.

In Figure 7, the relative frequency of abortion related maternal deaths from 1948 to 1977 is presented, divided according to cause and plotted at three-year intervals. Several patterns appear to be noteworthy. While there is a slight decline in those deaths due to "other and unspecified abortions" and a slight increase for those due to "spontaneous abortions," the basic patterns for these two classifications are relatively unchanged. This is not true for the other categories. The relative frequency of deaths from "abortions induced for other reasons" has abruptly fallen from 1970 to 1976. At the same time, the relative frequency of maternal deaths due to "abortions induced for legal reasons"

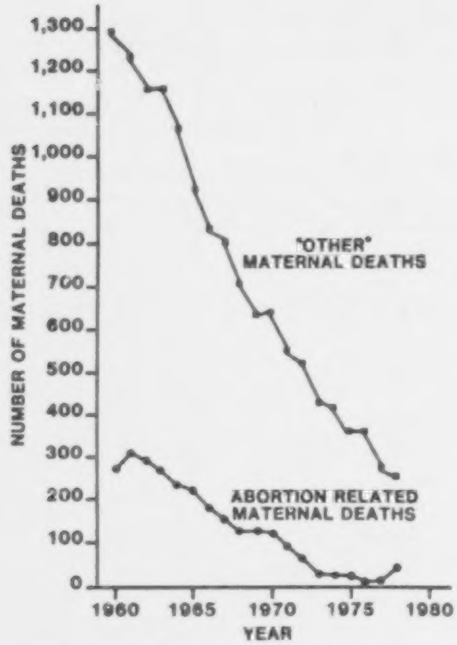

Figure 5. The number of maternal deaths due to "other" causes, and abortion related maternal deaths, 1960-1978.

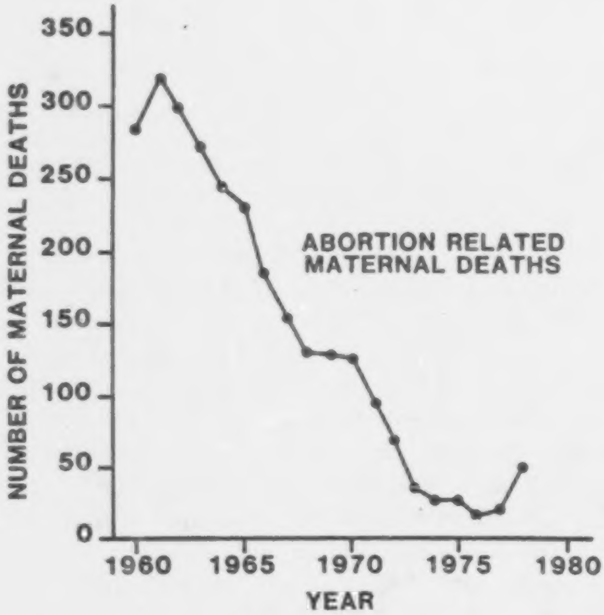

Figure 6. Abortion related maternal deaths from 1960 to 1978.

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Table 8. The number of maternal deaths due to abortion in the United States, 1940-1978, by category.

NUMBER OF MATERNAL DEATHS NATION-WIDE DUE TO ABORTION 1940-1978, BY CATEGORY[1]

Year	*Abortions Induced for Legal Reasons*[2]		*Spontaneous Abortions*		*Abortions Induced for Other Reasons*		*Other and Unspecified Abortions*[3]		*Estimated Number Criminal Abortion Deaths*[4]		*Total Number Induced Abortion Deaths*[5]		*Total Number Abortion Deaths*
	N	%	N	%	N	%	N	%	N	%	N	%	N
1978	—	—	—	—	—	—	—	—	—	—	—	—	50
1977	6	30.0	4	20.0	3	15.0	7	35.0	10	50.0	16	80.0	20
1976	1	6.2	5	31.2	0	0.0	10	62.5	10	62.5	11	68.7	16
1975	10	37.0	3	11.1	4	14.8	10	37.0	14	51.8	24	88.8	27
1974	6	22.2	7	25.9	1	3.7	13	48.1	14	51.8	20	74.0	27
1973	8	22.2	3	8.3	11	30.5	14	38.9	25	69.4	33	[illegible]	36
1972	10	14.3	12	17.1	26	37.1	22	31.4	48	68.6	58	82.9	70
1971	15	15.2	9	9.1	32	32.3	43	43.4	75	75.8	90	90.9	99
1970	10	7.8	9	7.0	58	45.3	51	39.8	109	85.2	119	93.0	128
1969	1	0.8	16	12.1	59	44.7	56	42.4	115	87.1	116	87.8	132
1968	2	1.5	22	16.5	55	41.4	54	40.6	109	82.0	111	83.5	133
1967	4	2.5	21*	13.1	69	43.1	66*	41.2	135	84.4	139	86.9	160
1966	1	0.5	29	15.3	74	39.2	85	45.0	159	84.1	160	84.6	189
1965	4	1.7	34	14.5	95	40.4	102	43.4	197	83.8	201	85.5	235
1964	5	2.0	35	14.2	103	41.7	104	42.1	207	83.8	212	85.8	247
1963	5	1.8	41	14.6	114	40.7	120	42.9	234	83.6	239	85.4	280
1962	5	1.6	47	15.4	115	37.7	138	42.2	253	83.0	258	84.6	305
1961	4	1.2	49	15.1	127	39.2	144	44.4	271	83.6	275	84.9	324
1960	10	3.5	38	13.1	129	44.6	112	38.8	241	83.4	251	86.9	289
1959	5	1.8	44	15.5	102	35.9	133	46.8	235	82.7	240	84.5	284
1958	1	0.4	43	16.6	85	32.8	130	50.2	215	83.0	216	83.4	259
1957	10	3.8	41	15.8	87	33.5	122	46.9	209	80.4	219	84.2	260
1956	11	5.0	36	16.3	68	30.8	106	48.0	174	78.7	185	83.7	221
1955	13	4.9	42	15.8	88	33.1	123	46.2	211	79.3	224	84.2	266
1954	21	7.3	43	15.0	89	31.0	134	46.7	223	77.7	244	85.0	287
1953	14	4.8	50	17.0	82	27.9	148	50.3	230	78.2	244	83.0	294
1952	21	6.6	50	15.6	101	31.6	148	46.2	249	77.8	270	84.4	320
1951	31	10.2	46	15.2	87	28.7	139	45.9	226	74.6	257	84.8	303
1950	17	5.4	53	16.3	91	28.8	155	49.0	246	77.8	263	83.2	316
1949	26	6.6	70	17.8	92	73.4	206	52.3	298	75.6	324	82.2	394
1948	28†	5.6	80†	16.2	148†	29.8	240†	48.3	388	78.1	416	83.7	496
1947	33	5.6	95	16.2	174	29.8	283	48.3	457	78.1	490	83.7	585
1946	43	5.6	123	16.2	226	29.8	367	48.3	593	78.1	636	83.8	759
1945	50	5.6	141	16.2	265	29.8	429	48.3	694	78.1	744	83.7	888
1944	55	5.6	160	16.2	294	29.8	476	48.3	770	78.2	825	83.8	985
1943	65	5.6	189	16.2	347	29.8	563	48.3	910	78.2	975	83.8	1,164
1942	70	5.6	199	16.2	367	29.8	595	48.3	962	78.1	1,032	83.7	1,231
1941	78	5.6	224	16.2	412	29.8	668	48.3	1,080	78.1	1,158	83.8	1,382
1940	94	5.6	272	16.2	501	29.8	812	48.3	1,313	78.2	1,407	83.8	1,679

1. Data are from the National Center for Health Statistics.

2. For 1968-1977, this represents the sum of those maternal abortion deaths classified as "abortion induced for medical indications" and "abortions induced for other legal indications."

3. For 1968-1977, this represents the sum of those maternal abortion deaths classified as "abortion not specified as induced or spontaneous" and "other abortions."

4. The sum of the columns headed "abortions induced for other reasons" and "other and unspecified abortions."

5. The total number of maternal abortion deaths minus those related to spontaneous abortion.

*For 1949-1967, the number of spontaneous abortions has been estimated by multiplying the number of maternal abortion deaths classified as "spontaneous and unspecified" by 0.258. The figure 0.258 is the frequency of maternal abortion deaths classified as due to "spontaneous abortion" for the sum of the two categories "spontaneous abortion" and "abortion not specified as induced or spontaneous" for the years 1968-1969. The "other and unspecified abortions" column is a combination of the remaining number of abortions "spontaneous and unspecified" added to the abortion deaths reported as "other."

†For 1940-1948, the breakdown is according to the following frequencies multiplied by the total number of maternal abortion deaths for the specific year: 0.056 for "abortion induced for legal reasons"; 0.162 for "spontaneous abortions"; 0.298 for "abortions induced for other reasons" and 0.483 for "other and unspecified abortions." The frequencies have been estimated from the relative frequencies observed in the previous ten years, 1949-1958. The columns do not always equal the total due to rounding.

has abruptly risen from 1970 to 1976. The relative frequency of maternal deaths estimated to be due to criminal abortion is also shown in Figure 7, and follows the pattern seen in the category "abortions induced for other reasons." An abrupt fall in the relative incidence of deaths from criminal abortions is observed from 1970 to 1976.

In Figure 8, the relative frequencies of three major categories are compared: the maternal deaths due to legal abortion ("abortions induced for legal reasons"), criminal abortion ("abortions induced for other reasons, other and unspecified abortions") and all induced abortions (legal and illegal combined). Two points are clear from this. First

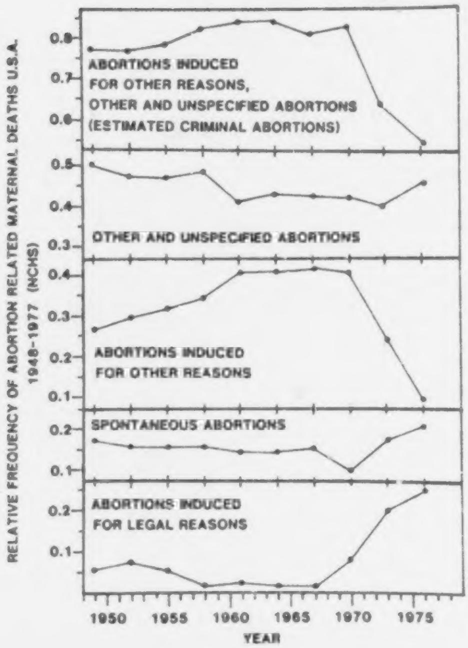

Figure 7. The relative frequency of abortion related maternal deaths in the United States, 1948-1977 (NCHS): abortions induced for other reasons; other and unspecified abortions (estimated criminal abortions); other and unspecified abortions; abortions induced for other reasons; spontaneous abortions; and abortions induced for legal reasons.

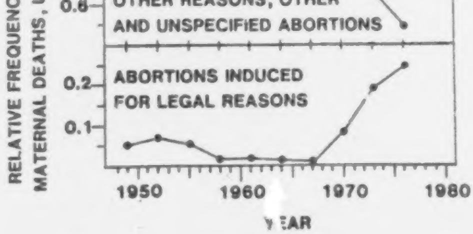

Figure 8. The relative frequency of abortion related maternal deaths in the United States, 1948-1977 (NCHS): all induced abortions; abortions induced for other reasons; other and unspecified abortions (estimated criminal abortions); and abortions induced for legal reasons.

of all, while there has been an abrupt fall in the relative incidence of abortion related maternal deaths due to criminal abortion, these deaths *have clearly not been eliminated*. Secondly, and even more significantly, the relative frequency of abortion related maternal deaths due to "abortions induced for legal reasons" has shown an increase which parallels the decrease in criminal abortion deaths. As a result, there has been no detectable change in the relative frequency of abortion related maternal death due to induced abortion in the United States in the last 30 years. It is extremely important that there has been *no* significant impact on the relative frequency of abortion related maternal death due to induced abortion in the United States since the legalization of abortion. The reason for this appears to be quite simple. While maternal deaths due to criminal abortion appear to be decreasing, *they have been replaced, almost one for one, by maternal deaths due to legal abortion.*

Relative Risk Factors

It has often been stated that abortion is X times safer than normal childbirth. The usual comparison is made between abortion related maternal mortality rates and the maternal mortality rates related to pregnancy, childbirth, and the puerperium. These comparisons are nonspecific and ultimately inaccurate since statistically they are comparing different entities.

The maternal mortality related to legal abortion has been expressed as the number of maternal deaths per 100,000 abortions. In addition, the rates are often expressed by subcategories, such as mortality at various gestational ages or for specific abortion procedures. The maternal mortality rates related to pregnancy, childbirth, and the puerperium have had no such advantage. Maternal mortality rates include all maternal deaths which are related to the entire nine-month pregnancy along with the three- to six-month postpartum period. As an example, a maternal death due to an abortion performed in the tenth week of pregnancy could well be compared (and quite often is) with the death of a woman who is not pregnant but is in her third or fourth month postdelivery. Such comparisons suffer significantly from a lack of specificity. In addition, the maternal mortality rates are inappropriately biased by the fact that they *contain* the data with which they are being compared, which obviously jeopardizes the validity of such a comparison seriously.

The problems of such traditional comparisons do not end there. Expressing maternal mortality rates as the number of deaths per 100,000 live births tends to inflate the maternal mortality rate relative to abortion rates. The latter is expressed on a "cases of pregnancy" basis, whereas the former specifically excludes certain "cases of pregnancy."

Not all pregnancies end in a live birth. Maternal deaths related to such problems as spontaneous abortion, ectopic pregnancy, stillbirth, and hydatidiform mole are included in the numerator while their "cases of pregnancy" are excluded from the denominator. The traditional comparisons then suffer from the absence of a common denominator, making it quite clear that a complete reevaluation of these comparisons is necessary.

Several adjustments should be made. First of all, the denominator in the maternal mortality rate should reflect more accurately the total number of "cases of pregnancy," taking into account those types of pregnancies mentioned above. In Table 9, the relative relationship between the number of live births and these other types is demonstrated. Reasonable estimates of the incidence of spontaneous abortion would be 15.0 percent of all pregnancies.[6] For stillbirth this would be 1.25 percent,[7] ectopic pregnancy, 0.6 percent, and molar pregnancy, 0.05 percent.[8] For every 100,000 live births, one would anticipate 120,336 "cases of pregnancy." This allows the factor 1.203 to represent the number of "cases of pregnancy" represented by every one live birth (Table 10).

The second necessary adjustment modifies the numerator so that it properly reflects the number of maternal deaths. Such an adjustment must keep in mind the type of comparisons which are possible, since

Table 9. The relative relationship of the number of live births, spontaneous abortions, stillbirths, ectopic pregnancies, and molar pregnancies.

RELATIVE RELATIONSHIP OF NUMBERS OF LIVE BIRTHS, SPONTANEOUS ABORTIONS, STILLBIRTHS, ECTOPIC PREGNANCIES, AND MOLAR PREGNANCIES

	Percent	*Relative Number of Cases per 100,000 Live Births*
Incidence of Live Birth	83.1	100,000
Incidence of Spontaneous Abortion	15.0	18,050
Incidence of Stillbirth	1.25	1,504
Incidence of Ectopic Pregnancy	0.6	722
Incidence of Molar Pregnancy	0.05	60
Case Totals	100.0	120,336

The more detailed results are tabulated here and in the following tables for the convenience of the reader so the derivation of all numbers can be followed. However, the authors do not claim that they know any more precise results than those given by two significant figures.

Table 10. Data on live births, the number of pregnancy cases, total and by subclassification, and the number of maternal deaths, total and by subclassification, 1972-1977, United States.

DATA ON LIVE BIRTHS, NUMBER OF PREGNANCY CASES, TOTAL AND BY SUBCLASSIFICATION, AND THE NUMBER OF MATERNAL DEATHS, TOTAL AND BY SUBCLASSIFICATION, 1972-1977, U.S.A.

Item	*1977*	*1976*	*1975*	*1974*	*1973*	*1972*
Live Births[1]	3,313,000	3,162,788	3,144,198	3,159,958	3,136,965	3,258,411
Total Pregnancies (Cases)[2]	3,985,539	3,804,834	3,782,470	3,801,429	3,773,769	3,919,868
Adjusted Number of Pregnancies (Cases)[3]	3,363,795	3,211,280	3,192,405	3,208,407	3,185,061	3,308,369
Adjusted Number of Maternal Deaths[4]	309	335	326	384	395	494
Estimated Spontaneous Abortions[5]	597,831	570,725	567,370	570,214	566,065	587,980
Maternal Deaths Due to Spontaneous Abortion NCHS[1]	4	5	3	7	3	12
CDC[6]	14	12	13	17	6	16
Estimated Ectopic Pregnancies[7]	23,913	22,829	22,695	22,808	22,643	23,519
Maternal Deaths Due to Ectopic Pregnancy[1]	44	39	50	51	46	48

1. Data are from National Center for Health Statistics.
2. Number of live births times 1.203 (see p. 85).
3. Total number of pregnancies (cases) minus the estimated number of spontaneous abortions and ectopic pregnancies.
4. Total number of maternal deaths minus those due to legal and spontaneous abortion, abortions induced for other reasons, other and unspecified abortions, and ectopic pregnancies.
5. Obtained by multiplying the total number of pregnancies (cases) by 0.15.
6. Data from *Abortion Surveillance Reports*, Center for Disease Control (CDC), Atlanta.
7. Estimated by multiplying the total number of pregnancies (cases) by 0.006.

gaps in the available data limit our precision. For example, it is impossible at the present time to compare the mortality rate of an induced abortion performed at eight weeks' gestation with the mortality of natural pregnancy for a similar gestational age. While specific data are collected on maternal mortality in legal abortion as it relates to specific gestational ages, no comparable data are available for natural pregnancy. Therefore, to make such comparisons goes far beyond the limits of available data.

Current data *will* allow us to compare the maternal mortality related to induced abortion and natural pregnancy during the first 20 weeks of pregnancy and again in the second 20 weeks. Such a comparison will be much more accurate and precise than any comparison made in the traditional fashion.

To do this, it is necessary to make appropriate adjustments in the number of maternal deaths. This requires that the number of maternal deaths due to legal and illegal abortion, spontaneous abortion, and ectopic pregnancy be excluded (Table 10). The maternal deaths due to spontaneous abortion will later be used to calculate the death-to-case rate for natural pregnancy in the first 20 weeks. The maternal deaths due to ectopic pregnancy will be considered separately, because there is no evidence that either spontaneous or legally induced abortion will eliminate this problem. If anything, there are data to suggest that induced abortion may increase the frequency of ectopic pregnancy,[9] though such a likelihood will not be assumed in the current analysis.

The total number of "cases of pregnancy" must now have subtracted from it those "cases of pregnancy" due to spontaneous abortion and ectopic pregnancy. With this, death-to-case rates for the adjusted maternal causes can be established. In calculating spontaneous abortion death-to-case rates, data from both the NCHS and CDC (excluding IUD related abortion deaths) are used, since there are some differences between the two. The raw data for these calculations are presented in Table 10.

The death rates for adjusted maternal causes, spontaneous abortion, and ectopic pregnancy are tabulated in Table 11 for 1972 through 1977. These years were selected because of the data which are available from the CDC for comparison over these years. During this time, the death-to-case rate for adjusted maternal causes ranged from a low of 9.2 in 1977 to a high of 14.9 in 1972; the cumulative six-year mean was 11.5. For spontaneous abortion, the rate ranged from 0.5 to 2.0 with a mean of 1.0 for the NCHS data, and from 1.1 to 3.0 with a mean of 2.2 for the CDC data. The death-to-case rates for ectopic pregnancy ranged from 170.8 to 223.6, with a mean of 202.3.

In Table 12, the relative risks of natural pregnancy and induced abortion during the first 20 weeks of pregnancy are compared for 1972 through 1977. It is clear that natural pregnancy is safer than induced abortion. While the CDC data for spontaneous abortion result in a higher death-to-case rate than the NCHS data, both figures are lower than that produced from the corresponding data for induced abortion. The data for ectopic pregnancy are significantly higher than the others, which comes as no surprise.

In Table 13, the relative risks of natural pregnancy and induced abortion during the second 20 weeks of pregnancy are compared for 1972 through 1977. Again, it is clear that natural pregnancy is safer. The death rate for adjusted maternal causes is 11.5, as compared to 20.5 for induced abortion: induced abortion is nearly twice as dangerous.

The Abortion Surveillance Branch of the Center for Disease Control has reported a death-to-case rate for legally induced abortions of 0.6 per 100,000 abortions performed at ≤ eight weeks' gestation. The comparable rates are 1.7 for 9-10 weeks' gestation, 2.7 for 11-12 weeks' gestation, 7.5 for 13-15 weeks' gestation, and 14.6 for 16-20 weeks' gestation.[10] Unfortunately, similar data are not available in that type of gestational-age breakdown for natural pregnancy. As a result, *comparisons between the abortion related maternal mortality at these gestational substages and the mortality of natural pregnancy are impossible. The only data available for a gestational substage represent the division at 20 weeks.* Spontaneous abortion is defined as that birth process which occurs during the first 20 weeks of pregnancy.[11] Therefore, the maternal

Table 11. The death-to-case rates for adjusted maternal causes, spontaneous abortion, and ectopic pregnancy, 1972-1977, United States.

DEATH-TO-CASE RATES FOR ADJUSTED MATERNAL CAUSES, SPONTANEOUS ABORTION, AND ECTOPIC PREGNANCY, 1972-1977, USA

Item	*1977*	*1976*	*1975*	*1974*	*1973*	*1972*	*Cumulative Average*
Adjusted Maternal Causes Death Rate[1]	9.2	10.4	10.2	12.0	12.4	14.9	11.5
Spontaneous Abortion Death Rate NCHS[2]	0.7	0.9	0.5	1.2	0.5	2.0	1.0
CDC[2]	2.2	2.1	2.3	3.0	1.1	2.7	2.2
Ectopic Pregnancy Death Rate[3]	184.0	170.8	220.3	223.6	203.2	204.1	202.3

1. The ratio, per 100,000 cases, of the adjusted number of maternal deaths to the adjusted number of pregnancies (cases)

2. Per 100,000 cases, using the estimated number of spontaneous abortions per year in the denominator. NCHS = National Center for Health Statistics; CDC = Center for Disease Control.

3. Per 100,000 cases, using the estimated number of ectopic pregnancies per year in the denominator.

Table 12. The relative risk, in the first 20 weeks of pregnancy, of natural pregnancy versus induced abortion—comparative data for 1972-1977.

RELATIVE RISK IN FIRST 20 WEEKS OF NATURAL PREGNANCY VERSUS INDUCED ABORTION: COMPARATIVE DATA FOR 1972-1977 INCLUSIVE

Entity	*Death-to-Case Rate*[1]	*Relative Risk*[2]
Spontaneous Abortion (NCHS)	1.0	1.0
Spontaneous Abortion (CDC)	2.2	2.2
Induced Abortion ≤ 20 Weeks	2.4[3]	2.4
Ectopic Pregnancy	202.3	202.3

1. Expressed as the number of maternal deaths per 100,000 cases in each category or classification.

2. Based on the index rate for spontaneous abortions of 1.0 per 100,000 spontaneous abortions (NCHS).

3. Based on 117 maternal deaths in 4,829,975 abortions performed during the first 20 weeks of pregnancy; reported for the years 1972-1977 by the Abortion Surveillance Branch of the Center for Disease Control, Atlanta.

mortality related to spontaneous abortion is a reasonable estimate of the maternal mortality rate associated with that stage of pregnancy.

It should be kept in mind, however, that most of the deaths which occur from spontaneous abortion occur during the second trimester of pregnancy (from the 13th through the 20th week of gestation). *If data were available* on the mortality rate from spontaneous abortion at ≤ 8 weeks of gestation, for example, one would anticipate that it would be extremely low. While one cannot be certain what that mortality is at the present time, one could speculate that it would be lower than those rates expressed for legally induced abortion. This suggestion is based upon the mortality rate from spontaneous abortion during the *entire* first 20 weeks of pregnancy being lower overall, and the knowledge that most

Table 13. The relative risk, in second 20 weeks of gestation and beyond, of natural pregnancy versus induced abortion—comparative data for 1972-1977 inclusive.

RELATIVE RISK IN SECOND 20 WEEKS AND BEYOND OF NATURAL
PREGNANCY VERSUS INDUCED ABORTION:
COMPARATIVE DATA FOR 1972-1977 INCLUSIVE

Entity	*Death-to-Case Rate*[1]	*Relative Risk*[2]
Adjusted Maternal Causes	11.5	1.0
Induced Abortion $\geq$ 21 weeks	20.5[3]	1.8

[1] Expressed as the number of maternal deaths per 100,000 cases in each category or classification.

[2] Based on the index rate of 1.0 for the death rate associated with adjusted maternal causes.

[3] Based on 12 maternal deaths in 58,642 abortions performed during the second 20 weeks of pregnancy, reported for the years 1972-1977 by the Abortion Surveillance Branch of the Center for Disease Control, Atlanta.

maternal deaths during that phase would occur during the second trimester and not during the first. Therefore, we do not feel that having an additional gestational breakdown for natural pregnancy would add anything very dramatic to the present discussion. The bottom line should remain the same: natural pregnancy during the first 20 weeks of gestation is safer than legal abortion induced during the same period of time.

SUMMARY AND CONCLUSIONS

There has been a need to completely reevaluate the comparisons that have been made between maternal mortality related to legal abortion and maternal mortality related to pregnancy, childbirth, and the puerperium. Traditional comparisons have been seriously flawed by comparing incomparable data. In this study, adjustments have been made so that accurate reflections of the "cases of pregnancy" can be made and compared. In addition, appropriate adjustments for maternal deaths have also been made, allowing a more accurate comparison between the mortality associated with legal abortion and that associated with natural pregnancy. The following conclusions have been reached as a result of this study:

1. With the introduction of abortion on demand, no significant change has been detected in the maternal mortality rate which could be attributed to legal abortion.

2. When 10 selected states, all of which legalized abortion prior to 1970, were studied, the same trend was observed but for a longer period after legalization. This evaluation allowed a study of eight years after abortion legalization, representing a very sizable subpopulation of the United States. It, too, indicated that the legalization of abortion has had no effect on the already existing downward trend in the maternal mortality rate.

3. Beginning in 1973, the year of the Supreme Court decision on abortion, there was a stabilization or plateau in the number of maternal deaths related to abortion (all causes). No such plateau was observed for nonabortion related maternal deaths.

4. In the 25 years prior to the Supreme Court decision, the largest number of maternal deaths related to criminal abortion in any single year was 388, occurring in 1948. Estimates that there were between 5,000 and 10,000 maternal deaths due to criminal abortion each year in the United States prior to the legalization of abortion would appear to have been grossly exaggerated.

5. In spite of a legal abortion policy, which has resulted in over 5.6 million legal abortions from 1963 to 1977, maternal deaths related to criminal abortion have not been eliminated.

6. In analyzing the trend in maternal deaths due to induced abortion, it has been shown that while maternal deaths stemming from criminal abortion appear to be decreasing, they have been replaced, almost one for one, by maternal deaths due to legal abortion. The results of this study indicate that there has been no significant impact on the relative frequency of abortion related maternal death due to induced abortion since the legalization of abortion.

7. In comparing the relative risk of natural pregnancy versus that of legal abortion, *natural pregnancy was found to be safer in both the first and second 20 weeks of pregnancy*. The data used in this comparison are thought to be more accurate than previously compiled comparisons done in the traditional fashion.

The results of this study seriously question just how successful the current American legal abortion policy has been. The often-stated concept that abortion is safer than childbirth has not stood well the scrutiny of careful evaluation. The hoped-for reduction in maternal deaths due to criminal abortion has been observed in part, but only at the cost of a proportionate increase in the number of maternal deaths due to legal abortion. All in all, the legal abortion policy has had a neutral effect in relation to maternal death. It can be concluded that the legal abortion policy, which has resulted in over 5 million legal abortions from 1971 to 1977, has had no *measurable* beneficial effect. Indeed, this study suggests that such a policy on abortion should be completely reevaluated.

SOURCES OF DATA

The data used in this study have come from the National Center for Health Statistics, the state departments of health of 10 selected states, and from the Abortion Surveillance Branch of the Center for Disease Control.

NOTES

1. *Amicus curiae* brief filed on behalf of the American College of Obstetricians and Gynecologists, the American Medical Women's Association, the American Psychiatric Association, the New York Academy of Medicine, medical school deans and professors, and certain individual physicians, in Doe v. Bolton, 410 U.S. 179 (1973).

2. Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973).

3. W. Cates et al.: Legal abortion mortality in the United States: epidemiologic surveillance, 1972-1974. *JAMA* 237:452, 1977.

4. J.A. Lampé, "The World in Perspective," in *Abortion and Social Justice*, ed. T.W. Hilgers and D.J. Horan (New York: Sheed and Ward, 1972).

5. L. Lader, *Abortion* (Boston: Beacon Press, 1966).

6. D. Warburton and F.C. Fraser: Spontaneous abortion risks in man: data from reproductive histories collected in a medical genetics unit. *Amer. J. Hum. Genet.* 16:1, 1964.

7. D.N. Danforth, ed., *Obstetrics and Gynecology*, 3rd ed. (New York: Harper and Row, 1977), p. 210.

8. E.R. Novak and J.D. Woodruff, *Novak's Gynecologic and Obstetric Pathology*, 8th ed. (Philadelphia: W.B. Saunders Co., 1979), pp. 541, 651.

9. A. Kotasek: Artificial termination of pregnancy in Czechoslovakia. *Int. J. Gynaec. Obstet.* 9:118, 1971.

10. U.S. Department of Health, Education and Welfare, Center for Disease Control, "Abortion Surveillance 1977" (Atlanta: September 1979).

11. E.C. Hughes, ed., *Obstetric-Gynecologic Terminology* (Philadelphia: F.A. Davis Co., 1972).

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13

An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy

Over the years, one of the major arguments in favor of legalized abortion has been the existence of criminal abortion. Since criminal abortion was presented as being both prevalent and dangerous, it was argued that legalizing abortion would provide a safe alternative and thereby eliminate criminal abortion altogether. It has often been alleged that, prior to the legalization of abortion, there were at least 1 million criminal abortions per year in the United States, resulting in 5,000 to 10,000 maternal deaths.

One of the great dilemmas which has plagued scientists for years has been how to determine the number of criminal abortions. At the First International Conference on Abortion, held in Washington, D.C., in 1967, the conclusion was reached that the figures on the number of criminal abortions in the United States are "based on personal estimates" and that "no way has yet been found of obtaining reliable statistics that would give an exact figure for the total population."[1] In 1958, a Planned Parenthood conference on abortion in the United States concluded that "a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1.2 million . . . there is no objective basis for the selection of a particular figure between these two estimates. . . ."[2] The actual number of criminal abortions each year in the United States has, therefore, been elusive. Up to this time, there has been no objective basis for claiming any number of criminal abortions, high or low.

It is the purpose of this chapter to present an objective model for accurately estimating the number of criminal abortions yearly in the United States. With the data generated from the model, the trends in criminal abortion can be analyzed and the effect of the legal abortion policy on these trends can be evaluated.

An Objective Model for the Estimation of the Number of Criminal Abortions

Investigators agree that the maternal mortality rate due to criminal abortion is higher than that of natural pregnancy.[3,4] By identifying the number of maternal deaths per year in the United States due to criminal abortion, the maternal death rate due to natural pregnancy, and the degree to which criminal abortion is more dangerous than natural pregnancy, an objective estimate of the number of criminal abortions per year can be calculated. The formula is:

$$\frac{\text{CAD}}{(\text{AMDR})\,(\text{RF})} = \text{CA}$$

In this formula,

CAD = the estimated number of maternal deaths due to criminal abortion in a given year.

AMDR = the adjusted maternal death rate for the year under evaluation, expressed as the number of maternal deaths (excluding deaths due to legal or illegal abortion) per 100,000 cases of pregnancy (excluding pregnancies ending in legal or illegal abortion.)

RF = the risk factor. The number of times more dangerous criminal abortion is than natural pregnancy.

CA = the estimated number of criminal abortions in a given year.

Data on maternal mortality rates are readily available from the National Center for Health Statistics (NCHS). However, maternal mortality rates are expressed as the number of maternal deaths (all causes) per 100,000 live births. These figures need to be properly adjusted in order to be used in this formula. It is the number of maternal deaths due to natural pregnancy which allows for correct estimates to be made. Therefore, maternal deaths due to legal or illegal abortion must be excluded, while those due to spontaneous abortion must be included. In addition, the denominator, 100,000 live births, must also be adjusted in order to reflect more adequately the cases of pregnancy from which the maternal deaths originate. Expressing maternal mortality rates as a function of live births gives a false indication of the death-to-case rate. For example, while deaths due to spontaneous abortion, ectopic pregnancy, stillbirth and/or hydatidiform mole would be included in the number of maternal deaths, their "cases of pregnancy" are not included because none of these end in live birth. In order to adjust for this, the number of live births for a given year must be multiplied by the factor 1.203 as previously described.[5]

The number of maternal deaths due to abortion (all causes) has been collected and reported by the National Center for Health Statistics for many years. For the years 1968-1977, the deaths have been subdivided into the following four categories: "abortions induced for legal reasons," "spontaneous abortions," "abortions induced for other reasons," and "other and unspecified abortions."[5] For these years, the sum of the latter two categories provided the estimate for the number of deaths due to criminal abortion.

For the years 1949-1967, the NCHS used a different classification. Therefore, in this study the number of maternal deaths due to criminal abortion was obtained by multiplying the abortion deaths classified as "spontaneous and unspecified" by 0.742 and then was added to the abortion deaths classified as "induced for other reasons" and "other." From 1940 to 1948, the number of maternal deaths due to criminal abortion was estimated by applying a standard factor to the total number of maternal deaths due to abortion.[5]

The risk factor of criminal abortion versus natural pregnancy was developed from existing data. A survey of the reproductive behavior of 889 mostly nonwhite women in New York City was conducted between 1965 and 1967 (the prelegalization era) by the National Opinion Research Center.[6] A total of 74 women or 8.3 percent of the sample said that they had *attempted* to abort one or more pregnancies and, of these, 31 women or 3.5 percent of the sample reported that *the attempt had been successful.* This survey gives significant insight into the frequency of criminal abortion in a given *high-risk population.* Data on the number of live births and the number of maternal deaths due to non-abortion and abortion related causes for the nonwhite population of New York City are available. A range for the estimated number of criminal abortions for this population can be calculated by multiplying the number of live births by 0.083 and 0.035. With this, death-to-case rates for natural pregnancy and criminal abortion can be calculated and then compared (Table 1). If 8.3 percent of all pregnancies were criminally aborted, the relative risk of criminal abortion to natural pregnancy would range from 4.9 to 10.3. If 3.5 percent of all pregnancies were criminally aborted, the relative risk would be from 11.6 to 24.5. A conservative estimate of the relative risk, then, would place criminal abortion as being between 5 and 10 times more dangerous than natural pregnancy.

Applying the formula for 1967 and 1966 provides the following examples.

Table 1. Calculations of the relative risk of natural pregnancy and criminal abortion for the nonwhite population of New York City.

Year	*Number of Live Births Nonwhites, N.Y.C.*[1]		*Estimated Number of Pregnancies (Cases) Nonwhites, N.Y.C.*[2]		*Number of Nonabortion Maternal Deaths Nonwhites, N.Y.C.*[1]		*Death-to-Case Rate*[3]
1965	42,128		50,680		28		55.2
1966	41,114		49,460		23		46.5
1967	39,520		47,543		32		67.3
	Estimated Number of Criminal Abortions Nonwhites, N.Y.C.[4]		*Number of Maternal Deaths Due to Criminal Abortion Nonwhites, N.Y.C.*[1]		*Death-to-Case Rate*[5]		
	x .083	*x .035*			*at .083*	*at .035*	
1965	4.206	1.774	24		570.6	1.352.9	
1966	4.105	1.731	17		414.1	982.1	
1967	3,946	1,664	13		329.4	781.2	
	Death-to-Case Rate Non-Abortion Maternal Deaths Nonwhite, N.Y.C.		*Death-to-Case Rate Criminal Abortion Nonwhite, N.Y.C.*		*Relative Risk Criminal Abortion vs. Natural Pregnancy*[6]		
			at .083	*at .035*	*at .083*	*at .035*	
1965	55.2		570.6	1,352.9	10.3	24.5	
1966	46.5		414.1	982.1	8.9	21.1	
1967	67.3		329.4	781.2	4.9	11.6	

1. Data are from the New York City Department of Health.

2. Calculated by multiplying the number of live births by 1.203 (see text).

3. Expressed as the number of nonabortion related maternal deaths per 100,000 cases of pregnancy.

4. The figures .083 and .035 come from S. Polgar and E.S. Fried: The bad old days: Clandestine abortions among the poor in New York City before liberalization of the abortion law. *Fam. Plan. Persps* 8:125, 1976 (see text). The estimated number of criminal abortions has been calculated by multiplying the estimated number of cases of pregnancy by .083 and .035.

5. Expressed as the number of maternal deaths due to criminal abortion per 100,000 criminal abortions.

6. The death-to-case rate for criminal abortions divided by the death-to-case rate for nonabortion related maternal deaths.

The more detailed results are tabulated here and in the following tables for the convenience of the reader so that the derivation of all numbers can be followed. However, the authors do not claim that they know any more precise results than those given by two significant figures.

Year *Risk Factor of 5*

1967

$$\frac{135}{\left(\frac{20.0}{100,000}\right)(5)} = 135{,}000 \text{ criminal abortions}$$

Risk Factor of 10

1966

$$\frac{159}{\left(\frac{20.5}{100,000}\right)(10)} = 77{,}561 \text{ criminal abortions}$$

For the years 1940-1977, the estimated numbers of criminal abortions, if criminal abortion is 3, 5, 10, and 15 times more dangerous than natural pregnancy, are listed in Table 3. Working data for each of the years are in Table 2.

Table 2. The number of live births, pregnancies (cases), "other" maternal deaths, maternal deaths ("other" plus spontaneous), and the adjusted maternal death rate for the years 1940-1977, U.S.A.

Year	*Number of Live Births*[1]	*Number of Pregnancies*[2] *(Cases)*	*Number of "Other" Maternal Deaths*[3]	*Number of Maternal Deaths "Other" Plus Spontaneous*	*Adjusted Maternal Death Rate per 100,000 Pregnancies (Cases)*[4]
1977	3,313,000	3,985,539	355	357	9.0
1976	3,162,788	3,804,834	374	379	10.0
1975	3,144,198	3,782,470	376	379	10.0
1974	3,159,958	3,801,429	435	442	11.6
1973	3,136,965	3,773,769	441	444	11.8
1972	3,258,411	3,919,868	542	554	14.1
1971	3,555,970	4,277,832	569	578	13.5
1970	3,731,386	4,488,857	675	684	15.2
1969	3,600,206	4,331,048	669	685	15.8
1968	3,501,564	4,212,381	726	748	17.8
1967	3,520,959	4,235,714	827	848	20.0
1966	3,606,274	4,338,348	860	889	20.5
1965	3,760,356	4,523,711	954	988	21.8
1964	4,027,490	4,845,070	1,096	1,131	23.3
1963	4,098,020	4,929,918	1,186	1,227	24.9
1962	4,167,362	5,013,336	1,160	1,207	24.1
1961	4,268,326	5,134,796	1,249	1,298	25.3
1960	4,257,850	5,122,194	1,290	1,328	25.9
1959	4,244,796	5,106,490	1,304	1,348	26.4
1958	4,203,812	5,057,186	1,322	1,365	27.0
1957	4,254,784	5,118,505	1,486	1,527	29.8
1956	4,163,090	5,008,197	1,481	1,517	30.3
1955	4,047,295	4,868,896	1,635	1,677	34.4
1954	4,017,362	4,832,886	1,818	1,861	38.5
1953	3,902,120	4,694,250	2,091	2,141	45.6
1952	3,846,986	4,627,924	2,290	2,340	50.6
1951	3,750,850	4,512,272	2,509	2,555	56.6
1950	3,554,149	4,275,641	2,644	2,697	63.1
1949	3,559,529	4,282,113	2,822	2,892	67.5
1948	3,535,068	4,252,687	3,626	3,706	87.1
1947	3,699,940	4,451,028	4,395	4,488	100.8
1946	3,288,672	3,956,272	4,495	4,616	116.7
1945	2,735,456	3,290,754	4,780	4,924	149.6
1944	2,794,800	3,362,144	5,473	5,633	167.5
1943	2,934,860	3,530,637	6,032	6,221	176.2
1942	2,808,996	3,379,222	6,056	6,235	184.5
1941	2,513,427	3,023,653	6,572	6,796	224.8
1940	2,360,399	2,839,560	7,194	7,465	262.9

1. From National Center for Health Statistics.
2. Calculated by multiplying the recorded number of live births by 1.203 (see text).
3. From National Center for Health Statistics. Includes all maternal deaths except those due to all abortion causes.
4. The number of maternal deaths due to spontaneous abortion and "other" causes, per 100,000 cases of pregnancy.

ESTIMATING CRIMINAL ABORTIONS

Table 3. The estimated number of maternal deaths due to criminal abortion, the adjusted maternal death rate, and the estimated number of criminal abortions in the United States if criminal abortion were 3, 5, 10, or 15 times more dangerous than natural pregnancy, 1940-1977.

Year	Estimated Number Criminal Abortion Deaths[1]	Adjusted Maternal Death Rate per 100,000 Pregnancies (Cases)[2]	Estimated Number of Criminal Abortions in the U.S.A. if Criminal Abortion Were[3] 3 Times More Dangerous	5 Times More Dangerous	10 Times More Dangerous	15 Times More Dangerous
1977	10	9.0	37,037	22,222	11,111	7,407
1976	10	10.0	33,333	20,000	10,000	6,667
1975	14	10.0	46,667	28,000	14,000	9,333
1974	14	11.6	40,230	24,138	12,069	8,046
1973	25	11.8	70,621	42,373	21,186	14,124
1972	48	14.1	113,475	68,085	34,042	22,695
1971	75	13.5	185,185	111,111	55,555	37,037
1970	109	15.2	239,035	143,421	71,710	47,807
1969	115	15.8	242,616	145,570	72,785	48,523
1968	99	17.8	185,393	111,236	55,618	37,079
1967	135	20.0	225,000	135,000	67,500	45,000
1966	159	20.5	258,537	155,122	77,561	51,707
1965	197	21.8	301,223	180,734	90,367	60,245
1964	207	23.3	296,137	177,682	88,841	59,227
1963	234	24.9	313,253	187,952	93,976	62,651
1962	253	24.1	349,931	209,958	104,979	69,986
1961	271	25.3	357,049	214,229	107,115	71,410
1960	241	25.9	310,167	186,100	93,050	62,033
1959	235	26.4	296,717	178,030	89,015	59,343
1958	215	27.0	265,432	159,259	79,630	53,086
1957	209	29.8	233,781	140,268	70,134	46,756
1956	174	30.3	191,419	114,851	57,426	38,281
1955	211	34.4	204,457	122,674	61,337	40,891
1954	223	38.5	193,074	115,844	57,922	38,615
1953	230	45.6	168,129	100,877	50,439	33,626
1952	249	50.6	164,032	98,419	49,210	32,806
1951	226	56.6	133,098	79,859	39,929	26,620
1950	246	63.1	129,952	77,971	38,986	25,990
1949	298	67.5	147,160	88,296	44,148	29,432
1948	388	87.1	148,488	89,093	44,546	29,698
1947	457	100.8	151,124	90,672	45,337	30,225
1946	593	116.7	169,380	101,628	50,814	33,876
1945	694	149.6	154,634	92,781	46,390	30,927
1944	770	167.5	153,234	91,940	45,970	30,647
1943	910	176.2	172,153	103,292	51,646	34,431
1942	962	184.5	173,803	104,282	52,141	34,761
1941	1,080	224.8	160,142	96,085	48,043	32,028
1940	1,313	262.9	166,476	99,886	49,943	33,295

1. From T. W. Hilgers and D. O'Hare, "Abortion Related Maternal Mortality: An In-Depth Analysis," Ch. 7.

2. The number of maternal deaths due to spontaneous abortion and "other" causes, per 100,000 cases of pregnancy (see Table 2).

3. Calculated by the following formula: $\frac{CAD}{(AMDR)(RF)} = CA$ (see text)

Limitations and Expectations of the Model

With the development of such a model, one must carefully analyze the sources of one's data to see where the strengths and weaknesses might be, so that proper interpretation and eventual analysis can be made. In this case, the data on overall maternal mortality should be considered a known factor. The data come from the NCHS evaluation and classification of death certificates, and for natural pregnancy related maternal deaths are considered to be reliable. Certainly the number of live births, also tabulated by NCHS, would also be considered reliable vital statistics data. The number of cases of pregnancy, obtained by multiplying the number of live births by 1.203, would have some degree of error associated with it although, if anything, this would be expected to be small.

The yearly estimate for the number of maternal deaths due to criminal abortion has also been taken from NCHS data. However, such data have not specifically been identified as deaths due to criminal abortion. Therefore, some error is involved. One would assume that the data used in this model as the estimated number of maternal deaths due to criminal abortion would be, on the one hand, consistent and comparable from year to year while, on the other hand, a probable underestimate of the actual number of maternal deaths due to criminal abortion in a given year. We would not anticipate that this underestimate would be very significant, since our use of NCHS data already has more maternal deaths for each of the years 1972-1977 than the Abortion Surveillance Branch of the Center for Disease Control (CDC) discovered for each of those years.[7] If the numbers are an underestimate, then this would artificially lower our calculated number of criminal abortions so that our calculations would be lower than the actual. The opposite would be true if we overestimated but this is highly unlikely.

The relative risk of criminal abortion to natural pregnancy has always been thought to be greater than 1.0. Tietze, in 1975, reported that he thought a "very low estimate" of the maternal death rate due to criminal abortion would be 40/100,000.[5] This would be four times the rate for natural pregnancy. In 1976, Cates and Rochat reported their estimation of 30/100,000,[4] or three times the rate for natural pregnancy. In both of these reports, *no data were provided or alluded to* which could lend any substance to the estimates. Our estimate is derived from objective data obtained during the prelegalization era. It does, however, have its deficiencies.

The most significant problem with the estimate of the relative risk of criminal abortion versus natural pregnancy obtained using the New York data (Table 1) is that it uses data on the incidence of criminal abortion for an admittedly high-risk population. In other words, while the incidence of criminal abortion for the nonwhite population of New York City between 1965 and 1967 is reported to be between 3.5 and 8.3 percent, this is undoubtedly an *overestimate* when applied to the nation as a whole. As the incidence of criminal abortion decreases, the estimated relative risk of criminal abortion to natural pregnancy will increase, given that all other data remain the same. As a result, the New York data applied on a national basis artificially inflate our estimate of criminal abortions. They do this by underestimating the relative risk of criminal abortion versus natural pregnancy. While our thesis will revolve around the most conservative estimate—that criminal abortions are 5 to 10 times more dangerous than natural pregnancy—it is *nearly* certain that the relative risk is greater than that. We feel that this error in our data overcompensates for any minor deficiency which might appear in any underestimation that we have made in maternal deaths due to criminal abortion. Taken together, the estimates at the 5 to 10 times more dangerous levels should be considered, if anything, an exaggeration of the actual number of criminal abortions. This is purposely accepted by the authors as the best possible objective assessment of the numbers of criminal abortions, with a high degree of assurance that the final numbers are not being understated.

Presentation of Data

During the years 1940-1967, the largest possible number of criminal abortions in any one year was approximately 210,000 (two significant figures) in 1961 and the least number in this prelegalization era was 89,000 in 1950; the mean was 98,000. There is a rise in the number of criminal abortions beginning in about 1954, and this continued until 1961 when a steady decline began (Figure 1). This rise and fall in the number of criminal abortions reflects the pattern of live births in the United States over the same period of time (Figure 2) and the national fertility rates for the same years.[8] Beginning between 1971 and 1972, there was an additional decline in the number of criminal abortions beyond that which can be explained solely on the basis of fertility or birthrates. Presumably, this decline is due to a concomitant increase in the number of legally induced abortions. Between 1974 and 1977, however, there was a noticeable stabilization in the incidence with no further decline demonstrable.

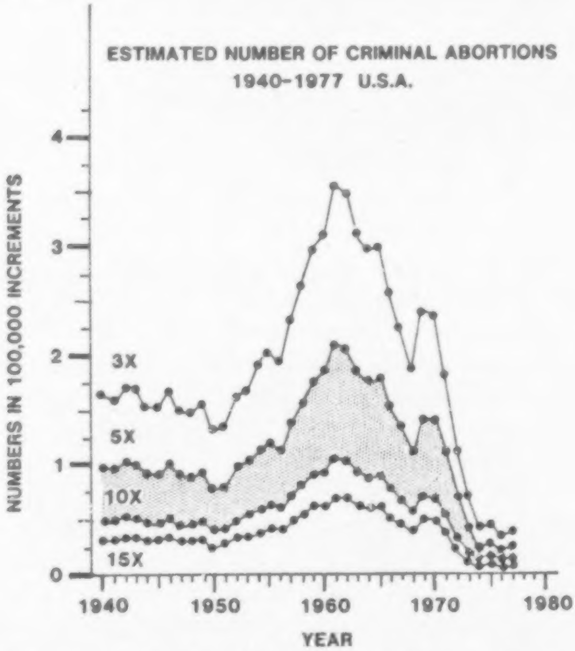

Figure 1. The estimated number of criminal abortions in the United States, 1940-1977, if criminal abortion is 3, 5, 10, or 15 times more dangerous than natural pregnancy.

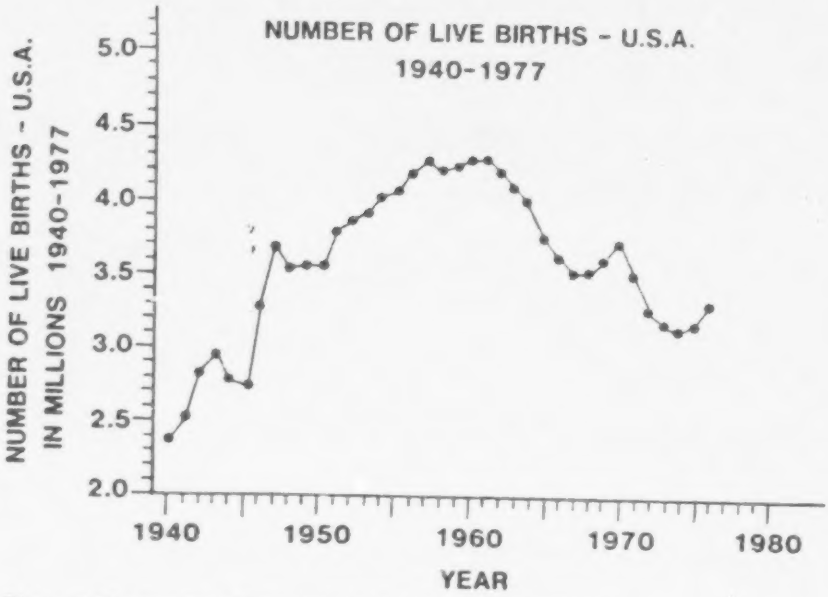

Figure 2. The number of live births in the United States, 1940-1977.

In Figure 3, the number of legal abortions per year for the United States from 1963 to 1977: Obviously, it is the legal abortion program in ponential increase is obvious. In Table 4, the estimated *total* number of abortions (legal and illegal) is presented if criminal abortion is 3, 5, 10, or 15 times more dangerous than natural pregnancy. These data are then graphically presented in Figure 4. Clearly, there has also been an exponential increase in the *total* number of abortions in the United states from 1963 to 1977. Obviously, it is the legal abortion program in the United States which overwhelmingly contributes to this marked increase in the total number of abortions we are observing yearly. It is not true, therefore, that legal abortions have simply replaced illegal abortions. That could only be true if criminal abortions were actually *safer* than natural pregnancy. The overall increase in the total number of abortions resulting from legalized abortion has been in the range of 6- to 11-fold.

Public Health Effects of Abortion Legalization

In order to measure the public health effects of abortion legalization, it is necessary to measure two basic parameters. First of all, one would wish to know just how significant an impact abortion legalization has had on the incidence of criminal abortion. Second, what has been the cost?

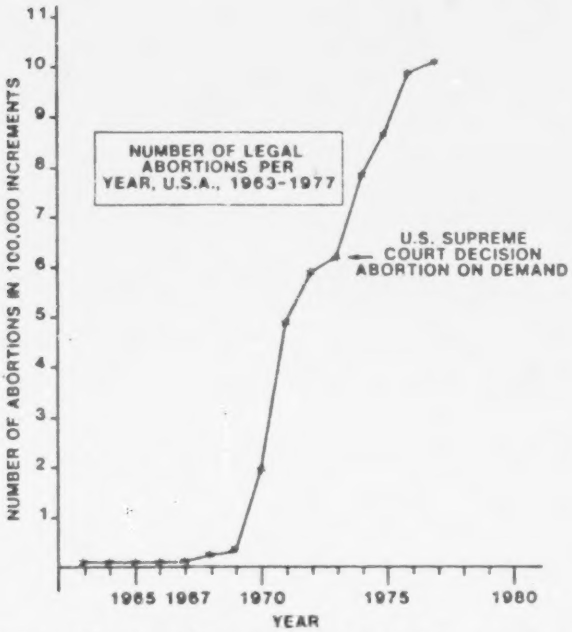

Figure 3. The number of legal abortions per year in the United States, 1963-1977. The year of the United States Supreme Court decision legalizing abortion on demand (1973) is marked.

In an attempt to answer the first question, the estimated annual average number of criminal abortions for five-year periods has been calculated (Table 5). The highest per year average was between 1960 and 1964, when there were nearly 150,000 criminal abortions. The lowest per year average (calculated on a three-year basis) was from 1975 to 1977 when there were nearly 18,000. However, the reduction in the incidence cannot be established by subtracting these two figures because the number of live births was proportionately higher in 1960-1964. A similar incidence of live births comparable to 1968-1972, the period of beginning legalization, can be found between 1950 and 1954. At that time, there were about 71,000 criminal abortions, which would represent an estimated reduction of 53,000 criminal abortions per year attributable to the abortion legalization program.

The relative annual incidence in the number of criminal and legal abortions from 1940 to 1977 is also found in Table 5. Since the early 1950s, when the fertility rates were comparable to recent years, there has been approximately a 4-fold decrease in the number of criminal abortions. To accomplish this, there has been an over 130-fold increase in the number of legal abortions per year. It has taken over 18 legal abortions to eliminate one criminal abortion.

Table 4. The total number of abortions, both legal and illegal, in the United States per year if abortion is 3, 5, 10, or 15 times more dangerous than natural pregnancy, 1963-1977.

Year	Number of Legal Abortions	*Total Number of Legal and Illegal Abortions in the United States if Criminal Abortion Were*			
		3 Times More Dangerous	*5 Times More Dangerous*	*10 Times More Dangerous*	*15 Times More Dangerous*
1977	1,079,430[1]	1,116,467	1,101,652	1,090,541	1,086,837
1976	988,267	1,021,600	1,008,267	998,267	994,934
1975	864,679	911,346	892,679	878,679	874,012
1974	780,824	821,054	804,962	792,893	788,870
1973	615,831	686,152	658,204	637,071	629,955
1972	586,760	700,235	654,845	620,802	609,455
1971	485,816	671,001	596,927	541,371	522,853
1970	193,491	432,526	336,912	265,201	241,298
1969	22,670	265,286	168,240	95,455	71,193
1968	18,170[2]	203,563	129,406	73,788	55,249
1967	9,116	234,116	144,116	76,616	54,116
1966	6,346	264,883	161,468	83,907	58,053
1965	7,256	308,479	187,990	97,623	67,501
1964	9,503	305,640	187,185	98,344	68,730
1963	5,204	318,457	193,156	99,180	67,855

1. For the years 1969-1977, data are from *Abortion Surveillance Reports*, Center for Disease Control, Atlanta

2. For the years 1963-1968, data are estimated from the number of abortions per 1,000 live births as experienced in PAS hospitals, extrapolated for the number of live births for the U.S.A. (C. Tietze: Therapeutic abortions in the United States, 1963-1968. *Stud. Fam. Plan.* 59. November 1970).

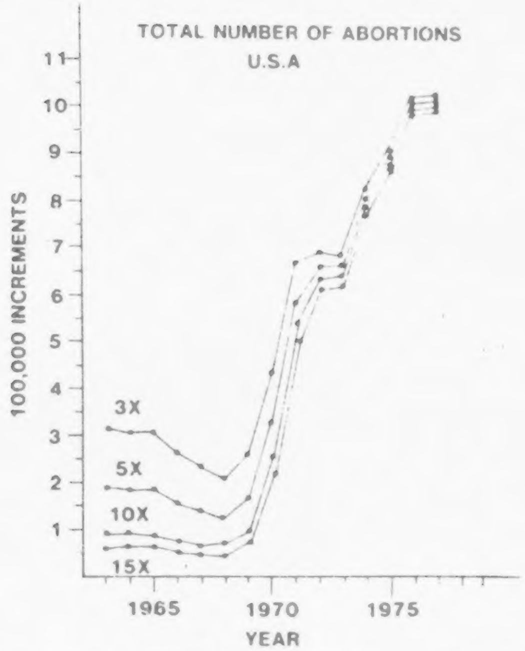

Figure 4. The total number of abortions, both legal and illegal in the United States, if criminal abortion were 3, 5, 10, or 15 times more dangerous than natural pregnancy, for the years 1963-1977.

The national per year legal abortion ratios (the number of legal abortions per 1,000 live births) are tabulated for 1963 through 1977 in Table 6. This information is also graphically displayed in Figure 5. No decrease in the number of criminal abortions was observed on a national scale until the legal abortion ratio reached approximately 160 (point A, Figure 5). The legal abortion ratio increased as the number of criminal abortions had begun to plateau. To reach this plateau, the legal abortion ratio had increased to approximately 250 (point B, Figure 5). In the last four years for which data are available, 1974-1977, there has been no further reduction in the number of criminal abortions. This plateau has occurred in spite of an increase in the national abortion ratio to 325 by 1977. These trends on a national level are not unlike those observed by Kahan, Baker, and Freeman on a more local level in one of the better-planned studies of criminal abortion.[9]

The criminal and legal abortion ratios and their relative incidences are presented in Table 7 for the years 1940-1977. Again, to produce a relatively modest reduction in the criminal abortion ratio, there has been an exorbitant increase in the legal abortion ratio. No significant reduction was observed until there had been an over 120-fold increase in the legal abortion ratio.

Table 5. The estimated average number of criminal and legal abortions per year and the relative incidence of criminal and legal abortions, 1940-1977, U.S.A.

Years	*Estimated Average Number of Criminal Abortions per Year*	*Relative Incidence Criminal Abortion*[1]	*Average Number of Legal Abortions per Year*	*Relative Incidence Legal Abortion*[3]
1940-1944	74,323	4.2	N/A[2]	—
1945-1949	69,371	4.0	N/A	—
1950-1954	70,946	4.0	N/A	—
1955-1959	107,254	6.1	N/A	—
1960-1964	146,388	8.3	7,354[4]	1.0
1965-1969	109,149	6.2	12,712	1.7
1965-1967	117,714	6.7	7,573	1.0
1968-1969	96,302	5.5	20,420	2.8
1970-1974	58,369	3.3	532,544	72.4
1970-1972	80,654	4.6	422,022	57.4
1973-1974	24,942	1.4	698,328	95.0
1975-1977	17,556	1.0	977,459	132.9

1. Based on an index rate of 1.0 for the years 1975-1977.

2. Not available.

3. Based on an index rate of 1.0 for the years 1963-1964.

4. Represents an estimate for the years 1963-1964 only, from PAS hospital experience.

Table 6. The number of live births, legal abortions, and the legal abortion ratio, 1963-1977, U.S.A.

Year	*Number of Live Births*	*Number of Legal Abortions*	*Abortion Ratio*[1]
1977	3,313,000	1,079,430[2]	352.8
1976	3,162,788	988,267	312.5
1975	3,144,198	864,679	275.1
1974	3,159,958	780,824	247.1
1973	3,136,965	615,831	196.3
1972	3,258,411	586,760	180.1
1971	3,555,970	485,816	136.6
1970	3,731,386	193,491	51.9
1969	3,600,206	22,670	6.3
1968	3,501,564	18,170[3]	5.2
1967	3,520,959	9,116	2.6
1966	3,606,274	6,346	1.8
1965	3,760,358	7,256	1.9
1964	4,027,490	9,503	2.4
1963	4,098,020	5,204	1.3

1. Number of legal abortions per 1,000 live births.

2. For the years 1969-1977, data are from *Abortion Surveillance Reports*, Center for Disease Control, Atlanta.

3. For the years 1963-1968, data are estimated from the number of abortions per 1,000 live births as experienced in PAS hospitals, extrapolated for the U.S.A. (C. Tietze: Therapeutic abortions in the United States, 1963-1968. *Stud. Fam. Plan.* 59: November 1970).

The second public health question is that of fiscal efficiency. With over 1 million legal abortions currently being performed yearly in the United States, it is this number of abortions that is being used to reduce the number of criminal abortions. With an estimated reduction in criminal abortions of 53,000 per year, it is possible to calculate the dollar cost of eliminating one criminal abortion. This analysis is presented in Table 8. The total cost to the public and private sectors for the current legal abortion policy is nearly $200 million per year. The cost to eliminate one criminal abortion is, therefore, in excess of $3,600.

Implications for Public Policy

This study presents data on the number of criminal abortions each year in the United States and the trends in criminal abortion both before and after legalization of abortion on demand. The value of the study lies in its reliance upon a thoroughly objective model, based on available data, for generating the estimated number of criminal abortions. If anything, the number of criminal abortions has been overestimated.

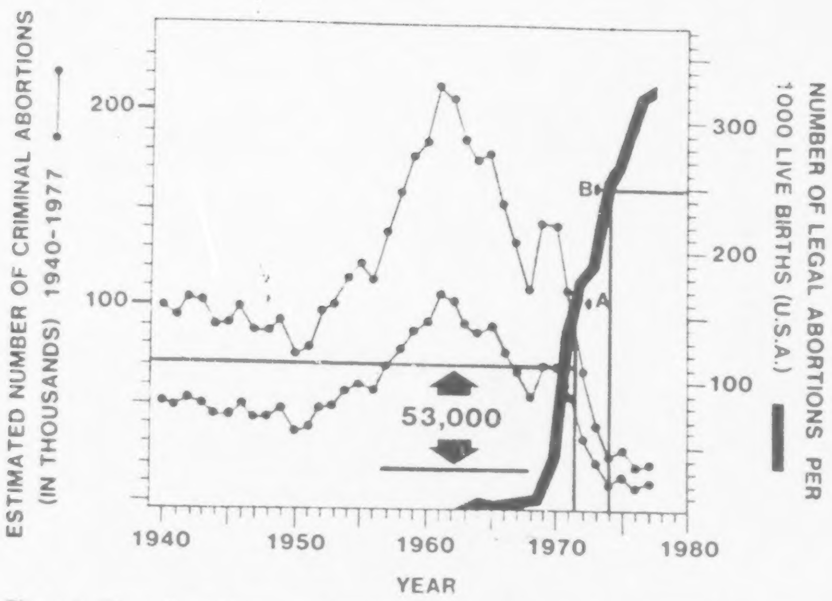

Figure 5. The estimated number of criminal abortions in the United States for the years 1940-1977 = stippled area (from stippled portion of Figure 1). The number of legal abortions per 1,000 live births (legal abortion ratio) for the United States 1963-1977 = bold bar. The horizontal line represents comparable time periods (based on birth rates). A decline in criminal abortions was not observed until the legal abortion ratio reached approximately 160 (point A) and no further decline has been observed for the legal abortion ratio above approximately 250 (point B). The graph demonstrates the reduction in criminal abortions of 53,000 which has been observed as the result of legalized abortion.

Such an overestimate was built into the assessment model so that an analysis could be made without the risk of understating the problem. From this evaluation, the following conclusions can be derived:

1. Estimates of the number of criminal abortions per year in the United States have previously been grossly exaggerated. A reasonable estimate for the actual number of criminal abortions per year in the prelegalization era would be from a low of 39,000 (1950) to a high of 210,000 (1961) and a mean of 98,000 per year.

2. It is not true that legal abortion simply replaces criminal abortion. With legalized abortion, there has been an exponential increase in the *total* number of abortions each year in the United States, in the range of 6- to 11-fold from the prelegalization era. This increase is directly attributable to the legalization of abortion.

3. It would appear that the legal abortion policy in the United States has resulted in a modest decrease in the number of criminal abortions. This decrease began between 1971 and 1972 and continued

Table 7. The criminal and legal abortion ratios and the ratios of the relative incidence of criminal and of legal abortion, 1940-1977, U.S.A.

Years	*Average Number of Live Births per Year*	*Average Number of Criminal Abortions per Year*	*Average Number of Legal Abortions per Year*	*Criminal Abortion Ratio*	*Relative Incidence Criminal Abortion Ratio*	*Legal Abortion Ratio*	*Relative Incidence Legal Abortion Ratio*
1940-44	2,682,496	74,323	N A[1]	27.2[2]	5.0[3]	—	—
1945-49	3,363,733	69,371	N A	20.6	3.7	—	—
1950-54	3,814,293	70,946	N A	18.6	3.4	—	—
1955-59	4,181,955	107,254	N A	25.6	4.6	—	—
1960-64	4,163,810	146,388	7,354	35.2	6.4	—	—
1965-69	3,597,872	109,149	12,712	30.3	5.5	1.8[4]	1.0[5]
1965-67	3,629,197	117,714	7,573	32.4	5.9	3.5	1.9
1968-69	3,550,885	96,302	20,420	27.1	4.9	2.1	1.2
1970-74	3,368,538	58,369	532,544	17.3	3.4	5.8	3.2
1970-72	3,515,256	80,654	422,022	22.9	4.2	158.1	87.8
1973-74	3,148,462	24,912	698,438	7.9	1.4	120.0	66.7
1975-77	3,206,662	17,556	977,459	5.5	1.0	221.8	123.2
						304.8	169.3

[1] N A = not available.

[2] Expressed as the estimated number of criminal abortions per 1,000 live births.

[3] Based on the index rate of 1.0 for the years 1975-1977.

[4] Expressed as the number of legal abortions per 1,000 live births.

[5] Based on the index rate of 1.0 for the years 1963-1964.

Table 8. Cost efficiency analysis of the public health policy of legal abortion to reduce criminal abortion in the U.S.A.

Estimated Number of Legal Abortions Used per Year to Reduce Criminal Abortions[1]	*At $200 per Legal Abortion, Cost of Legal Abortion Program per Year*
970,000[1]	$194,000,000
Estimated Reduction in Number of Criminal Abortions per Year	*Average Cost to Eliminate One Criminal Abortion*
53,000[2]	$3,660.38

1. The estimated average annual number of legal abortions for the years 1975-1977, minus the estimated average annual number of legal abortions for the years 1963-1967.

2. See text

until 1974, at which time a plateau was reached. For 1974 through 1977, there has been no noticeable reduction in spite of a continued increase in the number of legal abortions.

4. The decline in criminal abortions did not begin until the legal abortion ratio reached 160 and did not reach its plateau until the abortion ratio was 250. With a continued increase in the abortion ratio up to 325 in 1977, no further reduction in criminal abortion has been observed.

5. There has been an over 130-fold increase in the number of legal abortions and a nearly 170-fold increase in the legal abortion ratio to produce a relatively modest fourfold reduction in the number of criminal abortions. For each single criminal abortion which has been eliminated, there have been over 18 legal abortions.

6. The estimated annual reduction in the number of criminal abortions in the United States has been 53,000. In comparison, the public policy of legal abortion has generated 970,000 legal abortions per year.

7. A conservative estimate of the cost of eliminating one criminal abortion has been calculated to be in excess of $3,600.

The results of this study have significant implications for our current public policy on abortion. What was previously thought to be a simple solution to criminal abortion is clearly a nonsolution. The current legalization of abortion in the United States is a highly inefficient program requiring an incredibly top-heavy number of legal abortions to result in a *very* modest reduction in criminal abortions: to perform more than 18 legal abortions to eliminate one criminal abortion is contrary to good common sense. This invasion of the healthy fetal-maternal unit is destined to have other ecologically harmful effects as well.

In addition, we cannot escape the monetary expense of the current legal abortion policy. Our estimate of over $3,600 to eliminate one criminal abortion is undoubtedly conservative. One cannot help but conclude that a positive public health program which is based on education, counseling, medical assistance, financial and spiritual guidance and is funded with an annual appropriation of $200 million would be as effective, if not more so, in reducing criminal abortions. Those who are working to legally restrict abortion may gain confidence from these data. Indeed, everyone has a concern about criminal abortion, but individuals and groups differ on how to eliminate it as a public health problem. This study indicates that legal abortion has failed and that now it is time to try a different approach.

NOTES

1. R.E. Cooke et al., eds., *The Terrible Choice: The Abortion Dilemma* (New York: Bantam Books, 1968).

2. M. Calderone, ed., *Abortion in the United States* (New York: Hoeber and Harper, 1958).

3. C. Tietze. The effect of legalization of abortion on population growth and public health. *Fam. Plan. Persps.* 7:123, 1975.

4. W. Cates and T.W. Rochat: Illegal abortions in the United States: 1972-1974. *Fam. Plan. Persps.* 8:86, 1976.

5. T.W. Hilgers and D. O'Hare, "Abortion Related Maternal Mortality: An In-Depth Analysis," Chapter 7.

6. S. Polgar and E.S. Fried: The bad old days: Clandestine abortions among the poor in New York City before liberalization of the abortion law. *Fam. Plan. Persps.* 8:125, 1976.

7. U.S. Department of Health, Education and Welfare, Center for Disease Control, "Abortion Surveillance 1977" (Atlanta: September 1979).

8. S. Taffel, U.S. Department of Health, Education and Welfare, *Trends in Fertility in the United States*, Vital Health and Statistics: Series 21, data from the National Vital Statistics System, No. 28 (DHEW publication No. [HRA] 78-1906: September 1977).

9. R.S. Kahan, L.D. Baker, and M.G. Freeman: The effect of legalized abortion on morbidity resulting from criminal abortion. *Amer. J. Obstet. Gynec.* 121:114, 1975.

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1

Human Characteristics of the Early Fetus: A Sonographic Demonstration

The use of diagnostic medical sonography in the evaluation of fetal development, well-being, and gestational age is common in modern obstetrics. Sonography has been used in medicine since the early 1950s, and during this time there has been no evidence of harm to the patient or fetus. Epidemiological surveys have been conducted and research continues to further assure safety.[1]

The first trimester, or three months, of pregnancy is embryonically the most dynamic, and during this period sonography can demonstrate rapid fetal development, early signs of life, and human characteristics. Examples in this chapter are sonographic images obtained in a typical sonography practice setting.

Sonography uses high frequency sound waves to depict the anatomy and tissue characteristics of organs and structures within the body. While the human ear is capable of hearing frequencies of between 16 and 20,000 cycles per second, frequencies of 2,000,000 to 10,000,000 cycles per second are typically used in sonography. Sonographic imaging involves the transmittal of ultrasound (20,000 cycles per second or above) into the body .1 percent of the time and recording the returning echoes 99.9 percent of the time. A component referred to as a transducer transmits the ultrasound and detects the returning echoes which are then recorded to construct images. The time it takes for echoes to return gives information about the depth and relative locations of the internal structures reflecting the sound waves. The structures reflecting the echoes are displayed through different intensities or exposures in the images; this combination of the return time of the echoes and amplitudes of reflected echoes forms the final image.

Two types of sonography systems are used in producing sonographic images: compound, or B-mode, and real-time systems. B-mode scanning provides fine detail in nonmoving images and employs one transducer which transmits and receives the ultrasound waves. Real-time involves one transducer that moves mechanically or else numerous transducers side by side which transmit and receive waves in sequences, allowing movements of structures under the transducers to be seen and recorded simultaneously. In sonography of a first trimester uterus, the compound system provides fine detail of uterine contents and allows visualization of the entire pelvis. The real-time system views a smaller area with slightly less detail, but allows early observation of fetal heart motion and other signs of life as early as seven to eight weeks after the mother's last menstrual period.

Sonographic examinations are very acceptable to most patients. The only preparation prior to the examination is distension of the urinary bladder by increased fluid consumption. In the first trimester the urinary bladder provides a "window" into the pelvis to see the uterus and ovarian regions lying beneath and to the sides of the bladder. Mineral oil or a special gel which serves as a lubricant and acoustical couplant between the skin and transducer is applied to the patient's skin, and during the examination the transducer is moved gently over the skin. Usually, a television-type monitor is visible to the patient, and the sonographer performing the procedure may explain the images as they are produced. The ability of the mother to see her baby moving and its heart beating before she can feel movement provides an exciting experience. Conversely, a monitor visible to the mother can be a disadvantage when looking for fetal heart motion and body movement in cases where there is a question of fetal death or other abnormality.

The first evidence of pregnancy is earliest seen by sonography four weeks from the first day of the last menstrual period as a gestational sac, which is a doughnutlike structure seen in a slightly enlarged uterus with a thickened lining of tissue.[2] This sac appears empty until approximately six weeks, at which time the developing fetus appears within the sac as a small cluster of echoes. This cluster is the sonographic debut of the fetus. By eight weeks (Figure 1) the fetus is 1.5 cm in length, and body and organ formation has been completed.[3] The fetal pole has now become more definite, and the neurotube which forms the spinal cord and spine is seen in Figure 1 as a double line within the gestational sac. The placenta can also be identified. Real-time imaging simultaneously revealed heart motion and the neurotube in this eight-week fetus, although fetal heart motion actually begins at five weeks.[4]

Fetal size doubles between 8 and 10 weeks' gestation. Figure 2 shows very clearly a 10-week fetus in a gestational sac filled with amnionic fluid: further growth has permitted the delineation of the head, body, and limbs on a B-scan image. Real-time imaging easily depicted heart motion along with body and limb movements. At this stage, maternal stimuli such as coughing will elicit fetal response in the form of increased body and limb movement.

Two weeks' additional fetal growth provides an increase in size so that state of the art B-scan and real-time systems can produce images that actually look like a baby. Figure 3 is a B-scan image of a 12-week fetus in its environment: the head, body, and a leg are clearly depicted. Facial features can be seen as the orbit (socket) of the left eye and mandible (jawbone), while within the body the cardiac region is delineated as a round, dark structure divided by white lines—the walls of the cardiac chambers. Extending from the lower body is a leg flexed at the knee. Further detail and documentation of body and limb movement is seen in Figure 4, which contains a series of seven images photographed in sequence at one-second intervals from a videotape of the real-time examination of the fetus from Figure 3. The fetus changed from a supine to a prone position in between the two sonography procedures. During the real-time sequence, changes in head, body, spine, and limb position can be seen; during the procedure, the fetus was clearly observed to have hiccups. By the end of the sequence, the fetus had "crawled" out of the transducer array's view. All changes in position are due to fetal movement, since the transducer array was held stationary during the photographed portions of the procedure.

Sonography in the first trimester can give invaluable information about the development, well-being, and gestational age of a fetus. The early visualization, with increasing clarity, of the heart, body, and extremities in motion and at rest from 8 to 12 weeks' gestation provides exciting information regarding the human characteristics of the early fetus.

NOTES

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1. L.M. Hellman et al.: Safety of diagnostic ultrasound in obstetrics. *Lancet* 1:1133, 1970.

2. I. Donald: Sonar as a method of studying prenatal development. *J. Pediatr.* 75:326, 1969.

3. L.M. Hellman and J.A. Pritchard, eds. *Williams' Obstetrics*. 14th ed. (New York: Appleton-Century-Crofts, 1971), p. 200.

4. R.L. DeHaan, in *Organogenesis*, ed. R.L. DeHaan and H. Ursprung (New York: Holt, Rinehart, 1965), p. 401.

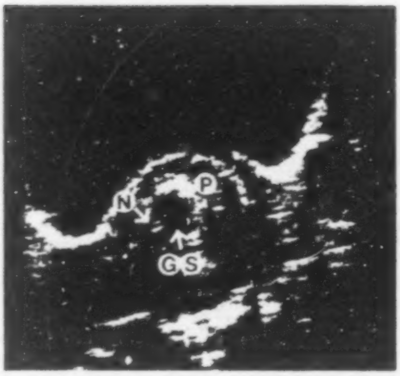


Figure 1. A pregnancy at eight weeks. The fetus is 1.5 cm in length and the neurotube (double line) is seen as the first identifiable body part. GS, gestational sac; P, placenta; N, neurotube.

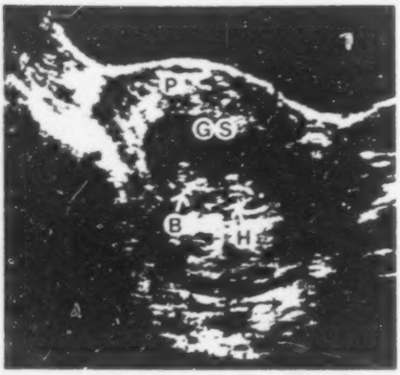


Figure 2. At 10 weeks the head and body can be seen as separate structures. The fetus is now 3 cm in length. GS, gestational sac; P, placenta; H, head; B, body.

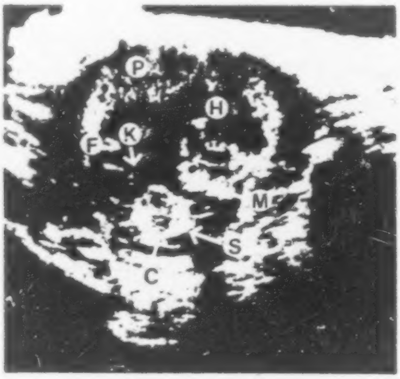
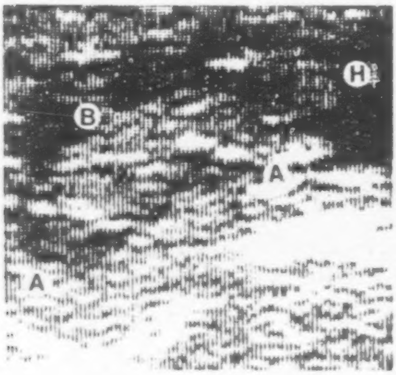
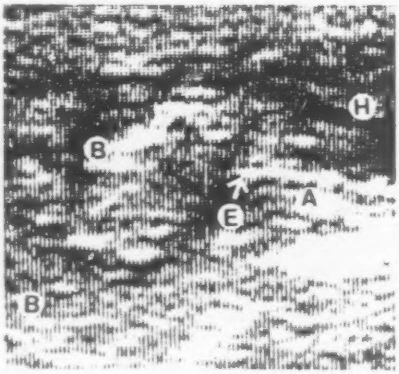


Figure 3. This 12-week fetus is lying on its back in a "fetal position" and looks like an actual baby. Facial features, cardiac structures, and a flexed leg are visible. P, placenta; H, head, M, mandible; C, cardiac structures; K, knee; F, foot; S, spine; orbit of left eye (small arrow).





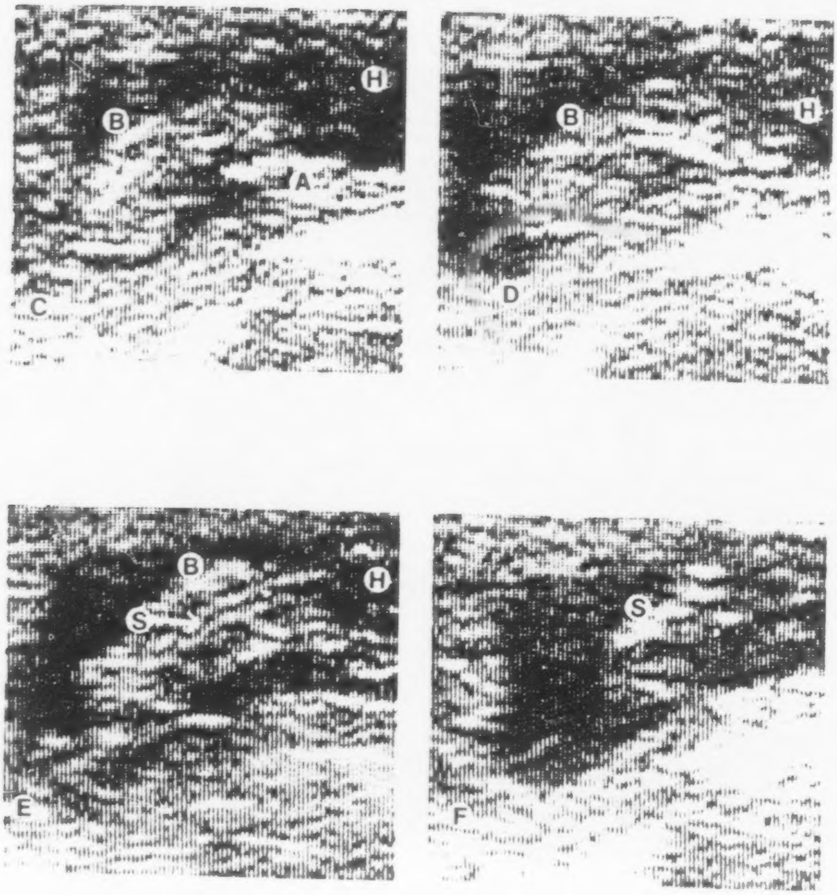
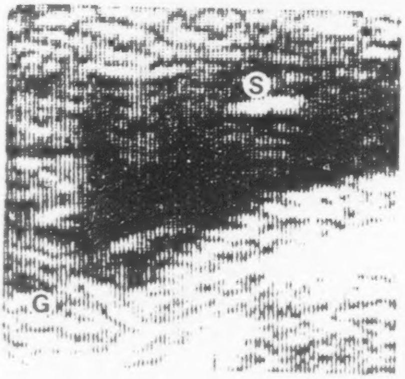


Figure 4. This sequence of one-second interval images in A through G demonstrates fetal characteristics and movement of the 12-week fetus seen in Figure 3. (A.) Fetus in prayer position, right arm extended. A, arm; B, body; H, head. (B.) The body is now upright and the right arm is bent at the elbow. E, elbow. (C.) Right arm is again extended and body more prone. (D.) The fetus has now moved forward. (E.) The spine is seen as the fetus begins to crawl out of the transducer's field of view. S, spine. (F.) and (G.) The head and then body disappear as the fetus crawls out of range.



Senator HATCH. We will continue these hearings on October 19. Again we will be discussing the myths and realities of abortion in America.

I think this hearing has certainly given us some indication of the wide disparities of viewpoints on this issue. It has been most interesting.

On November 4, the subject is, again, myths and realities of abortion in America.

On November 5, we will be talking about the abortion right—the moral dimension.

On November 12, we will be talking about pending constitutional proposals and their legal impact.

On November 16, pending constitutional proposal and their legal impact.

We will probably have two more hearings after that on organizational testimony.

We hope that these hearings will cover the abortion issue thoroughly so that the people in our country can understand the various points of view and the various approaches that are recommended.

We also hope that people in this country will study the various approaches that have been suggested here from the human life amendment to the human life bill to the amendment I filed, and evalvate their respective merits.

I think that we will now recess these hearings until our next hearing date.

Thank you.

[Whereupon, at 11:30 a.m., the hearing recessed, to reconvene Monday, October 19, 1981, at 9 a.m.]

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

MONDAY, OCTOBER 19, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:07 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Tom Parry, chief counsel; Stephen Markman, general counsel; Randy Rader, counsel; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The Subcommittee on the Constitution will come to order.

Today marks the third day of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution relating to the abortion right.

On the first day, we were privileged to have with us two of the Nation's outstanding constitutional authorities on the *Roe* v. *Wade* decision—Prof. John Noonan of the University of California and Prof. Laurence Tribe of Harvard University.

On the second day, we were again privileged to have with us four of the Nation's leading medical authorities on abortion—Dr. Irving Kushner of the University of Southern California Medical School, Dr. Carl Tyler of the Centers for Disease Control, Dr. Bernard Nathanson of New York City, and Dr. Thomas Hilgers of the Creighton University Medical School.

Our panel of witnesses today is no less distinguished. Today, we will focus again on some of the myths and realities of abortion from the medical perspective.

While our last hearing tended to focus on some of the macroaspects of abortion—how many abortions are, in fact, performed annually; how much of this increase is attributable to the abortion cases; and at what stage of the pregnancy are these abortions performed—today's hearing will focus even more precisely on the abortion procedure—the microview, so to speak.

We are very happy to have with us today Dr. Richard T. Schmidt of the department of obstetrics and gynecology, University of Cincinnati Medical School; Dr. George M. Ryan, Jr., department of obstetrics and gynecology, University of Tennessee; Dr. Jasper F. Williams, Jr., chairman of the department of obstetrics and gynecology, Bernard Hospital; Dr. Haig Kazazian, professor of pediatrics at Johns Hopkins University; and Ms. Terry Beresford, director of the Training Institute of Planned Parenthood of Maryland.

If you could all come forward and take a seat, we would appreciate having your testimony.

Dr. Kazazian, I understand, is not here yet. As soon as he arrives, we will have him also come to the witness table.

We will begin with Dr. Richard T. Schmidt of the Department of Obstetrics and Gynecology of the University of Cincinnati Medical Hospital, where he also teaches obstetrics.

Dr. Schmidt is formerly president of the American College of Obstetricians and Gynecologists.

We are very happy to have you here, and we look forward to hearing your testimony at this time.

STATEMENT OF RICHARD T. F. SCHMIDT, M.D., FACOG, CLINICAL PROFESSOR OF OBSTETRICS AND GYNECOLOGY, UNIVERSITY OF CINCINNATI, AND DIRECTOR, DEPARTMENT OF OBSTETRICS AND GYNECOLOGY, GOOD SAMARITAN HOSPITAL, CINCINNATI, OHIO

Dr. SCHMIDT. Thank you, Mr. Chairman.

In addition to the identifications you made, I think it is pertinent to say that I served as chairman of the American College's committee on professional standards over the critical years of changing abortion practices from 1971 to 1976. In this capacity, I edited the college's manual of standards which is still current.

Over approximately the same time, I served on the college's committee on bioethics. I am presently on the council on scientific affairs of the AMA.

Through these experiences, as well as those gained over 30 years of active practice in obstetrics and gynecology, I am intimately aware of the difficult problems and the competing values inherent in the abortion issue.

I am also acutely conscious of the fact that we live in a pluralistic society which by tradition and continued effort should allow the exercise of individual conviction in the broadest parameters consistent with the principles on which this Nation was founded.

It is in the full light of these considerations that I believe we should submit to the electorate, through its legislative process, the question of whether the time has come to amend or correct for the fifth time in our Nation's history an action of the Supreme Court in order to preserve the values inherent in our tradition.

Such an action is proposed in the same spirit and for many of the same reasons that the 14th amendment was proposed to correct the sad error of the *Dred Scott* decision.

I, therefore, support the intent of the several amendments before you which would restore to the unborn a share of membership in the human family.

A nation's laws, beyond regulating human behavior for the common good, set the standards by which its people live. It is a startling fact that in the case of abortion, current law leaves us with the principle that the life of every future member of our society may be terminated on the value judgment of a single private individual. That individual, for better or for worse, is the single individual with the greatest self-interest.

The way our standards treat the early fringe of human life has a direct bearing on the treatment of the aged fringe or those on the fringe of normality or the fringe of health.

Should it seem remote that the principles established in abortion could be extended to the aged, the defective, or the infirm, it might be pointed out that at the Sonoma Conference, a major conference on the bioethical problems of new-born intensive care, a substantial portion of the panelists believed that some severely defective infants, to use the words of the summary report, "should be killed under certain conditions."

Much the same arguments are used by the proponents of euthenasia. Common to each of these advocacy positions is the conclusion that the value of human life is not inherent in each of those lives but rather contingent on the value judgments of those who profess to speak for the object of their judgments.

Particularly to those of us who are closer to old age than to youth and closer to imperfection than perfection, this would seem to be a tenuous hold on our right to life. How much more tenuous must be the rights of those who are closer to the fringe?

The Supreme Court in *Roe* v. *Wade,* left unresolved the question of when life begins. In this context, the beginning of life is taken to mean that point at which an individual of the human species shares the basic attributes of other members of the human family and, therefore, shares their inherent right to life.

As a medical practitioner, I can understand the dilemma but not the court's solution. Obstetricians are commonly presented with a parallel dilemma concerning the fact of life rather than a right.

In some medical emergencies, such as abrupt separation of the placenta, it cannot be determined whether a salvageable spark of infant life exists nor can it reasonably be concluded that it does not.

Characteristically, obstetricians act on the presumption of life and deliver the baby by the most expeditious means. We would rightfully be judged negligent if we did not.

It would seem reasonable for our society to react to the dilemma regarding the existence of a right by acting on the presumption of its existence in the absence of a clear demonstration that it does not.

The court took a contrary view and denied to the States the power to make a different determination, regardless of what consensus may exist within the State. Putting the proposed amendments through the legislative process would allow the electorate to decide this question.

Clearly, the greatest number of abortions to be affected, should these amendments become law, would be those without medical indication—the socioeconomic, the elective abortion, or to put it in the other partisan term—the abortion on demand.

These clearly constitute the vast majority of the 1¼ million or more abortions done each year. In this area lies the most impelling reason for submitting the question to public debate and determination.

Despite the wide claim that there is a consensus supporting current abortion law, this claim has never been tested. There are indications that such is not the case.

The subcommittee may be familiar with the impressive study of public opinion on abortion conducted by Judith Blake, currently professor of demography and sociology at UCLA.

The language of the report indicates her personal support of the Supreme Court decisions. Nonetheless, after a carefully constructed and tightly reasoned study of abortion opinion over a 10-year span ending in 1977, she reported a strong national majority of both women and men opposed to elective abortion.

An equally strong opposition to any abortion after 3 months was also found. Both the public and physicians, regardless of their individual beliefs and practices, deserve to know the true status of public opinion.

The medically indicated abortion is commonly cited as an impelling reason to support current abortion law and to oppose all of the amendments under consideration here, even though some provide specific protection to the life of the mother.

It would be very helpful to know the number of abortions currently being done for life-saving indications. Unfortunately, these data are not available.

Despite an extensive national data collection system and reporting system, the Centers for Disease Control is able to categorize only legal and illegal abortions.

By any estimate, only a minute fraction of the total number of abortions currently done are for life-saving indications. I understand you had expert testimony suggesting 1 or 2 percent. This number has been diminishing for a number of years and continues to do so.

Even though small in number, they are of obvious importance to the patients involved and to the physicians who care for them.

Toxemia of pregnancy and chronic renal disease are often cited as the most impelling medical indications for abortion. At one time they were. Severe toxemia, or eclampsia, is a disease particular to pregnancy. It is characterized by marked elevation of blood pressure, convulsions and coma, and is potentially fatal. It is usually cured by interrupting the pregnancy.

However, this disease is characteristic of the last trimester of pregnancy. Because of this concentration in the last trimester, interruptions for this indication are usually past the 26th or 28th week and are premature deliveries rather than abortions.

Progressive advances in neonatal medicine now make it possible to salvage even very early premature infants. Equally great advances in perinatal medicine provide the means for better control of the disease and make it possible to monitor the status of fetal well-being with reasonable accuracy on virtually a moment-to-moment basis.

In this way, the interests of both mother and infant can be carefully balanced and a time chosen for delivery that will be beneficial to both.

A somewhat comparable situation applies in the management of chronic renal disease which can now most often be controlled to viability of the infant. The most severe such case in our institution of recent years was carried to a successful outcome for both mother and infant, after a number of weeks of dialysis—treatment on the artificial kidney.

Following delivery of a healthy child, the mother was restored to her previous measurable state of renal competence.

Beyond the problems of women already pregnant, dark suspicions are raised that the proposed amendments would interdict the use of such contraceptives as intrauterine devices and low dose oral contraceptives.

To make such a case would require a number of assumptions.

The intrauterine device is known to be in some instances abortifacient. However, other mechanisms are also demonstrable.

For example, large numbers of phagocytes, a kind of waste disposal cell, are liberated in the presence of IUD's. These cells may attack the entering sperm, the descending or implanting ovum, or affect the endometrium so as to prevent implantation.

One might view some of these mechanisms as the ethical equivalent of abortion, but their variability and uncertainty provide a doubtful basis for the application of law. Equal or greater difficulties are encountered in establishing the low dose oral contraceptives as abortifacient.

In summary, Mr. Chairman, virtually every aspect of the abortion issue has been determined—not through the discussion, deliberation, and decision of our peers but by a single action of the Supreme Court, appropriately described by a dissenting Justice as an exercise of raw judicial power.

The practical result of that decision, as measured by the rationale with which it is applied, has been to deny to the unborn any independent right to life and to create a new and specific right of abortion.

These issues should be clarified by the whole of the society they affect, and I urge the subcommittee and the Congress to bring them to the electorate.

Senator HATCH. Thank you so much, Dr. Schmidt.

Dr. Ryan, we will turn to you next.

Our next witness is Dr. George M. Ryan, Jr., who is with the Department of Obstetrics and Gynecology at the University of Tennessee where he also teaches.

He is the current president of the American College of Obstetricians and Gynecologists. We are honored to have you here today.

STATEMENT OF GEORGE M. RYAN, JR., M.D., FACOG, PRESIDENT, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS

Dr. RYAN. Thank you, Mr. Chairman.

I am George Ryan, Jr., professor of obstetrics and gynecology and community medicine at the University of Tennessee Center for the Health Sciences in Memphis, Tenn., and a physician with nearly 30 years of practice experience in obstetrics and gynecology.

Additionally, as you have pointed out, I am the current president of the American College of Obstetricians and Gynecologists, the membership of which includes more than 23,000 physicians who specialize in the provision of health care to women in America.

I am here today representing the official policies and position of the American College of Obstetricians and Gynecologists concerning the four proposals before this subcommittee which would initiate an amendment to the Constitution of the United States regarding abortion.

Both Senate Joint Resolution 17 and Senate Joint Resolution 18 establish personhood at fertilization or conception and give all products of conception the same protection under the 5th and 14th amendments as any citizen.

Similar proposal, Senate Joint Resolution 19, specifically chooses fertilization as the moment for establishing such constitutional protection.

The fourth proposal, Senate Joint Resolution 110, which you introduced, Mr. Chairman, proposes an alternative approach and would permit Congress or State legislatures to restrict or abolish access to abortion and, thus, vitiate the ruling of the Supreme Court in 1973 in *Roe* v. *Wade.*

I shall briefly address the first three proposals collectively, and then proceed to a more extended examination of your proposal and the likely consequences of its passage related to the practice of obstetrics and gynecology in America and the potential impact upon the patients we serve.

Five months ago, the American College of Obstetricians and Gynecologists voiced strong opposition to legislation—S. 158—considered by the Senate Judiciary Subcommittee on Separation of Powers.

The so-called human life bill defines human life as beginning at conception. It proposes to extend constitutional protections to products of conception.

The ACOG's position was founded upon grave concerns regarding the consequences of such a definition, including the impact upon the treatment of congenital disorders, such as Tay-Sachs disease, complicated pregnancies, and the impact upon nonpregnant women's choice of contraception.

Our concerns today are the same as they were 5 months ago. I am here to provide medical testimony which is essential so that the Congress has full information about how these proposed measures could affect the health of women in America.

Three proposals—Senate Joint Resolution 17, 18, and 19—would have effectively the same impact as the so-called human life bill. We oppose them on precisely the basis underlying our opposition to S. 158. And allow me to explain.

INTERFERENCE IN NORMAL MEDICAL PRACTICE

These proposals do appear to assume that every fertilized egg will develop without complications to become a living human being. Clearly, this is not true. Possibly, 25 percent will abort spontaneously—a so-called miscarriage.

At present, when a miscarriage is judged by the physician to be inevitable, we remove the products of conception from the womb, which is a D&C, in order to reduce blood loss, pain, and risk of infection.

I can assure you that we physicians would be hampered in our provision of care if in such a situation a threat existed of criminal prosecution.

I am afraid that appropriate action would be delayed and patients would suffer.

EXCEPTIONS WHEN "REQUIRED TO SAVE THE LIFE OF THE MOTHER"

Other fertilized eggs implant in the tube, causing an ectopic or tubal pregnancy. Whenever we diagnose this condition, we operate and remove this pregnancy, because it may become a threat to the life of the patient if it should rupture in the abdomen.

If we were to operate on a woman with an ectopic pregnancy to prevent the development of a potential life-threatening situation, it is unclear whether we would be protected and acting, as might be required by State or Federal law, in order to save the life of the mother.

Certainly, she is in no immediate and life-threatening danger until it ruptures. If the physician were to wait until such an extreme danger became clear and present, threatening the very life of the woman before intervening, this would be a tragic encroachment upon the legitimate interests of the family and the welfare of the woman.

Thus, we have grave misgivings about the language allowing for exceptions when the action is required to save the life of the mother.

INTERFERENCE IN CARE OF THE COMPLICATED PREGNANCY

Patients also develop complications late in pregnancy, such as toxemia. As Dr. Schmidt has described, it is a disease characterized by high blood presssure, convulsions, and possible death.

At present, we deliver the fetus early to avoid a threatening situation for both woman and fetus. As Dr. Schmidt has indicated, that is a premature delivery and not an abortion.

We try our best to save these premature infants; however, we do not save them all. Some may die.

As must become apparent, the amendment proposals leave little latitude for acting swiftly at the initial, critical stages of complication if the interests of the mother and the fetus diverge.

INTERFERENCE WITH CARE OF NONPREGNANT WOMEN

More immediate and likely to impact on women in general is the very real threat that some contraceptives could be declared abortifacients and might become inaccessible—forcing, for instance, the over 10 million women who presently use IUD's and low-dose oral contraceptives to risk unwanted pregnancy.

To summarize our objections to these bills, they have extensive ramifications for the health care of many women who are not seeking abortion.

Turning to the language suggested in Senate Joint Resolution 110, the amendment would permit Congress and the States to abolish access to abortion entirely, including utilization in cases of pregnancy by rape or incest, or even to save the life of the pregnant woman.

The ACOG policy statement on abortion was first enunciated and approved by our executive board in 1970 and includes a basic assertion that is critical to the appropriate provision of care, and I quote:

> The final decision as to performing the abortion must be left to the medical judgment of the pregnant woman's attending physician, in consultation with the patient.

Since 1973, the physicians in the United States have had the opportunity to practice consistent with this principle. During this time, elective abortion has emerged as one of the safest operations in current use. Studies have indicated that abortion is more safe than carrying a pregnancy to term and many times more safe than illegal abortion.

Prior to *Roe* v. *Wade*, when abortion was largely illegal in the United States, many women died each year as a result of complications resulting from illegal abortion. Many thousands suffered prolonged and permanent disability.

As legal abortion became more readily available, the number of women dying as a result of abortion procedures decreased dramatically. For example, prior to legalization of abortion, abortion-related deaths were the single largest cause of maternal mortality in New York City. Today that cause of death has been virtually eliminated.

The abolition of legal abortion will not eliminate the need for nor the performance of abortion. Ideal contraceptives are not yet available.

Abnormal and unwanted pregnancies will continue to occur.

The proposed legislation would give the State and Congress the right to simply make abortion illegal and promote the establishment of an underground network of both trained and untrained persons performing abortions and distributing abortifacients to women with unwanted pregnancies who may be desperate for help.

Particularly, at risk of unwanted pregnancy, largely because of lack of education and lack of access to confidential health services, are sexually active teenagers, as evidenced by the 300,000 teenagers who have abortions each year in the United States.

It is unrealistic to expect any significant outcome as a result of this legislation other than a leap in the number of teen pregnancies being carried to term.

Childbearing by teens is undesirable because pregnancy and childbearing in these years is associated with both maternal and fetal problems.

Senator HATCH. Doctor, could you please hold for a minute? I have an emergency call.

I want to recess so that I can take care of it.

[Recess taken.]

Senator HATCH. I apologize for interrupting. If I have another interruption, I would like the witness who is testifying to continue. I will get back as quickly as I can.

I am sorry for these interruptions, but it is just the way our lives are.

Dr. Kazazian, we are happy to have you here as well.

Please continue, Dr. Ryan.

Dr. RYAN. Thank you, Mr. Chairman.

If you are in obstetrics and gynecology you certainly understand interruptions.

Senator HATCH. I would think so. [Laughter.]

Dr. RYAN. To pick up the thread, Mr. Chairman, we had discussed Senate Joint Resolution 17, 18, and 19.

Our feeling is that over and beyond the notable issue of abortion, this type of legislation defining life as beginning at the moment of conception would create great difficulties for us as we attempt to provide health care for a wide variety of women who are not truly seeking abortions.

In terms of Senate Joint Resolution 110, we feel that this indeed would allow Congress and the several States the right to legislate precisely this type of bill. As such, it would place us in the same kind of difficult position, as well as the women of this country and their families.

I had gotten to the point of discussing the problems, particularly related to teenagers, who had high risk for unwanted pregnancy.

It is unrealistic to expect any significant outcome as a result of this type of legislation, other than a leap in the number of teen pregnancies being carried to term.

Childbearing by teens is undesirable because pregnancy and childbearing in these years is associated with both maternal and fetal problems. Preeclampsia and eclampsia are more common in very young mothers, while prematurity, low birth weight, and neonatal death are more common in the infants of teens than in those of older women.

Whether these pregnant teens choose to carry pregnancies to term or whether they seek illegal abortions, the outcome is predictably to be a notable increase in morbidity and mortality.

It is important to note, also, that the majority of abortions—three to one, in fact—do not occur in teenagers. These are instances of deliberate choice by adult women in our Nation.

Consider also, Mr. Chairman, further aspects of the availability of abortion under certain circumstances.

Development of antenatal diagnostic techniques has allowed families at high risk for having severely handicapped children to plan a pregnancy knowing they can avoid this tragic outcome. They fear the unknown, and they have frequently been deterred from having another child.

Since 1973, however, many families with histories of birth defects have been able to determine by diagnostic techniques that pregnancies with a high risk of poor outcome are in many cases likely to produce healthy children.

It has also permitted women older than the normal or optimal childbearing age to have affirmative proof of healthy pregnancies.

Making abortion illegal would discourage many families from risking the pregnancies that so often result in greatly desired and perfectly healthy babies being born.

In conclusion, I must reiterate the position of the American College of Obstetricians and Gynecologists in opposition to the proposed amendments to the Constitution on the basis that while the obvious and stated goal of such amendments is to ban abortion, their likely consequences could seriously interfere with the continued improvement of health care delivery and the assurance of quality of care for women in America.

These constitutional amendments could potentially extend their effects beyond the issue of abortion and interfere with health care to women not seeking abortions.

Mr. Chairman, I call upon you and the subcommittee to address the existing and continuing interests of the women and their families who could be so adversely affected by the passage of any of these proposals. I request that your focus include the health concerns of women and their families and not only the interests of the embryo and fetus.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Dr. Ryan.

Dr. Williams will be our next witness. He is an obstetrician and gynecologist at the Williams Clinic in Chicago, Ill.

Dr. Williams is past president of the National Medical Association, a predominantly black medical association.

We are honored to have you with us as well.

I would like to note for the record that without objection all formal statements will be placed in the record at the completion of the oral presentations of the panel.

Dr. Williams.

STATEMENT OF JASPER F. WILLIAMS, JR., M.D., CHAIRMAN, DEPARTMENT OF OBSTETRICS AND GYNECOLOGY, BERNARD HOSPITAL, AND OBSTETRICIAN AND GYNECOLOGIST, WILLIAMS CLINIC, CHICAGO, ILL.

Dr. WILLIAMS. Thank you, Mr. Chairman.

It is a pleasure and an honor to have your attention to my views relative to the human life and how it should be protected.

I understand that you have heard testimony from others who are members of the scientific community and who have expressed their views pro and con upon the subject as it relates to human life and our Government's role with reference thereto.

You have probably heard or read all that I have to say. Its value, therefore, will lie in whether, when these hearings are over, the preponderance of believable testimony supported by scientific and authentic evidence with all the emotional predictions and fantasies washed out, supports or fails to support the intent of the preservation of life.

Is there a need for this bill or are you wasting time on a matter of no real consequence?

If there is a need for corrective action, is this the appropriate action?

Will the benefits exceed the undesirable side effects?

Is this the time, if the primary answers to the above questions are all yes?

The following conclusions are my answers to the above questions and my qualifications, some of which you have read.

I would like to include, however, that I have practiced medicine almost exclusively with blacks in the ghetto of Chicago for 28 years.

The largest percentage of abortions being performed are being performed on my people. The city of Washington, D.C., aborts more babies than they deliver.

During all those years of practice, I have had a great deal of experience with some of the wild ideas—I call them wild—which people state and the things they say will occur if abortions go underground.

I am a member of the American College of Obstetrics and Gynecology, of which the gentleman next to me is my president, but he does not speak for me.

I consider the American College of Obstetrics and Gynecology, of which I am a member, to be in the same rut that the American Medical Association was in a few years ago when most of the doctors in America left it and have not returned to it.

The leadership which an organization such as that should give to establishing the truth available to the people in the community is lacking. The reactionary statements often made and conclusions often given are not based upon fact.

Question No. 1: Is there need?

There are an estimated 1.5 to 2 million abortions performed each year in the United States. Many of them are not reported, although we are supposed to be in an age of legal abortions. Many of the deaths and the complications of abortions are not reported either.

This is because the abortion industry represents a $500 million doctor's bonanza. Not many people walk away from that much money no matter how much education they have and no matter how strong their ethics might have been before the price of the Mercedes went up.

These products—the products of abortions—death, morbidity, and a lowered feeling of responsibility on the part of teenagers and adults as well, with reference to what happens when I go to bed, are bad side effects of abortion.

Before the abortions were made legal, I saw few people die from illegal abortions. Since they have become legal, I have seen more die than died before. This is in the city of Chicago with five or six medical centers.

Many of the abortions are performed in so-called clinics and many of those clinics are manned by the people who were doing abortions when they were illegal.

If this Congress passes some resolutions that make them illegal again, they are still going to do them. I agree that is the case.

However, they have had a little bit more experience, and we have made greater advances in the science of medicine. Our antibiotics are a little better, and the equipment they use is better.

Therefore, there will not be any increase in morbidity or mortality if abortions are made illegal again.

The number of medical cases in which abortion is an indicated and appropriate part of the treatment is practically nil.

Since 1953, I have never seen a patient die who died because she needed an abortion and it could not be performed.

I have seen patients die with sickle-cell disease. Aborting them would not have helped. Those patients could have been treated a little bit better by the prevention of pregnancy; but once they were pregnant, not aborting them did not make the situation worse.

The same is true of congestive heart failure. The gentleman on the right has mentioned how with dialysis we are now able to handle severe renal disease. Open heart surgery is performed on pregnant patients.

Doctors now have the tools and the knowledge with which to work so that they can handle almost any disease a patient might have, whether that patient is pregnant or not, and without interrupting the pregnancy.

Some people complain that Tay-Sachs disease is a serious disease, and that we would be unable to treat it properly if abortions were not available to us.

Tay-Sachs disease is one in which there is slow neurologic deterioration of the baby.

During that 1 or 2 years, or 3 or 4 months, when that baby is alive, the parents watch it slowly deteriorate and nobody can do anything for the baby.

I have watched families—only one really, because the disease is not that common and is usually seen among Jewish people and I do not have any Jewish patients.

As chairman of the department of obstetrics, I am a consultant in four hospitals. I have seen others with patients who had the disease. The incidence is low, but once the baby is born, something happens to those parents. That something is manifest by an increased love and desire to do something for somebody who really needs it.

I have not seen a deterioration or a regret in any of these people once this has happened. The same is true of Downs disease. There is no baby any more lovable than a Downs baby. The people who have those children feel sorry for the kids, but I have not seen them sorry that they had them. I have not seen them sorry that they did not take advantage of aborting them.

Abortion is an easy way out. Because of the large number of them being performed on blacks, I have the feeling that there are ulterior motives involved. I am not certain that it is because you are interested in the welfare of the black woman or whether you are just tired of the increased public aid rolls, that the black woman increases by having more and more illegitimate babies—that in spite of no job, and so forth.

If you look at that side of the question, then it looks like genocide.

Certainly, I do not believe that the solution for the social and economic ills of this country should be solved that way. If we can educate these people and give them jobs and give them equal opportunity in the marketplace, that will solve the problem and abortion will not.

The willingness to pay for abortions, while denying support for correction of infertility, together with threats of loss of support to minorities and to the poor, add to this apparently genocidal aspect of this vicious act of holocaust dimensions.

Why is it that in the Capital of the Nation more abortions are performed than babies are delivered? Is it because there are too many poor people in Washington?

Obviously, there is a need to stop the slaughter; because there is no need to continue it. Sex education, contraception, self-control, and a return to basic values are needed. Combined with current medical knowledge, it can correct 99.8 percent of any problems an illegitimate baby may suffer or a prospective mother may fear.

The States have in many instances tried to regulate abortion. The courts have made most such efforts null and void.

The efforts which the Hatch bill seem to attempt to make would preempt to a certain extent State statutes and give them the basis that the Supreme Court seems to deny—to provide protection for their people.

This bill, I think, is the proper approach at this time because it is possible to pass it and because to enforce it would be possible. It solves the problem.

Will the benefits exceed the undesirable side effects? The benefits include indicating to the world that this Nation is a nation of sound, moral fiber which can find solutions to the problems of poverty, ignorance, prejudice, and disease without resorting to a variation of the Nazi elimination by class as it is done in abortions.

We can indicate to all the people that this Government can, through the democratic process, provide protection for the weak, the poor, and the unborn and give lesser recognition to loud demonstrations than to calm, quiet, factual presentations, indicating that this is an issue of good versus evil and not of Catholic versus Government or versus everybody else.

We could indicate that this Government and this society itself will reward prudence, excellence, performance, sexual integrity, family stability, and courage.

The disadvantages of the bill are that a considerable expenditure must be made initially to impress those who would under present circumstances be seeking abortions with the options that are available.

About $500 million in abortions would dry up. The doctors who are dependent upon that income, of course, would have to seek other sources of revenue.

The news media, which now advertise abortions a good deal would lose that revenue. These are the disadvantages of passing the bill.

Back alley abortioners and similar operators would be very disappointed at the number of clients seeking their help. They would not go underground; they have never been underground. They paid who they had to pay, and they stayed in business before. They probably will do that now.

However, we, unfortunately, are a large country. It is impossible to 100 percent police every aspect of the law—heroin, pot, speed, and alcoholism remain terrible problems for this Nation.

Our welfare rolls will increase some until youth and their parents become convinced that abortions are not a substitute for contraception. They will then become more responsible. Both the childhood pregnancy rate and the childhood abortion rate will decline.

Therefore, on balance, the potential benefits exceed the possible ill effects of the passage of a human life bill.

Is this the time for passage? I am not a politician and, therefore, cannot address the political timeliness of presenting the bill now.

However, from a medical point of view, the following are obvious:

With the present state of affairs of about 1.5 million or more abortions being performed a year, we do not need to perform them to save lives or to increase the emotional stability of our Nation.

The courts are not in the near future going to make any difference in the way abortion laws are interpreted.

The more people who have abortions the more there will be who would vote against the bill in order to maintain their self-esteem, regardless of whether they were injured or not.

Therefore, if we would save lives and fill the vacuum of inaction to greatest advantage with the passage of some human life bill, now is the time.

Senator HATCH. Thank you, Doctor.

Our next witness will be Dr. Kazazian who is professor of pediatrics at Johns Hopkins University.

Dr. Kazazian, we are happy to have you here.

I apologize that more members of our Constitution Subcommittee are not here. All but one are out of town. The one who is here is conducting his own hearing in another subcommittee.

We will go to you, Dr. Kazazian.

I am going to have to leave at about 10:10.

Dr. KAZAZIAN. I should be done by then.

Senator HATCH. Mrs. Beresford, I feel very badly that I cannot be here to hear your testimony; however I will read it. I will have Mr. Markman take your testimony, and then I will submit all of my questions in writing to each of you.

I hope that you will take the time to return your answers as quickly as possible.

That will give you a better opportunity to express yourselves.

We will make your answers to my questions a part of the record.

The purpose of these hearings, of course, is to build a record on both sides of this issue and to have the very best witnesses we possibly can. I think that, thus far, we have had excellent witnesses and I want to commend all of you.

We will see how good you are, Dr. Kazazian. [Laughter.]

That is putting on a little pressure, but we have heard a lot about you.

Please proceed.

STATEMENT OF HAIG KAZAZIAN, M.D., PROFESSOR OF PEDIATRICS, JOHNS HOPKINS UNIVERSITY

Dr. KAZAZIAN. Thank you, Senator Hatch.

I appreciate the opportunity to state my opposition to the resolution, Senate Joint Resolution 110.

I am not an expert on the Constitution, but I oppose this amendment because I oppose measures to ban abortion.

I believe that one may assume that since the amendment, if passed, would make it possible for the States to enact laws which ban abortion in all cases, one must explore the implications of that possibility.

I will focus on the effects of such a ban for pregnant women at risk for severe genetic disease in their expected child.

I am a geneticist and a pediatrician, and I direct a prenatal diagnostic clinic at a major university hospital, Johns Hopkins.

In many States across the country today, of pregnant women over the age of 35, 1 in 5 to 1 in 3 are undergoing genetic amniocentesis to rule out chromosome abnormalities, particularly Down syndrome in their babies.

These women are usually very anxious about the outcome of their pregnancies. They want healthy babies very much but about 2 percent of them will be told of a serious chromosome abnormality and most of this latter group will elect, after counseling, to terminate the pregnancy.

The other 98 percent will be relieved to learn that their baby is at least chromosomally normal. Couples at risk for a number of other inherited metabolic diseases, neural tube defects, and hemoglobin diseases, such as sickle-cell anemia and Cooleys anemia, are also electing to learn in advance whether their baby is affected.

For these couples, the risk of an affected child is higher, ranging from 2 to 4 percent in women who have had a previous child with a neural tube defect to 25 percent for those with a previous child with a metabolic disease, such as Tay-Sachs disease.

All these couples undergoing amniocentesis—and my estimate is perhaps 30,000 annually in the United States—require the assurance that abortion is an option available to them should they learn their baby is severely affected.

Let me mention some important effects of prenatal diagnosis which you may not previously have considered.

Dr. Bannerman and Ms. Bernhardt at SUNY Buffalo did a survey of women who had undergone amniocentesis during which they asked the following question: What would you have done had amniocentesis not been available?

Four percent of the women stated that they would have aborted the pregnancy early without the testing. Since about 2 percent of such pregnancies usually end in abortion after an abnormal fetus is detected and one would surmise that if abortion were banned it would be carried out illegally as it was prior to 1973, about 2 percent, or 2 babies in 100, would have been aborted unnecessarily.

Thus, we can surmise that the availability of amniocentesis actually saves the life of perhaps 2 in 100 babies conceived by these high-risk mothers.

In addition, over 8 percent of the women who had amniocentesis stated that they would not have undertaken pregnancy at all without the possibility of amniocentesis. Thus, 8 of 100 babies to mothers in this group would not have been conceived.

Bannerman states that: "There is, therefore, an apparent bonus of 10 pregnancies per 100 that might not have been completed if amniocentesis had not been available to this group of women."

He calls this the pro-life bonus of amniocentesis.

Let me stress further the pro-life aspects of amniocentesis. Screening programs have detected many couples at risk for Tay-Sachs disease in their child. This is a devastating degenerative disease—you have heard a little about it already—of the nervous system which uniformly kills by age 5.

Couples at risk are now having normal numbers of pregnancies and acquiring normal children because they know that amniocentesis and selective termination of the affected fetuses is an option.

Without that option, I am sure that most of the more than 500 women known to be at risk across the country would not contemplate pregnancy.

It is not easy for these couples, but almost all of them believe that prenatal diagnosis is the only appropriate option available to them.

I would like to read briefly excerpts from an unsolicited letter from one of our patients at Hopkins to Senator Mathias, a member of this committee. She was writing about another abortion-related issue. She had just terminated her first pregnancy because the fetus was affected with Tay-Sachs disease. She and her husband strongly desire future pregnancies.

She writes:

> My husband and I are carriers of a rare genetic disorder known as Tay-Sachs disease. There is a 25 percent chance with every pregnancy that we would produce a child affected with this disease. Tay-Sachs is a devastating condition which causes progressive physical and mental degeneration from infancy until certain death before the age of 5, and usually much earlier.
>
> Anyone who has had the misfortune of giving birth to an affected child will tell you that the quality of that child's life is virtually nonexistent—to say nothing of the horror of watching one's child die a slow, suffering death. The one fortunate point is that Tay-Sachs disease can be detected in the fetus through amniocentesis.
>
> Since my husband and I knew we were both carriers, we went through this process and received the results when I was 21 weeks pregnant. Our unborn son was affected with Tay-Sachs disease.
>
> There was never any doubt in our minds that the only moral and humane option was to terminate the pregnancy. Who in their right mind would give birth to a child who would know nothing but suffering?
>
> There is no way I can adequately express to you how desperately we wanted this baby or how difficult it was to end his life, even in the fetal stage. I felt him move; we had known him and loved him for 21 weeks.

That is the end of the excerpt from the letter.

Perhaps one day it will be possible to treat Tay-Sachs disease, Down syndrome, and other genetic disorders detectable in the fetus.

However, for the present time, those couples at high risk for such diseases, about 30,000 annually in the United States, are asking for the option of prenatal diagnosis by amniocentesis and selective abortion in those cases where an affected fetus is found.

This amendment, Senate Joint Resolution 110, provides the possibility for States to ban such abortions. It is for this reason that I would oppose Senate Joint Resolution 110 and urge that the amendment not be reported out of the subcommittee.

Senator HATCH. Thank you.

Mrs. Beresford, let me apologize to you.

I would like to hear the first few minutes of your testimony, but I have to leave because of an emergency.

Mrs. **Beresford.** I would be pleased to start, Senator, and you may leave when you need to.

Senator **Hatch.** If possible, would you make some of your major points in the next couple of minutes? Afterward you could take the time to make any additional comments for the record that you feel are essential.

I assure you that I will read your testimony in the record.

If you could make your major points right now, I would personally appreciate it.

STATEMENT OF TERRY BERESFORD, DIRECTOR, PROFESSIONAL TRAINING INSTITUTE, PLANNED PARENTHOOD OF MARYLAND, BALTIMORE, MD.

Mrs. **Beresford.** I would be glad to do that.

I have worked for the past 10 years as a consultant and a trainer in family planning and reproductive health care. I have trained many hundreds of professional staff—doctors, nurses, and counselors—in family planning and abortion services all over the country.

Here are a few comments that I have to make about my experience, both in counseling those who seek abortions and in working with others who do.

Women of all ages seek abortion services—as young as 11 or 12, and as old as 45 or 50. We see women of all races and all ethnic backgrounds—the majority, by the way are white—and all social classes, because contraceptive methods are not perfect and because human beings are not perfect.

We see victims of rape and incest, and victims of ignorance, immaturity, and neglect. We see city dwellers and suburbanites, blacks and whites, rich and poor. We see daughters of ministers and wives of Congressmen. We see women of all religious persuasions, and all political beliefs.

More than 25 percent of all abortions in this country are requested by Catholic women.

We see some women who say they are morally or philosophically opposed to abortion—even some who say they are members of the Right to Life Movement. The fact that they too can find themselves with an unintended and unwanted pregnancy and may find that abortion seems to them to be the most reasonable, healthful, and moral choice in their circumstances, seems to me evidence of how complex people's lives are and how personal and intensely private decisions about pregnancy and childbearing are for everyone.

I have been impressed with how seriously all of these women approach the problem of abortion. Nearly all have spent time in sober consideration of personal and family values; have wrestled with the pros and cons of alternatives available to them and have tried to decide on the course of action that will minimize suffering and misfortune for themselves and for their existing families and children.

They have carefully considered their religious and ethical beliefs, along with the practical concerns they face in daily life. They make their decisions with all the anxiety, and sometimes pain, that major life decisions produce.

Senator HATCH. Mrs. Beresford, I need to leave, I think you are giving a most articulate statement for your particular point of view. I am going to be interested in spending some time on it.

Mrs. BERESFORD. Thank you.

Senator HATCH. I am going to ask my counsel, Steve Markman, who is sitting to my left, to ask some questions of each of you before we recess the hearing. I think it is important that we publicly ask some of these questions.

I hope you will not mind.

I just want you to know that I have been very intrigued with your testimony. All of you have been very interesting today. Each of you has a very sincere and dedicated point of view. There have been good arguments on both sides.

To those of us who have deep feelings on either side, I have to show respect. There are bad arguments on both sides as well.

What we want to do in these hearings is to get the best arguments out. Then, hopefully, if Senate Joint Resolution 110 does pass, it would allow this matter to be decided by a majority of the people in this country through elected representatives rather than unelected judges. That is what we are trying to do.

We feel that if those who feel abortion is essential and feel that they have the numbers on their side are as confident as they have indicated in the past, they should be willing to submit this issue to the democratic process.

Likewise those who feel that the vast majority of people believe in some restraint or restriction on abortion should be willing to submit this to the democratic process.

That is the advantage of the amendment which I have filed. It allows whichever side is basically right in the eyes of the people to win ultimately, and it allows for negotiation and compromise.

I have nothing but compliments for you people who have appeared here today and for those in the past. I think we have had a very measured, and carefully considered series of testimony on this issue that perhaps over the years has been sadly neglected.

I hope that we can arrive at some conclusion that will help us resolve this conflict in a way that is more palatable and acceptable to the vast majority of people in this country.

All that we can hope to do is to get this matter resolved by the vast majority of the people in a consensus approach. That is what I am trying to do.

I appreciate your testimony.

If you will forgive me, I hate to leave you. For your point of view, I think you are one of the most articulate people we have had before our committee, Mrs. Beresford.

Mrs. BERESFORD. Thank you.

I am sorry that I cannot continue with you, but I understand.

Senator HATCH. I know you do.

I will read your statement. I will be happy to meet with you personally if you feel that you would like to.

Mrs. BERESFORD. I would be delighted to.

Senator HATCH. Thank you so much.

Please proceed.

Mrs. BERESFORD. The idea that many pregnant women give no thought to ethics or are insensitive to the issues of life and death, family and religion, is a fiction and one that could only be believed by those who have never talked with these women nor seen their distress at having to decide how best to serve the many and sometimes conflicting values that they hold dear.

When abortion is chosen, it is usually to serve values such as these:

To bring only wanted children into the world; to rear children in stable, loving families; to provide adequate food, clothing, shelter, education, and opportunity for a child; to avoid the unnecessary suffering caused by disease and deformity; to be healthy, educated, and grown up before becoming a parent; and to break the cycle of poverty and welfare dependence.

In so choosing, the woman must temporarily sacrifice service to other cherished but conflicting values like motherhood and nurturing. Most women experience this choice with deep feelings of concern and a strong desire to make a good and responsible decision.

One interesting aspect of ethical concern is that the issue of whether the practice of abortion leads to infanticide or euthenasia seems to be an entirely academic issue in the minds of theoreticians.

Pregnant women appear to believe universally that interrupting fetal life is in no way similar or connected to killing infants or taking adult life—acts which they would never participate in or condone.

It appears that while the majority of people understand that eggs are living cells, as are sperm, and that conception represents the beginning of human reproduction, the majority also seem to carry a deep and culturally determined belief that personhood and citizenship are acquired at birth.

Abortion does not affect people's belief in either the beauty and mystery of life or the rights of persons and citizens.

Indeed, if it did, it would have done so long ago, for abortion is not new to the history of the world or to this society.

The American Public Health Association and the Centers for Disease Control estimate that in the early 1900's about 1 million illegal abortions were done every year. The true negative impact of those illegal abortions, as you have heard in other testimony, was that maternal life and health were seriously endangered and that large sums of money were paid to illegal and often incompetent or predatory practitioners.

Since legalization, maternal mortality has been reduced to near zero; complications are rare; and fees for service, now about one-tenth their former size, are paid to board-certified physicians and other licensed and trained staff in facilities that are open to public inspection.

I have done staff training in more than 50 such clinics in the United States. What I have seen in most of them has been a clean, attractive facility, medical care of the highest quality, sensitive and respectful treatment of patients, and careful attention to the patient's right to make an uncoerced, informed choice.

While not every abortion provider in the country meets standards, it is remarkable to me that now, just 8 years after legalization, the majority of providers are of high quality. Indeed, they are often cited as models for the delivery of safe, inexpensive, outpatient health care.

The fear that legal abortion would affect women's willingness to use contraception certainly has been dispelled by the family planning statistics of the last decade. More persons now use birth control than ever before. Women who have had an abortion are, statistically speaking, more likely to be contraceptive users than those who have not.

Nearly all women still indicate they believe it is best to prevent an unwanted pregnancy. Being able to choose a safe, legal abortion when prevention has not occurred, has not altered that belief.

More than 90 percent of abortions in the United States are done in the first trimester. Only about 8 percent are second trimester. That number is not growing. In fact, it has diminished with every year since legalization.

Women seen in second trimester services tend to be those with the most difficult life circumstances. Here we find the woman who wanted a child but has learned she is carrying a defective fetus. Here we may find the young teenager, often the victim of exploitation, rape, or incest, who has had nowhere to turn for help. Here, too, are the very poor who could not find financial means in time; and the sick and disturbed who were unable to face the reality of pregnancy or find the resources for timely decisionmaking.

Since women are fertile for about 35 years of their lives, since contraceptives are imperfect, and since people's lives are complex and often difficult, abortion exists as one alternative to unwanted pregnancy and birth.

Preserving the option of safe, legal abortion for those who would choose it is prudent, humane, and in accord with the ethical views of the majority of our citizens.

Thank you.

Mr. **MARKMAN**. Thank you, Mrs. Beresford.

Again, we are sorry for the somewhat difficult straits of this morning's hearing. The Senator did want to apologize once more for his conflicting commitments.

We would like to submit several questions for the record. I would like to emphasize that they will be part of the permanent record and that your responses will be circulated to other members of this subcommittee and the committee.

In addition, we would like to impose on you if we could to answer several written questions, if that would not be too difficult.

The first question I would like to ask, and I wonder if we could have Dr. Kazazian respond first and then go from right to left, would be this one:

How frequently, in your view, are therapeutic abortions necessary? In other words, how often in your experience are abortions necessary in order to save the life or protect the physical health of the mother.

Dr. **KAZAZIAN**. My experience is not in the abortion area. As I said before, I am a pediatrician and a geneticist.

I would say that my experience is limited there to the prenatal diagnosis area. In very rare cases is the genetic disease life-threatening to the mother.

Mr. **MARKMAN**. Dr. Schmidt.

Dr. **Schmidt**. The only answer I could give you is very rare.

These figures, as I indicated in my prepared remarks, are simply not available.

I would point out that this part of the issue has changed only for the better.

At no time in my 30 years of practice have I seen more than a rare instance of a life-theatening indication for therapeutic abortion and these have become even rarer in recent years.

There should be a statistical answer available but there is not.

Mr. **Markman**. Dr. Williams.

Dr. **Williams**. As I stated earlier in my remarks, since 1953 I have never seen a case that required therapeutic abortion. That is my experience at Illinois Masonic Hospital where they deliver about 3,500 a year, at St. Bernard's where we deliver about 1,200 a year, at Jackson Park where we deliver about 1,000 a year, and previously, prior to its closing, at Providence Hospital where they delivered about 700 a year.

That does not mean that they were not requested. I was on the therapeutic abortion committee of Illinois Masonic Hospital and the most common request for therapeutic abortions was because of possible psychotic episodes. That, of course, is a real lulu. Most people who are going to go off their rocker, are going off anyway.

Mr. **Markman**. Dr. Ryan.

Dr. **Ryan**. I think true therapeutic abortions for truly medical indications for lifesaving indications are relatively rare.

As I have indicated to you, our concerns are that any construction of language, such as that, would have ramifications that would impact many other decisions we make as to whether or not we have acted truly to save the life of the mother or whether it is a judgment call which is due and liable to be reviewed by courts subsequently. It puts us in great jeopardy in trying to provide appropriate quality care for women.

Mr. **Markman**. Mrs. Beresford.

Mrs. **Beresford**. I would see saving the life of the mother as the far end of a continuum of health care. Before the point of saving the life, there are also issues of protecting physical and mental health.

Mr. **Markman**. Let me ask a question about another so-called hard case: How prevalent are abortions that are sought for reasons of rape or incest? How reliable are procedures designed to prevent fertilization following intercourse?

Is the psychological trauma normally involved in rape or incest a factor in determining the probability of pregnancy? In other words, does it diminish the likelihood or the frequency of pregnancy resulting from intercourse?

Dr. Kazazian.

Dr. **Kazazian**. That is outside my area of expertise; I will pass.

Mr. **Markman**. Dr. Schmidt.

Dr. **Schmidt**. I am not sure if I understand all of the question, so prompt me if I am not responding.

It is reasonable to conjecture that the psychological trauma involved in rape or incest would diminish the probability of conception. There is some indication that the number of demonstrated conceptions following rape is significantly less than the calculated statistical chance of conceiving following a randomly timed coitus. However, I know of no way to prove this conjecture.

The other part of your question—the prevention?

Mr. **Markman**. I was asking how reliable are procedures for preventing fertilization.

Dr. **Schmidt**. It depends on what procedure you are talking about.

It is not uncommon to do a D&C immediately after rape.This is not considered an abortion, for implantation would not yet have occurred; but the support for a possibly fertilized ovum would be removed. If you are talking about that kind of procedure, I would say it is highly successful.

If you are talking about morning after pills, that treatment has fallen into less use because of its threat of carcinoma of the vagina in a living female offspring. Its success rate in preventing pregnancy has been very good.

Mr. **Markman**. Dr. Williams.

Dr. **Williams**. These two incidents are very frequently offered as the reasons that abortion should be legal—to protect the patient who has been raped or suffered incest.

I would like to give you a couple of examples. Believe it or not, both of these occurred within the past month in my practice.

A mother brought her 15-year-old daughter in and said: "Dr. Jasper, I want you to examine her and take care of her because she was raped by four boys last night." The mother was distraught.

I said: "If you will please leave the room, I will take care of your girl."

She left the room and I asked the girl: "Did they arrest the boys?" She said: "No."

I said: "Do you know the boys?" She said: "Yes."

I said: "Do you want them arrested?" She said: "No."

I said: "Did they hurt you?" She said: "No."

I said: "How come you call this rape?" She said: "My mom called it rape."

The point I am making is that very frequently the rape charge is not proven.

If it is a valid, honest-to-goodness rape, the incidence of pregnancy following a rape is extremely low.

In the presence of the kind of treatment that Dr. Schmidt indicated it is zero. A D&C within 12 hours after rape, or even within 24 hours, will protect the patient 100 percent.

With reference to incest, one woman came in about 3 weeks ago and said: "Dr. Jasper——"

They call me Dr. Jasper instead of Dr. Williams. In our clinic, I have two brothers who are doctors and a son who is a doctor. One of them has a son. If you say Williams, five of us answer. Therefore, they call each of us by our first names.

She said: "Dr. Jasper, I can't go to sleep." I said: "What is the matter? "

She said: "I killed my husband last night." I said: "You did what?"

She said: "I killed him." I said: "Why?"

She said: "Everytime he gets drunk he wants to ride, and when he is drunk he can kill you. I told him I did not want to, and he insisted. I stuck a knife in his belly. Now I cannot go to sleep."

I said: "Why aren't you in jail?" She said: "I called the police, and they came. I told them what happened. They said I would have to go to an inquest, but they did not arrest me."

What is a woman's obligation with reference to marriage? What is incest? Is it just a guy who is rough when he is drunk or what is it?

I do not really buy the argument. In my practice, the number of women who have come in complaining of incest is relatively small. When I have taken the time to talk to them about it, they did not move out. If it had been that bad, it seems that they would have.

Dr. RYAN. No. 1, I am incensed by Dr. Williams' implications that rape never occurs. [Applause.]

And, second, the fact that he does not even know the definition of the word incest, which becomes apparent from his testimony, is, again, evidence of the kind of difficulties we have in bringing facts before the American people.

You ask how often rape and incest occur. I can assure you they occur much more often than is reported. The barriers to reporting these kinds of events are very real.

A pregnancy occurs much more often than is reported. Abortion does seek to provide a choice to women—one which some of Dr. Williams' patients might not choose but which others would choose.

The kind of legislation we are talking about would negate that choice.

Even if it is a few patients, are we going to pass legislation minimizing the importance of the individual in this country? Are we going to minimize the fact that it is only a few people who are held hostage by terrorists? Are there only a few people who suffer from rape or incest?

We cannot pass that kind of legislation in this country.

It seems to me a very, very fundamental fact that the rights of the individual should be seriously considered and that we cannot make legislation on the basis of the numbers game.

Mrs. BERESFORD. I would like to enlighten Dr. Williams by telling him that incest means sexual intercourse between parent and child or brother and sister in the same family.

I concur heartily with Dr. Ryan's answer to those questions.

Both rape and incest are much more common than are reported in public data. One of the reasons for that is that there is a great stigma attached to incest which makes it difficult for people to acknowledge it.

With regard to rape, in many places, the woman who has been raped is not regarded as a victim but is somehow held responsible or accountable for the rape having occurred.

Those of us who counsel women who are pregnant and who are seeking abortions have learned that there are many more women who have been forced to submit to intercourse and are in fact pregnant as a result of that intercourse than the public data would suggest.

I would concur in the recommendation that that data needs to be refined and made available to the public.

Dr. KAZAZIAN. May I come back and comment? My memory has been jogged a little bit.

Within the last year, we have been called by the State attorney's office of Baltimore to see if we could prove incest in three cases of presumed father-child incest with pregnancy resulting.

In all three of those cases, the daughter desired and obtained termination of pregnancy. In all three of those cases, the father was obviously not cooperative in trying to prove incest against him. In only one of the three were we able to prove it by genetic means, and the father was given 5 years in jail.

I think that it probably does occur much more than we think it does and pregnancy will result rarely, but here we have three examples of probable incest with pregnancy resulting.

Mr. MARKMAN. Before we go on to the next question, I would just like to repeat what Senator Hatch said last week: "We do not expect that any individual in this audience will agree with each of the members of the panel, but we would very much appreciate it if they would show each of them courtesy."

If there are any thoughts or comments or concerns that any in the audience have about the testimony, we would very much appreciate it if you would wait until after the hearing to express those to your colleagues.

Let me go to another question:

A recent article in the Philadelphia Enquirer, which Senator Hatch would like to place in the record at this point, has concluded that there are significant numbers of live-born fetuses taking place every day at medical hospitals throughout the country.

I would like to ask the members of the panel what their own experience has been, firsthand or secondhand, with this kind of occurrence? What, in your opinion, are the doctors' medical and ethical obligations with respect to such so-called aborted abortions?

[Material submitted by Senate Hatch follows:]

[From Today magazine, the Philadelphia Inquirer, Aug. 2, 1981]

ABORTION: THE DREADED COMPLICATION

(By Liz Jeffries and Rick Edmonds [1])

A woman's scream broke the late-night quiet and brought two young obstetrical nurses rushing to Room 4456 of the University of Nebraska Medical Center. The patient, admitted for an abortion, had been injected 30 hours earlier with a salt solution, which normally kills the fetus and causes the patient to deliver a mass of lifeless tissue, in a process similar to a miscarriage.

This time, though, something had gone wrong. When nurse Marilyn Wilson flicked on the lights and pulled back the covers, she found, instead of the stillborn fetus she'd expected, a live 2½-pound baby boy, crying and moving his arms and legs there on the bed.

Dismayed, the second nurse, Joanie Fuchs, gathered the squirming infant in loose bedcovers, dashed down the corridor and called to the other nurses for help. She did not take the baby to an intensive care nursery, but deposited it instead on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. Other nurses and a resident doctor gathered and gaped.

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Finally, a head nurse telephoned the patient's physician, Dr. C. J. Labenz, at home, apparently waking him.

"He told me to leave it where it was," the head nurse testified later, "just to watch it for a few minutes, that it would probably die in a few minutes."

This was in Omaha, in September 1979. It was nothing new. Hundreds of times a year in the United States, an aborted fetus emerges from the womb kicking and alive. Some survive. A baby girl in Florida, rescued by nurses who found her lying in a bedpan, is 5 years old now and doing well. Most die. The Omaha baby lasted barely 2½ hours after he was put in the closet with the dirty linen.

Always, their arrival is met with shock, dismay and confusion.

When such a baby is allowed to die and the incident becomes known, the authorities often try to prosecute the doctor. This has happened several dozen times in the past eight years, most recently in the case of Dr. LaBenz, who is to go on trial in Omaha this fall on two counts of criminal abortion. But interviews with nurses, some of them visibly anguished, uncovered dozens of similar cases that never reached public attention.

In fact, for every case that does become known, a hundred probably go unreported. Dr. Willard Cates, an expert on medical statistics who is chief of abortion surveillance for the Center for Disease Control in Atlanta, estimates that 400 to 500 abortion live births occur every year in the United States. That is only a tiny fraction of the nation's 1.5 million annual abortions. Still, it means that these unintended live births are literally an everyday occurrence.

They are little known because organized medicine, from fear of public clamor and legal action, treats them more as an embarrassment to be hushed up than a problem to be solved. "It's like turning yourself in to the IRS for an audit," Cates said. "What is there to gain? The tendency is not to report because there are only negative incentives."

One result of the medical community's failure to openly acknowledge the problem is that many hospitals and clinics give their staffs no guidelines for dealing with abortion live births. Even where guidelines exist, they may not be followed. The doctor is seldom present when a live birth occurs, because most late abortions—those done later than the midpoint of pregnancy—are performed by the injection of a solution (the method used in the Omaha case) that slowly induces delivery of the fetus many hours later. Crucial decisions therefore fall to nurses and physician residents with secondary authority over the case.

Signs of life in the baby may or may not be recognized. At some hospitals a live-born abortion baby is presumed dead unless it conspicuously demonstrates otherwise, by crying or waving its arms and legs. Even then, the medical personnel on the scene may let the baby die rather than try to save it.

Because they are premature, these infants need immediate care, including machine support, in order to live. Given such care, many can survive in good health, as did a pair of abortion babies born in separate incidents in Wilmington, Del., in the spring of 1979 and since adopted. Others are too premature to be saved even with the best of care.

Whether they live or die, these abortion live births—and even successful, routine abortions of late-term, highly developed fetuses—are taking a heavy emotional toll on medical staffs across the country. Some physicians say they have "burned out" and have stopped doing abortions altogether. Nursing staffs at hospitals in Cleveland, Grand Rapids, Fort Lauderdale and elsewhere have rebelled at late abortions and have stopped their hospitals from performing any abortions later than the midpoint of pregnancy. Some staff members who regularly perform late abortions report having nightmares about fetuses, including recurring dreams in which they frantically seek to hide fetuses from others.

In legalizing abortion in 1973, the Supreme Court said it was reserving the right to protect the life of a viable fetus—that is, one with the potential to survive outside the womb. But the court never directly acknowledged the chance of an aborted fetus being born alive. And it therefore never gave a clear guideline for dealing with what Dr. Thomas Kerenyi, a leading New York expert on abortions, has called "the dreaded complication."

Twenty states (including Pennsylvania, New Jersey, and Delaware) have no laws limiting late abortions or mandating care for live-born abortion babies. Even where such state laws exist, they have usually been found unenforceable in practice or unconstitutional.

"Everyone—doctors, attorneys, state legislators—is looking for some clear guidelines concerning disposition of these infants," said Newman Flanagan, district attorney for the City of Boston. "If a baby has rejected an abortion and lives, then it is a person under the Constitution. As such, it has a basic right to life. Unfortunately, it is difficult to protect that right, because there are no guidelines addressed to this specific issue."

Medical trends indicate that abortion live births will continue. They may even become more frequent. For one thing, demand for late-term abortions is undiminished, and with the growing popularity of genetic testing to screen for fetal defects midway through pregnancy, educated and affluent women are now joining the young, the poor and the uninformed who have been, until now, the main groups seeking late abortions.

Furthermore, estimating the gestational age of a fetus in the womb—a crucial aspect of a successful abortion—remains an inexact art. In March, doctors at the Valley Abortion Clinic in Phoenix estimated that one woman as 19 to 20 weeks pregnant; days later she delivered not an aborted fetus but a 2½-pound, 32-week baby. It survived after two months of intensive care at a Phoenix hospital.

Finally, medical science in the past 10 years has greatly improved its ability to care for premature babies. Infants are becoming viable earlier and earlier. Those with a gestational age of 24 weeks and weighing as little as 1½ pounds can now survive if given the best of care.

So long as doctors perform abortions up to the 24th week of pregnancy (as is legal everywhere in the United States under the 1973 Supreme Court ruling), it is statistically certain that some of these borderline cases will turn out to be viable babies, born alive. It happened again last May in Chicago—a 19-to-20-week estimate, a liveborn 2-pound baby boy.

By ignoring the problem of abortion live births, the courts and the medical establishment are choosing to overlook a long, well-documented history of cases: January 1969, Stobhill Hospital, Glasgow, Scotland: A custodian heard a cry from a paper bag in the snow beside an incinerator. He found a live baby. It was taken inside and cared for in the hospital's operating theater but died nine hours later. The infant's gestational age has been estimated at 26 weeks by the physician performing the abortion. It was actually closer to 32 weeks. No efforts were made to check for signs of life before that aborted baby was discarded. No charges were filed. Because the case has been written about in British medical journals, it was a matter of record—before abortion was legalized in this country—that such things could happen.

April 1973, Greater Bakersfield Hospital, Bakersfield, Calif.: A 4½-pound infant was born live following a saline abortion (induced by an injection of salt solution) performed by Dr. Xavier Hall Ramirez. Informed by phone, Dr. Ramirez ordered two nurses to discontinue administering oxygen to the baby. His instructions were countermanded by another doctor, the baby survived and later was placed for adoption. Ramirez was indicted for solicitation to commit murder. His attorney argued that a medical order based on medical opinion, no matter how mistaken, is privileged. Dr. Irvin M. Cushner of the University of California at Los Angeles, later to become a top health policy official in the Carter administration, testified that it was normal for Ramirez to expect the delivery of a dead or certain-to-die infant as the result of a saline abortion.

July 1974, West Penn Hospital, Pittsburgh: Dr. Leonard Laufe performed an abortion on a woman who contended she had been raped—though that and her account of when she became pregnant were later disputed. She had been turned down for an abortion at another hospital, where the term of her pregnancy was estimated at 26 to 31 weeks. Laufe put it at 20 to 22. The abortion, induced by an injection of prostaglandin, a substance that stimulates muscle contraction and delivery of the fetus, was filmed for use as an instructional film. The film showed the three-pound infant moving and gasping. Also, a nurse and a medical student testified that they had noticed signs of life. No charges were filed, however, after a coroner's inquest at which Laufe testified that the infant sustained fatal damage during delivery.

February 1975, Boston: Dr. Kenneth Edelin was convicted of manslaughter for neglecting to give care to a 24-week infant after a 1973 abortion at Boston City Hospital. Witnesses said Edelin held the infant down, constricting the flow of oxygen through the umbilical cord and smothering it. He was the first and only American doctor ever convicted on charges of failing to care for an infant born during an abortion. The conviction was overturned by the Massachusetts Supreme Court on the ground that improper instructions had been given to the jury. Edelin and his lawyer argued that he had taken no steps to care for the infant because it was never alive outside the womb.

March 1977, Westminster Community Hospital, Westminster, Calif.: A seven-month baby girl was born live after a saline abortion performed by Dr. William Waddill. A nurse testified that Waddill, when he got to the hospital, interrupted her efforts to help the baby's breathing. A fellow physician testified that he had seen Waddill choke the infant. "I saw him put his hand on this baby's neck and push down," said Dr. Ronald Cornelson. "He said, 'I can't find the goddam trachea,' and 'This baby won't stop breathing.'" Two juries, finding Cornelson an emotional and unconvincing witness, deadlocked in two separate trials. Charges against Waddill were then dismissed. He had contended the infant was dying of natural causes by the time he got to the hospital.

July 1979, Cedars-Sinai Medical Center, Los Angeles: Dr. Boyd Cooper delivered an apparently stillborn infant, after having ended a problem pregnancy of 23 weeks. Half an hour later the baby made gasping attempts to breathe, but no efforts were made to resuscitate it because of its size (1 pound 2 ounces) and the wishes of the parents. The baby was taken to a small utility room that was used, among other things, as an infant morgue. Told of the continued gasping, Cooper instructed a nurse, "Leave the baby there—it will die." Twelve hours later, according to testimony of the nurse, Laura VanArsdale, she returned to work and found the infant still in the closet, still gasping.

Cooper then agreed to have the baby boy transferred to an intensive care unit, where he died four days later. A coroner's jury ruled the death "accidental" rather than natural but found nothing in Cooper's conduct to warrant criminal action.

A common thread in all these incidents is that life was recognized and the episode brought to light by someone other than the doctor. Indeed, there is evidence that doctors tend to ignore all but the most obvious signs of life in an abortion baby.

In the November 1974 newsletter of the International Correspondence Society of Obstetricians and Gynecologists, several doctors addressed a question from a practitioner who had written in an earlier issue that he was troubled by what to do when an aborted infant showed signs of life.

One was Dr. Ronald Bolognese, an obstetrician at Pennsylvania Hospital in Philadelphia, who replied:

"At the time of delivery, it has been our policy to wrap the fetus in a towel. The fetus is then moved to another room while our attention is turned to the care of [the woman]. She is examined to determine whether complete placental expulsion has occurred and the extent of vaginal bleeding. Once we are sure that her condition is stable, the fetus is evaluated. Almost invariably all signs of life have ceased."

(Bolognese recanted that statement in a 1979 interview. "That's not what we do now," he said. "We would transport it to the intensive care nursery.")

In addition, Dr. William Brenner of the University of North Carolina Medical School suggested that if breathing and movement persist for several minutes, "the patient's physician, if he not in attendance, should probably be contacted and informed of the situation. The pediatrician on call should probably be apprised of the situation if signs of life continue."

Dr. Warren Pearse, executive director of the American College of Obstetrics and Gynecology, was asked in a 1979 interview what doctors do, as standard practice, to check whether an aborted fetus is alive.

"What you would do next [after expulsion] is nothing," Pearse said. "You assume the infant is dead unless it shows signs of life. You're dealing with a dead fetus unless there is sustained cardiac action or sustained respiration—it's not enough if there's a single heartbeat or an occasional gasp."

These seemingly callous policies are based on the assumption that abortion babies are too small or too damaged by the abortion process to survive and live meaningful lives. That is not necessarily the case, though, even for babies set aside and neglected in the minutes after delivery.

A nursing supervisor who asked not to be identified told of an abortion live birth in the mid-'70s in a Florida hospital. The infant was dumped in a bedpan without examination, as was standard practice. "It did not die," the nurse said. "It was left in the bedpan for an hour before signs of life were noticed. It weighed slightly over a pound."

The baby remained in critical condition for several months, but excellent care in a unit for premature infants enabled it to survive. The child, now 5 years old, was put up for adoption. The nursing supervisor, who has followed its progress, said she has pictures of the youngster "riding a bicycle and playing a little piano."

In the spring of 1979 two babies were born alive, five weeks apart, after saline abortions at the Wilmington Medical Center. They were given vigorous care, survived and were later adopted. One had been discovered by a nurse, struggling for breath and with a faint heartbeat, after having been placed in a plastic specimen jar. The second was judged to be a live delivery and was given immediate help breathing.

A baby girl, weighing 1 pound 11 ounces, was born in February 1979 after a saline abortion at Inglewood (Calif.) Hospital, Harbor General Hospital, which is associated with UCLA and is fully equipped to care for premature babies, was called for help, but the neonatal rescue team did not respond. The infant died after three hours.

The Los Angeles Department of Health Services investigated and was told that there had been confusion over the baby's weight and that it reportedly showed poor vital signs. It was "very unusual for them not to pick up [an infant] of this size," Dr. Rosemary Leake of Harbor General told investigators.

The administrator of a New York abortion unit, asked what would be done for a live-born abortion baby, said, "The nurses have been trained in how to handle this. I'd like to think we would do everything to save it. But honestly I'm not sure."

These incidents together suggest that life in an aborted infant may or may not be recognized. If it is, supportive treatment may or may not be ordered.

Such incidents, when discovered, often provoke prosecutions. A few may seem something like murder at first blush. But on closer inspection the doctors' actions have been judged, time and again, not quite to fit the definition of a crime.

Nowhere was this more vividly shown than in the case of Dr. Jesse J. Floyd, who was indicted on charges of murder and criminal abortion by a grand jury in Columbia, S.C., in August 1975. The charges were the result of an abortion a year earlier of a baby that appeared to have a gestational age of 27 to 28 weeks. It weighed 2 pounds 5 ounces and lived for 20 days.

In October 1979 the state dropped its case against Floyd. County prosecutor James C. Anders later conceded in an interview that South Carolina's abortion law was of dubious constitutionality. "In the second place," he said, "I had a reluctant witness [the infant's mother]. That and the passage of time worked against me."

A detailed record was developed in the case, as part of a federal suit that Floyd brought against Anders in which he sought to block the state prosecution. The 20-year-old mother, Louise A., lived in the small town of Hopkins, worked at a military-base commissary and had plans to enroll in a technical college. Those plans made her unwilling to have the baby she was carrying, so she presented herself for an abortion at Floyd's office in July 1974. Court records indicate that she had been told erroneously by her hometown doctor's nurse that she was not pregnant, and that she only slowly realized that she was.

Floyd found her to be past the first trimester of pregnancy, and under South Carolina law that meant an in-hospital abortion would be required. There were delays in her raising $450 for the abortion and more delays in admitting her to Richland Memorial Hospital. She was injected with prostaglandin on Sept. 4 and expelled the live baby early on the morning of Sept. 6.

"I started having real bad labor pains again," Louise recalled in her deposition, "and finally my baby was born. I called the nurse. Then about four or five of them came in the room at the time. The head nurse came in the same time the other nurses came in and she told me did I know that the baby was a seven-month baby. I told her no.

"One of the nurses said that the baby was alive. They took the baby out of the room. He never did cry, he just made some kind of a noise."

The first doctor on the scene, paged from the cafeteria, was a young resident. She did not hesitate. On detecting a heartbeat of 100, she clamped and severed the umbilical cord and had the baby sent to the hospital's intensive care unit.

"It was a shock, a totally unique emergency situation, very upsetting to all of us," the doctor, who now practices in California, said in an interview. "Some people have disagreed with me [about ordering intensive care for an abortion live birth] but that seems to me the only way you can go.

"It's like watching a drowning. You act. You don't have the luxury of calling around and consulting. You institute life-preserving measures first and decide about viability later on."

Ten days after birth, the baby had improved markedly and was given a 50-50 chance of survival. Then he developed a tear in the small intestine and died of that and other complications on Sept. 26.

Louise A. never saw the child. She checked out of the hospital two days after the abortion and did not return. But she did show a passing interest in the baby's progress.

"I kept calling this nurse," Louise said in her deposition. "I would call . . . and get information from them about the baby, and they told me he was doing fine. They told me he had picked up two or three pounds. I started going to school, and one afternoon I called home and they told me the baby had died, but no one told me the cause of his death."

Floyd never saw the infant either. On the day of the abortion, his hospital privileges at Richland were withdrawn, and they have never been restored.

These circumstances presented prosecutor Anders with a difficult case. Floyd had had no physical contact with the live-born infant, nor was he issuing orders concerning its care. Nonetheless, Anders thought the doctor could be held responsible for the infant's death.

Anders pressed his murder charge using an old English common-law theory. Under this theory, willfully doing damage to a "vital" infant in the womb could be considered a crime against the fetus as a person. The abortion itself, Anders alleged, was an assault.

This line of argument is not entirely far-fetched. For instance, a Camden, N.J., man was convicted of murder in 1975 after he shot a woman in the abdomen late in her pregnancy, causing the death of the twins she was carrying. But application of the theory to abortion had never been tested—in South Carolina or anywhere else.

South Carolina law in the mid-1970s prohibited third-trimester abortion unless two other doctors certified that the abortion was essential to protect the life or health of the mother. No such certifications were made for Louise. However, various Supreme Court rulings suggested that both the requirement of consultation with other doctors and the explicit definition of viability (as beginning in the third trimester) would make that law unconstitutional.

Floyd's lawyers, George Kosko of Columbia, S.C., and Roy Lucas of Washington, also filed voluminous expert affidavits on the difficulty of estimating gestational age accurately. At worst, they argued, Floyd had made a mistaken diagnosis. What proof was there that he had intentionally aborted a viable baby?

District Court Judge Robert Chapman and the Fourth Circuit Court of Appeals agreed that the prosecution was based on flimsy evidence and should be blocked. However, the Supreme Court disagreed, in a ruling in March 1979, and suggested that judgment should be withheld on constitutional matters until the state prosecution had run its course. The way was thus cleared for Anders to proceed, but with witnesses dispersed, memories fading and the legal basis for prosecution still doubtful, Anders chose to drop the case.

Floyd, 49, continues performing first-trimester abortions at his Ladies Clinic, but the loss of hospital privileges and the damage to his reputation caused his surgical practice to collapse, he said.

The long legal proceeding also seems to have had a chilling effect on abortion practice throughout South Carolina, which Anders concedes was one of his intentions.

"The main thing is the dilemma it puts the other physicians in," Floyd said in an interview. "It's just about dried up second-trimester abortions in this state. I have to send mine to Atlanta, Washington or New York."

Asked about late abortions and the risk of live births, Floyd said he thought abortions performed through the sixth month of pregnancy create "a problem to which there isn't an answer. We probably need to move back to 20 weeks. I would be reluctant to do one now after 20 weeks."

A similar case occurred about the same time in South Carolina, when Anders obtained a criminal indictment charging Dr. Herbert Schreiber of Camden, S.C., with first-degree murder and illegal abortion.

On July 18, 1976, a month after the charges had been filed, the 60-year-old doctor was found dead in a motel room in Asheville, N.C. A motel maid discovered the body slumped in a chair. Several bottles of prescription drugs were recovered from the room. Two days later the Buncombe County medical examiner ruled the death a suicide from a drug overdose.

Schreiber, who left no note, had pleaded not guilty to the charge of having killed a live baby girl after an abortion by choking or smothering her to death.

Comparing the Floyd and Schreiber cases, Anders found an irony: Schreiber "just reached in and strangled the baby," the prosecutor said his evidence showed. "I charged him with murder, and he committed suicide. If he had been willing to wait, he probably would have been OK too."

Not every doctor who performs a late abortion has to confront an aggressive prosecutor like Anders. but even those abortion live births that escape public notice raise deeply troubling emotions for the medical personnel involved. "Our training disciplines you to follow the doctor's orders," explained a California maternity nurse. "If you do something on your own for the baby that the doctor has not ordered and that may not meet with his commitment to his patient, the mother can sue you. A nurse runs a grave risk if she acts on her own. Not only her immediate job but her license may be threatened."

Nonetheless, nursing staffs have led a number of quiet revolts against late abortions. Two major hospitals in the Fort Lauderdale area, for instance, stopped offering abortions in the late 1970s after protests from nurses who felt uncomfortable handling the lifelike fetuses.

A Grand Rapids, Mich., hospital stopped late-term abortions in 1977 after nurses made good on their threat not to handle the fetuses. One night they left a stillborn fetus lying in its mother's bed for an hour and a half, despite angry calls from the attending physician, who finally went in and removed it himself.

In addition, a number of hospital administrators have reported problems in mixing maternity and abortion patients—the latter must listen to the cries of newborn infants while waiting for the abortion to work. And it has proved difficult in general hospitals to provide round-the-clock staffing of obstetrical nurses willing to assist with the procedure.

One young nurse in the Midwest, who quit to go into teaching, remembers "a happy group of nurses" turning nasty to each other and the physicians because of conflicts over abortion. One day, she recalled, a woman physician "walked out of the operating room after doing six abortions. She smeared her hand—which was covered with blood—on mine and said, 'Go wash it off. That's the hand that did it.'"

Several studies have documented the distress that late abortion causes many nurses. Dr. Warren M. Hern, chief physician, and Billie Corrigan, head nurse, of the Boulder (Colo.) Abortion Clinic, presented a paper to 1978 Planned Parenthood convention entitled "What About Us? Staff Reactions.* * *"

The clinic, one of the largest in the Rocky Mountain states specializes in the D&E [dilation and evacuation] method of second-trimester abortion, a procedure in which the fetus is cut from the womb in pieces. Hern and Corrigan reported that eight of the 15 staff members surveyed reported emotional problems. Two said they worried about the physician's psychological well-being. Two reported horrifying dreams about fetuses, one of which involved the hiding of fetal parts so that other people would not see them.

"We have produced an unusual dilemma," Hern and Corrigan concluded. "A procedure is rapidly becoming recognized as the procedure of choice in late abortion, but those capable of performing or assisting with the procedure are having strong personal reservations about participating in an operation which they view as destructive and violent."

Dr Julis Butler, a professor of obstetrics and gynecology at the University of Minnesota Medical School, is concerned about studies suggesting that D&E is the safest method and should be used more widely. "Remember," he said, "there is a human being at the other end of the table taking that kid apart.

"We've had guys drinking too much, taking drugs, even a suicide or two. There have been no studies I know of of the problem, but the unwritten kind of statistics we see are alarming."

"You are doing a destructive process," said Dr. William Benbow Thompson of the University of California at Irvine. "Arms, legs, chests come out in the forceps. It's not a sight for everybody."

Not all doctors think the stressfulness is overwhelming. The procedure is a little bit unpleasant for the physician," concedes Dr. Mildred Hanson, a petite woman in her early fifties who does eight to 10 abortions a day in a clinic in Minneapolis, just a few miles across town from where Butler works. "It's easier to * * * leave someone else—namely a nurse—to be with the patient and do the dirty work.

"There is a lot in medicine that is unpleasant" but necessary—like amputation a leg—she argues, and doctors shouldn't let their own squeamishness deprive patients of a procedure that's cheaper and less traumatic.

However, Dr. Nancy Kaltrieder, an academic psychiatrist at the University of San Francisco, has found in several studies "an unexpectedly strong reaction" by the assisting staff to late-abortion procedures. For nurses, she hypothesizes, handling tissues that resemble a fully formed baby "runs directly against the medical emphasis on preserving life."

The psychological wear-and-tear from doing late abortions is obvious. Philadelphia's Dr. Bolognese, who seven years ago was recommending wrapping abortion live-borns in a towel, has stopped doing late abortions.

"You get burned out," he said. Noting that his main research interest is in the management of complicated obstetrical cases, he observed: "It seemed kind of schizophrenic, to be doing that on the one hand—helping women with problem pregnancies to have babies—and do abortions."

Dr. John Franklin, medical director of Planned Parenthood of Southeastern Pennsylvania, was the plaintiff in a 1979 Supreme Court case liberalizing the limits on late abortions. He does not do such procedures himself. "I find them pretty heavy weather both for myself and for my patients," he said in an interview.

Dr. Kerenyi, the New York abortion expert, who is at Mt. Sinai Hospital, has similar feelings but reaches a different conclusion. "I first of all take pride in my deliveries. But I've seen a lot of bad outcomes in women who did not want their babies—so I think we should help women who want to get rid of them. I find I can live with this dual role."

The legal jeopardy, the emotional strain, the winking neglect with which "signs of life" must be met—all these things nurture secrecy. Late abortions take place "behind a white curtain," as one prosecutor put it, well sheltered from public view.

Only one large-scale study has been done of live births after abortions—by George Stroh and Dr. Alan Hinman in upstate New York from July 1970 through December 1972—(a period during which abortion was legal in New York alone. It turned up 38 cases of live births in a sample of 150,000 abortions.

Other studies, including one that found signs of life in about 10 percent of the prostaglandin abortions at a Hartford, Conn., hospital, date from the mid-1970's. No one is so naive as to think there is reliable voluntary reporting of live births in the present climate, according to Dr. Cates of the Center for Disease Control.

Evidence gathered during research for this story suggests, without proving definitively, that much of the traffic in late abortions now flows to the New York and Los Angeles metropolitan areas, where loose practice more easily escapes notice.

"The word has spread," the Daily Breeze, a small Los Angeles suburban paper, said in July 1980, "that facilities in greater Los Angeles will do late abortions. How late only the woman and the doctor who performs them know."

This kind of thing is disturbing even to some people with a strong orientation in favor of legal abortion. For instance, the Philadelphia office of CHOICE, which describes itself as "a reproductive health advocacy agency," will recommend only Dr. Kerenyi's service at Mt. Sinai among the half-dozen in New York offering abortion up to 24 weeks. The others have shortcomings in safety, sanitation or professional standards, in the agency's view.

An internal investigation of the abortion unit at Jewish Memorial Hospital in Manhattan showed that six fetuses aborted there in the summer of 1979 weighed more than 1½ pounds. The babies were not alive, but were large enough to be potentially viable. A state health inspector found in June 1979 that the unit had successfully aborted a fetus that was well over a foot long and appeared to be of 32 weeks gestation. Hospital officials confirmed in an interview that later in 1979 a fetus weighing more than four pounds had been aborted.

"It's disconcerting," Iona Siegel, administrator of the Women's Health Center at Kingsbrook Jewish Medical Center in Brooklyn, said of abortions performed so late that the infant is viable. When Ms. Siegel hears, as she says she often does, that a patient turned away by Kingsbrook because she was past 24 weeks of pregnancy had an abortion somewhere else, "that makes me angry. Number one, it's against the law. Number two, it's dangerous to the health of the mother."

Though one might expect organized medicine to take a hand in bringing some order to the practice of late abortions, that is not happening.

"We're not really very pro-abortion," said Dr. Ervin Nichols, director of practice activities for the American College of Obstetrics and Gynecology. "As a matter of fact, anything beyond 20 weeks, we're kind of upset about it."

If abortions after 20 weeks are a dubious practice, how does that square with abortion up to 24 weeks being offered openly in Los Angeles and New York and advertised in newspapers and the Yellow Pages there and elsewhere?

"That's not medicine," Nichols replied. "That's hucksterism."

Cates, of the Center for Disease Control, concedes that he has ambivalent feelings about those who do the very late procedures. There is obviously some profiteering and some bending of state laws forbidding abortions in the third trimester. But since late abortions are hard to get legally in many places, Cates puts a low priority on trying to police such practices. Medical authorities leave the late-abortion practitioners to do what they will. And so, too, by necessity, do the legal authorities.

The Supreme Court framed its January 1973 opinion legalizing abortion around the slippery concept of viability. As defined by Justice Harry Blackmun in the landmark *Roe vs. Wade* case, viability occurs when the fetus is "potentially able to live outside the mother's womb albeit with artificial aid."

The court granted women an unrestricted right to abortions, as an extension to their right of privacy, in the first trimester of pregnancy. From the point to viability, the state can regulate abortions only to make sure they are safe. And only after a fetus reaches viability can state law limit abortion and protect the "rights" of the fetus.

"Viability," Blackmun wrote, after a summer spent researching the matter in the library of the Mayo Clinic, "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

The standard was meant to be elastic, changing in time with medical advances. Blackmun took no particular account, though, of the possibility of abortion live births, or of errors in estimating gestational age.

In subsequent cases, the high court ruled that:

A Missouri law was too specific in forbidding abortion after 24 weeks. "It is not the proper function of the legislature or the court," Blackmun wrote, "to place viability, which essentially is a medical concept, at a specific point in the gestational period."

A Pennsylvania law was too vague. The law banned abortions "if there is sufficient reason to believe that the fetus may be viable." The court said it was wrong to put doctors in jeopardy without giving them clearer notice of what they must do.

State laws could not interfere with a doctor's professional judgment by dictating the choice of procedure for late abortions or by requiring aggressive care of abortion live births.

According to a 1979 survey by Jeanie Rosoff of Planned Parenthood's Alan Guttmacher Institute, 30 states have laws regulating third-trimester abortions. Some of these laws prohibit or strictly limit abortions after the fetus has reached viability. Some require doctors to try to save abortion live-born babies. Only a few states have both types of laws.

In addition, a number of these laws have been found unconstitutional. Others obviously would be, in light of Supreme Court rulings. Virtually all the state laws would be subject to constitutional challenge if used as the basis of prosecution against an individual doctor.

New York and California, ironically, have among the strongest, most detailed laws mandating care for survivors of abortions. But these laws have proved only a negligible check on the abortion of viable babies.

"We've had a number of claims come up that a baby was born live and full effort was not given to saving it," said Dr. Michael Baden, former chief medical examiner of New York City. "We've not had cases of alleged strangulation [as with Dr. Waddill in California] and that surely must be rare. All [the doctor] has to do is nothing and the result is the same."

Alan Marrus, a Bronx County assistant district attorney, has investigated several live-birth cases and the applicable New York law. He has yet to find "a case that presented us with facts that warranted prosecution. You need an expert opinion that in fact there was life and that the fetus would have survived. Often the fetus has been destroyed—so there is nothing for your expert witness to examine."

The incidents only come to light at all, Baden and Marrus noted, if some whistleblower inside the hospital or clinic brings them to the attention of the legal authorities. The credibility of that sort of witness may be subject to attack. And even if the facts do weigh against a doctor, he has some resources left. Almost always he can claim to have made no more than a good-faith error in medical judgment.

"This is happening all over the place," said a California prosecutor. "Babies that should live are dying because callous physicians let them die." But he despairs of winning any convictions. "Nobody's as dumb as Waddill. They're smarter today. They know how to cover themselves."

Unfortunately, advances in medical technique may only aggravate the overall problem. Fetuses are becoming viable earlier and earlier, while the demand for later abortions shows no sign of abating. Some argue that Justice Blackmun's definition of viability as "usually seven months" was obsolete the day it was published. It clearly is now.

A decade ago, survival of an infant less than 3 pounds or 30 weeks gestation was indeed rare, principally because the lungs of smaller infants, unaided, are too undeveloped and fragile to sustain life. Now, infants with birth weights of about 1⅔ pounds routinely survive with the best of care, according to Dr. Richard Behrman, chief of neonatology at Rainbow Babies and Childrens Hospital in Cleveland and chairman of a national commission that studied viability in the mid-1970s.

Sometimes even smaller babies make it, and the idea that most of them will be retarded or disabled is out-of-date Behrman said. "Most . . . survive intact."

Even with the medical advances, though, some live-born infants are simply too small and undeveloped to have a realistic chance to survive. A survey last year of specialists in neonatal care found that 90 percent would not order life-support by machine for babies smaller than 1 pound 2 ounces or less than 24 weeks gestation. And on occasion, a newborn may manifest muscular twitches or gasping movements without ever "being alive" according to the usual legal test of drawing a breath that fills the lungs.

Still, it is no longer a miracle for an infant of 24 weeks development (which can be legally aborted) to be saved if born prematurely.

"It is frightening," said Dr. Roger K. Freeman, medical director of Women's Hospital at the Long Beach Memorial Medical Center in Long Beach, Calif. "Medical advances in the treatment of premature babies enable us to save younger fetuses than ever before. When a fetus survives an abortion, however, there may be a collision of tragic proportions between medicine and maternity. Medicine is now able to give the premature a chance that may be rejected by the mother."

In 1970, Freeman developed the fetal stress test, a widely used technique for monitoring the heart rate of unborn fetuses. Also, he and a colleague at Long Beach, Dr. Houchang D. Mondalou, have developed a drug, betamethzene, that matures premature lungs within days instead of weeks. The hospital claims a 90 percent success rate with infants weighing as little as 1 pound 11 ounces.

At the University of California at Irvine, work is under way on an "artificial placenta" that doctors there say could, within five years, push the threshold of viability back even further.

The life-saving techniques are not exclusive to top academic hospitals, either. Good neonatal care is now broadly available across the United States. In fact, the lively issue in medical circles these days is not whether tiny premature babies can be saved, but whether it is affordable. Bills for the full course of treatment of a two-pound infant typically run between $25,000 and $100,000. To some, that seems a lot to pay, especially in the case of an abortion baby that was not wanted in the first place.

The only way out of the dilemma, it would seem, would be for fewer women to seek late abortions. Though some optimists argue that this is happening, there is evidence that it is not.

Studies show that women seeking abortions late in the second trimester are often young, poor and sexually ignorant. Many either fail to realize they are pregnant or delay telling their families out of fear at the reaction. The patients also include those who have had a change of circumstance or a change of heart after deciding initially to carry through a pregnancy; some of these women are disturbed.

As first-trimester abortion and sex education become more widely available, the optimists' argument goes, nearly all women who choose abortion will get an early abortion. But in fact a new class of older, well-educated, affluent women has now joined the hardship cases in seeking late abortions.

This is because a recently developed technique, amniocentesis, allows genetic screening of the unborn fetus for various hereditary diseases. Through this screening, a women can learn whether the child she is carrying is free of such dreaded conditions as Downs syndrome (mongolism) or Tay-Sachs disease, a genetic disorder that is always fatal, early in childhood.

The test involves drawing off a sample of amniotic fluid, in which the fetus is immersed in the womb. This cannot be done until the 15th or 16th week. Test cultures for the various potential problems take several weeks to grow. Sometimes the result is inconclusive and the test must be repeated. The testing also reveals the unborn child's sex and can be used to detect minor genetic imperfections.

To many women, particularly those over 35, amniocentesis seems a rational approach to minimizing the chances of bearing a defective child. A few, according to published reports, go a step further and make sure the baby is the sex they want before deciding to bear the child.

In any case, it is late in the second trimester—within weeks of the current threshold of viability—before the information becomes available on which a decision is made to abort, or not abort. The squeeze will intensify as amniocentesis becomes more widely available and as smaller and smaller infants are able to survive.

The abortion live-birth dilemma has caught the attention of several experts on medical ethics, and they have proposed two possible solutions.

The simplest, advocated by Dr. Sissela Bok of the Harvard Medical School among others, is just to prohibit late abortions. Taking into account the possible errors in estimating gestational age, she argues, the cutoff should be set well before the earliest gestational age which infants are surviving.

Using exactly this reasoning, several European countries—France and Sweden for example—have made abortions readily available in the first three months of pregnancy but very difficult to get thereafter. The British, at the urging of Sir John Peel, an influential physician-statesman, have considered in each of the last three years moving the cutoff date from 28 weeks to 20 weeks, but so far have not done so.

But in this country, the Supreme Court has applied a different logic in defining the abortion right, and the groups that won that right would not cheerfully accept a retreat now.

A second approach, advocated by Mrs. Bok and others, is to define the woman's abortion right as being only a right to terminate the pregnancy, not to have the fetus dead. Then if the fetus is born live, it is viewed as a person in its own right, entitled to care appropriate to its condition.

This "progressive" principle is encoded in the policies of many hospitals and the laws of some states, including New York and California. As the record shows, though, in the alarming event of an actual live birth, doctors on the scene may either observe the principle or ignore it.

And the concept even strikes some who do abortions as misguided idealism.

"You have to have a feticidal dose" of saline solution, said Dr. Kerenyi of Mt. Sinai in New York. "It's almost a breach of contract not to. Otherwise, what are you going to do—hand her back a baby having done it questionable damage? I say, if you can't do it, don't do it."

The scenario Kerenyi decribes did in fact happen, in March 1978, in Cleveland. A young woman entered Mt. Sinai Hospital there for an abortion. The baby was born live and, after several weeks of intensive care at Rainbow Babies and Childrens Hospital, the child went home—with its mother.

The circumstances were so extraordinary that medical personnel broke the code of confidentiality and discussed the case with friends. Spokeswomen for the two hospitals confirmed the sequence of events. Mother and child returned to Rainbow for checkup when the child was 14 months old, the spokeswoman there said, and both were doing fine.

The mother could not be reached for comment. But a source familiar with the case remembered one detail: "The doctors had a very hard time making her realize she had a child. She kept saying, 'But I had an abortion.' "

How Things Sometimes Go Wrong

Of the various ways to perform an abortion after the midpoint of pregnancy, there is only one that never, ever results in live births.

It is D&E (dilatation and evacuation), and not only is it foolproof, but many researchers consider it safer, cheaper and less unpleasant for the patient. However, it is particularly stressful to medical personnel. That is because D&E requires literally cutting the fetus from the womb and, then, reassembling the parts, or at least keeping them all in view, to assure that the abortion is complete.

Ten years ago it was considered reckless to do an abortion with cutting instruments after the first trimester of pregnancy. Now, improved instruments, more skilled practitioners and laminaria—bands of seaweed that expand when moist and are used to gently dilate the cervix, creating an opening through which to extract fetal parts—allow the technique to be used much later.

D&E is being hailed as extending the safe and easy techniques used for first-trimester abortions (cutting or vacuuming out the contents of the womb) well into the second three months of pregnancy. But there are dissenters. Dr. Bernard Nathanson, formerly a top New York City abortionist, now an anti-abortion author and lecturer, says that D&E "is a very dangerous technique in the hands of anyone less than highly skilled."

Besides, D&E puts all the emotional burden on the physician. And there are other techniques that allow the doctor, as one physician put it, to "stick a needle in the [patient's] tummy," then leave the patient to deliver the fetus vaginally as in normal childbirth and nurses to assist and clean up.

These more common methods for abortions after the midpoint of pregnancy use the instillation of either saline solution or prostaglandin. In these procedures, some of the woman's nurturing amniotic fluid is drawn out of the womb by an injection through her belly and is replaced with the abortion-inducing drug. (The amount of fluid in the womb is kept relatively constant to make sure the womb does not rupture.)

The two instillation substances work in different ways. Saline solution poisons the fetus, probably through ingestion, though the process is not completely understood. Usually within six hours, the fetal heartbeat stops. At the same time the saline induces labor, though supplemental doses of other labor-inducing drugs often are given to speed this effect.

Prostaglandin, on the other hand, is a distillate of the chemical substance that causes muscles to move. It is thought not to affect the fetus directly but instead is potent at inducing labor. Fetal death, if it does occur, is from prematurity and the trauma of passage through the birth canal.

Each substance also has an undesired side effect. Saline, an anti-coagulent that increases bleeding, can make minor bleeding problems more serious and in rare cases even cause death. Prostaglandin, because it causes muscles to contract indiscriminately, was found to cause vomiting and diarrhea in more than half the patients in early tests. Claims that it causes fewer major complications, which made it preferred to saline by many in the mid-1970s, have now been questioned. And the high incidence of live births (40 times more frequent than with saline, according to one study) also has lessened its popularity.

But saline is not foolproof either in preventing live births. Dr. Thomas F. Kerenyi of Mt. Sinai Hospital in New York, the best-known researcher on saline abortions, said most live births result from "errors in technique"—either administering too small a dosage or getting some of it into the wrong part of the womb.

A wrong estimation of gestational age can cause either a saline or prostaglandin abortion to fail. A larger-than-expected fetus might survive the trauma of labor or might reject a dose of saline (or urea, a third instillation substance sometimes used).

And on the basis of physical examination alone, studies show, doctors miss the correct gestational age by two weeks in one case out of five, by four weeks in one case out of 100, and sometimes by more than that. Pregnancies can be dated more exactly by a sonogram, a test that produces an outline image of the fetus in the womb, but because of its cost (about $100) many doctors continue to rely on physical exams.

There is one other abortion technique, hysterotomy, but it is the least desirable of all from several points of view. Because it is invasive surgery (identical to a Caesarean section) it has a much higher rate of complication than do the instillation techniques. Usually done only after attempts to abort with saline have failed, it has the highest incidence of all of live births.

As the infant is lifted from the womb, said one obstetrician, "he is only sleeping, like his mother. She is under anesthesia, and so is he. You want to know how they kill him? They put a towel over his face so he can't breathe. And by the time they get him to the lab, he is dead."

Over the years, the chief criterion in choosing between abortion methods has been safety for the patient. Advocates of D&E contend that bleeding, perforation of the uterus and infection all occur less frequently with D&E than with other methods. Dr. Willard Cates of the Center for Disease Control in Atlanta prefers D&E. Because it can be done—unlike instillation—in the early part of the second trimester, he has said, the need for as many as 80 percent of the very late abortions could be eliminated.

How very late are abortions performed?

His own clinic at Mt. Sinai, Dr. Kerenyi said, screens patients closely to make sure they are not past the legal 24-week limit. But in theory, he said, there is nothing to prevent successful saline abortions from being performed "virtually all the way to birth. At 30 weeks, say, you would just have to draw off and inject that much more of the solution."

Most practitioners who were interviewed say they stop doing D&E at 18 to 22 weeks. But again, there appears to be nothing to prevent the technique from being used much later.

"You can do it, you can do it," an abortionist, who would talk only if not quoted by name, said of D&Es late in pregnancy. "Some son-of-a-bitch misreads a sonogram and sends me a woman 26 weeks. I've done it. You've just got to take your time and be careful. And you're not going to end up with a live birth."

"I Stood By And Watched That Baby Die"

Nurses are the ones who bear the burden of handling the human-looking products of late abortions. And when an unintentional live birth occurs, they are the first to confront the waving of limbs and the gasping.

Reluctant to talk about their experiences, most of those interviewed for this article did not want their names to be published, and out of professional loyalty, they did not even want their hospitals to be named.

They spoke of being deeply troubled by what they have seen of late abortions in American hospitals.

Linda is a nurse in her late 50s in Southern California. Hurrying out of a patient's room one day to dispose of the aborted "tissue," as nurses were taught to think of it, she felt movement. Startled, she looked down, straight into the staring eyes of a live baby.

"It looked right at me," she recalled. "This baby had real big eyes. It looked at you like it was saying, 'Do something—do something.' Those haunting eyes. Oh God, I still remember them."

She rushed the 1½-pound infant to the nursing station. She took the heart rate—80 to 100 beats a minute. She timed the respiration—three to four breaths a minute. She called the doctor.

"I called him because the baby was breathing," Linda said. "It was pink. It had a heartbeat. The doctor told me the baby was not viable and to send it to the lab. I said, 'But it's breathing' and he said, 'It's non-viable, it won't be breathing long—send it to the lab.'"

She did not follow the order. Nor did she have resources at her command to provide any life-saving care. Two hours later the infant died, still at the nursing station, still without medical treatment. It died in a makeshift crib with one hot-water bottle for warmth and an open tube of oxygen blowing near its head.

The nursing supervisor, Linda said, had refused to let her put the baby in the nursery, where there was equipment to assist premature babies in distress. "She said to follow the doctor's orders and take it to the lab. I kept it with me at the station. We couldn't do an awful lot for it."

This happened eight years ago, in 1973, but Linda is still upset. "I stood by and watched that baby die without doing a thing," she said. "I have guilt feelings to this day. I feel the baby might have lived had it been properly cared for."

Jane, about 50, is the head floor nurse in an Ohio hospital. She and her fellow nurses successfully petitioned their hospital in 1978 to stop doing later abortions. Twice before that, she witnessed live births after abortions.

She recalls vividly the 16-year-old patient who phoned her mother after her abortion and said in an agonized voice, "Ma, it's out—but Ma, it's alive."

That happened in 1975. Jane still speaks of it bitterly, her eyes flashing anger.

A year earlier Jane saw the second abortion live birth in her experience. "I was called by the patient's roommate," she recalled. "When I got there the baby's head was sticking out and its little tongue was wiggling. Everybody felt they couldn't do anything until they called the doctor. It was a little thing—it only lasted about 15 minutes. But it was alive, and we did nothing. And that was wrong."

It rankles, too, that she was routinely forced to handle dead fetuses, the size and shape of well-formed premature babies.

"Because of my position," she said, "I had to pick them up off the bed and put them in a bottle of formalin [a preservative fluid]. Sometimes you had to have a very large container. Our gynecologists seemed to have a very poor ability to estimate gestational age. Time and again they would say with a straight face, 'This woman is 20 weeks pregnant' when she was actually 26 weeks."

Norma Rojo, about 35, is an obstetrical nurse at Indio Community Hospital in Indio, Calif. She was present the night of May 3, 1980, when a 15-year-old patient delivered a live baby girl after a saline abortion.

"Get rid of it," the patient cried hysterically. "I'm sorry, Mama—get rid of it," she said, the baby alive, kicking and crying, between her legs.

Two weeks earlier the girl had been in a traffic accident that killed four others and had sought the abortion out of fear that her baby might be damaged.

The fetus, which in tests had shown a normal heartbeat of 132 to 136 in the womb, appeared healthy at birth. "She was beautiful," said Mrs. Rojo. "She was pink. There were no physical deformities. She let out a little lusty cry. She lay in a basin put there to catch all the stuff. She was waving her arms and legs. You could tell she was making a big effort to live."

The nurses cut the umbilical cord, wrapped the infant in a blanket and took her to the intensive care nursery. She was put in an isolette (a life-support system) within minutes and was given oxygen.

Acting on their own, the nurses had the 1-pound 14 ounce baby transferred six hours later to Loma Linda University Medical Center, one of several hospitals in the Los Angeles area specializing in the care of very small premature infants. Four days later the baby was reported stable but had developed a complication causing hemorrhaging of the brain. Dr. David Deming of Loma Linda said then that its chances were only 50-50. He added, though, that the abortion had done little damage. "I would say there is probably no effect on her from the saline."

Eleven days after birth, the baby died. Family members indicated they were upset by the nurses' effort to save it.

"After this experience," Rojo said, "my friend [another nurse] and I are changed. We realize doctors aren't perfect. . . . I hope this is the last [abortion live birth] I ever see, but if there are any more, we will do the same thing."

Dr. **KAZAZIAN**. Are you talking about live births following second-trimester abortions?

Mr. **MARKMAN**. Yes.

Dr. **KAZAZIAN**. To my knowledge, at Hopkins we have not had any live births. I may be wrong, but to my knowledge we have not had any in the last 8 to 10 years.

The number of second-trimester abortions is relatively small. As was pointed out, it is on the order of 7 or 8 percent of all terminations of pregnancy.

We have instituted the procedure that when a second-trimester termination is occurring, a member of the neonatal team be informed of that termination and be available to give care, if there is a live birth. To my knowledge, as I have said, none have occurred. That is our procedure.

We do feel that a natalogist should know about it and be available for all second-trimester abortions.

Mr. **MARKMAN**. In that same article, Dr. Cates of the Centers for Disease Control indicated that approximately 400 to 500 of these occurred each year. At the same time, he acknowledged that these figures were probably significantly underrepresenting the actual number of live births because of the reluctance of many doctors and hospitals to report that sort of occurrence.

Dr. Schmidt.

Dr. **SCHMIDT**. You have given a better figure than I think we could come up with.

I am sure that Dr. Willard Cates and the CDC have better information than any of us individually.

In the literature, we see no such reports. Such information would have to come from an institution with a sufficient volume of second-trimester abortions and the willingness to report it. It is a very touchy issue. It is one of the problems which Dr. Cates referred to.

It is not exactly clear what are the present legal obligations of a physician in the presence of a second-trimester abortion.

There was the *Edein* case in Boston. There was considerable discussion in our college as to what the legal obligations of a physician were in that precise circumstance, that is, whether it is acceptable for a physician to put his hand into the uterus and terminate the life of the fetus in order to avoid the possibility of delivering a surviving infant. Even that was not agreed upon.

I do not have an answer. I think you got as good an answer as you could have gotten from Dr. Cates.

Dr. **WILLIAMS**. First, back to the question a few minutes ago.

I did not imply that rape does not occur. I said it does not occur as often as it is claimed and that the therapy outlined by Dr. Schmidt was adequate.

With reference to incest, obviously my definition was in error. I have no additional comments on that.

With reference to the number of live births associated with midtrimester abortions, the hospitals where I work have stopped midtrimester abortions. This is because they were associated with the very high maternal morbidity and two mortalities in less than 2 years.

One physician committed suicide after his patient died during such an abortion. They thus lost three people and two babies to mid-trimester abortions. They do not do any more in those hospitals.

Dr. **Ryan**. I really cannot comment on that.

I personally have not had that experience. The preferred method of late first-trimester or early mid-trimester abortions today is dilatation and curettage of the uterus. That does not produce live-born babies.

That is one of the problems. Many times testimony is built upon experiences which are no longer truly representative of current practice.

In those kinds of instances, our technology is changing very quickly. I do not think it should be a problem today.

My personal belief—and I think this is quite consistent with the ethics of most physicians—is that when presented with a live-born, very premature baby, we call the pediatricians from the newborn center and they care for that child.

That child is really taken away from us. We are not the persons who make that determination.

I think you will find most pediatricians will make every effort, within reason, to support that child's opportunity to live. This is not always successful though. I would point that out.

Mrs. **Beresford**. It seems to me that the fact that it is possible for such an occurrence to happen in a second-trimester abortion, even though rare, is an additional argument for having first-trimester services readily available, well-publicized, legal, and safe and to encourage people who need to make that choice to make it early in their pregnancy.

Mr. **Markman**. We often hear the argument that abortion should be a decision left to a woman and her doctor. One of our witnesses last week, Dr. Nathanson, testified that the doctor, in fact, is virtually never involved in the actual abortion decision. He noted that the decision on whether or not to undertake an abortion had already been made in at least 95 percent of the cases in which he was asked to perform an abortion. How does this compare with your own experiences?

Dr. **Kazazian**. My experience is in the very limited setting of the prenatal diagnostic clinic where all the women want to have their babies.

We participate very closely with the women and the couples in their decisions as to whether to terminate or not.

In other words, when we find an abnormal child by our testing, we bring the couple in for extensive counseling to tell them what the expected or extremes of the outcome may well be. In that situation, we have a large role in the decision.

The decision is left up to the parents, and many parents will decide not to terminate in certain situations of this kind while most will decide to terminate.

Dr. **Schmidt**. I think the best answer I can give you is to tell you what happened with policy in the American College regarding that very issue.

In 1968, the standards promoted by the college were to require medical consultation on every abortion. At that time, there was a clear and what I thought a very strong statement opposing elective abortion.

What it said was that the "College will not condone nor support the concept that an abortion be considered or performed for any unwanted pregnancy or as a means of population control.

In 1970, 2 years later, that policy was changed to include approval of elective abortion. At that time, the consultation requirement was altered to fit the change in policy. Consultation was then required only for the medically indicated abortion; for a nonmedical indicated abortion, that is, an elective abortion no consultation was required.

I think that pretty well indicates the status of the physician under current law. Once you have established the policy that this is a judgment only for an individual woman, then medical judgment is not a question.

I think we can offer support services. Some university clinics, for example, do very well in that regard.

By and large in the average commercial clinic—and I know this only from hearing it through patients—women simply do not see the doctor except for the specific procedure of abortion and whatever physical evaluation is done.

There is no conversation about indication.

Mr. **MARKMAN**. Dr. Williams.

Dr. **WILLIAMS**. The largest number of patients I see in the hospitals are not patients who initially went to an obstetrician. In most cases, they have been to surgeons or internists or family practitioners or osteopaths or somebody else.

Once they told whomever they went to that they were pregnant—or what was bothering them, and it was discovered they were pregnant—then they were either referred to one of the city clinics or to a physician who might be a specialist in obstetrics. A few family practitioners do deliver babies.

By the time the patient gets to me, she comes in saying she wants an abortion. The amount of consultation she has had has been relatively zero.

The average obstetrician and gynecologist who is worth his salt does not really have a whole lot of time to spend with the patient. Consultation at that point is relatively nil also. The patient is listened to a little bit and history is taken by a medical assistant or a nurse maybe. The doctor reviews it and moves on as quickly as he can.

To change the mind of a person who comes in asking for an abortion takes sometimes from one-half hour to 2 or 3 days and several visits. All the possible complications have to be gone through.

It takes a lot of time. Most doctors just do not have it.

I am afraid—and I cannot prove it—that the amount of real honest-to-goodness consultation people get who are having abortions is not adequate.

Dr. **RYAN**. What you are asking is what is the role of the physician in the interaction leading to the decision for abortion.

The role of physicians is truly to bring some of the special knowledge that they may have. The patient may be at risk. She may choose an abortion when that is not the wisest course for her.

We have had patients present themselves to us, for instance, who are seeking an abortion on the basis that they had an X-ray in early pregnancy. By counseling and by assuring them that indeed there is not a significant danger associated with that amount of radiation, we are able to assure the patient that they can proceed.

All of our decisions are not, in effect, trying to change the mind of the patient. Our interaction with the patient is really to try to bring information to bear, which we as physicians have.

It is also important to recognize the current concepts of the interaction of a patient and physician. We are not there to dictate to them a course of action that they must take. We are there to provide some special expertise which allows us to inform them of the options, the alternatives they have, the risks and benefits of these various options, and then have the patient act as a partner in that decision.

When we perform that role correctly, whether we are talking about the decision to have anesthesia at childbirth or a decision to have your uterus out for a nonfatal condition or whether the decision to have an abortion, we have indeed served as a trusted advisor to the patient and not a person dictating our own viewpoints to them.

Mrs. **Beresford**. Once again I concur with Dr. Ryan. I think physicians quite rightly help the patient to assess the risks and complications and her own physical suitability for an abortion procedure. Wisely, they do not attempt to impose their own particular views on their patients.

I would like to say in addition that I have read Dr. Nathanson's book. There are some things in it that are appalling, including the fact that after giving all of his arguments for why he changed his mind and now considers abortion to be unethical, he states in his book that he still performs abortions in his private practice for some of his patients. I find that appalling.

Mr. **Markman**. Senator Grassley, do you have any questions?

Senator **Grassley** [acting chairman]. No; I have no questions. I assume you have some more to ask?

Mr. **Markman**. Yes; I have a few more.

Senator **Grassley**. I think you should proceed.

Mr. **Markman**. Thank you, Senator. I just have two more questions.

A number of studies have been submitted to the subcommittee that suggest that women who have had abortions, particularly those who have had multiple abortions, have higher rates of difficulty in giving subsequent childbirth.

I would like to ask the members of the panel if they are familiar with any of these studies and whether or not they would have any comments on the general conclusions of these studies.

Mrs. Beresford, would you like to start?

Mrs. **Beresford**. Yes.

As I think most of you know, at the moment the research is not definitive. We have had some studies which would indicate that there is a possibility of low birth weight or difficulty in carrying to term for women who have had more than two abortions.

There have also been several studies recently that do not indicate that consequence.

It seems to me prudent to say that anything we do to the human body is likely to have some consequences. I would expect to find in due course that adequate research will indicate that there are some possible risks either to future childbearing or to other aspects of health care—just as there is from anything that we do that interferes with the finely tuned mechanism that is the human body.

What that says to me is that we must ask ourselves what are the risks and compared to what? The point has been made many times that there are considerable risks to those same women bearing full-term babies and in using some of the existing methods of contraception.

It is incumbent upon those of us in the helping professions to explain as best we are able to patients what the differing risks are from differing courses of action and to allow people to choose which of those risks they will run.

I would suggest that at the moment we need to be saying to people that the research is not yet definitive. We are studying. We need to study more, and we need to keep making those results available to people.

Dr. **Ryan**. I would agree that all the votes are not in. I would also point out that many of the purported ill effects are based upon experiences from the fifties and sixties.

As I said to you earlier, these are not always representative of current practices at all.

In those days, the uterus was dilated forcibly. Today we use many techniques to have very slow and gentle dilatation over a period of 12 to 24 hours.

The suction abortion rather than the sharp and rather rough D&C has changed this technique tremendously.

There has never to my knowledge been a substantiated risk to a woman who has one abortion. There just is not, under current circumstances, with current abortion techniques.

Those figures, I believe, are largely based upon procedures which are no longer widely performed.

Second, in this country, we have no evidence that after one abortion, which constitutes the largest number of our patients, there is any risk to future childbearing.

Mr. **Markman**. Dr. Williams.

Dr. **Williams**. The number of people who undergo a second abortion—if they are under 25 years of age—is in the vicinity of 15 to 20 percent. The number of complications following one or two abortions which lead to the incompetent cervix problem is not very great, as the doctor indicated.

They changed from the original rough dilatation to the use of a combination of laminaria and dilatation. It has reduced that incidence.

The greater complication that follows abortion is one of sterility—inability to conceive rather than inability to retain the pregnancy.

That is associated with infection and with too vigorous a curettage procedure in the first place.

Dr. **Schmidt**. I do not know that I have anything significant to add. I agree essentially with what Dr. Williams and Dr. Ryan have said.

The reports on this subject have come largely from Europe. Their techniques are not our techniques.

I would agree with Dr. Ryan that there is probably less likelihood. I would agree also that it is a problem both of infertility and incompetent cervix—that is, an increased pregnancy loss rate.

There have been many reports of increases in women who have had abortions, as opposed to women who have not.

I would agree that that number is probably diminishing.

Dr. **Kazazian**. I also have very little to add except an anecdotal comment.

We have had a small number of women, and we know of more, who have had more than one termination for a genetic disorder. They have not had difficulty getting pregnant again, and they have not had difficulty carrying those babies to term.

I think if there is an effect, it must be a relatively small one—statistically.

Mr. **Markman**. Let me ask one other question for the entire panel.

This has to do with eugenic abortions or abortions for purposes of combating disease or deformity or defect in the child.

How advanced is our technology today? Can doctors conclude with certainty that a fetus will possess some deformity or disease or that they will be one sex or another? Or can they only conclude that there will be a probability of such a result?

What are the odds we are dealing with? How conclusive can we be in our determinations before childbirth that a child will suffer from some kind of disease or defect?

Mrs. **Beresford**. I will pass that question since I think it is a technical question and physicians should respond.

Dr. **Ryan**. We can be quite certain. The chromosomal abnormalities that are identifiable is not a percentage basis. The only percentage is what percentage of the high risk patients will actually have them.

The identification of these abnormalities has reached a stage that one could be almost absolutely certain. I say almost, because I am not a geneticist and I am not actually in the laboratories and familiar with what possibilities could go wrong in a laboratory process. I am sure that will be spoken to.

Once that diagnosis is given to us, we proceed with the absolute belief that that is a diagnosis and is not just a chance.

Dr. **Williams**. Amniocentesis is sometimes difficult to perform. Occasionally, the placenta is implanted on the anterior surface of the uterus. Occasionally, there is such a small amount of fluid that no matter how hard you try, you cannot get anything.

The procedure itself occasionally causes an abortion.

Once the fluid is obtained, I am not certain how long it takes the cells to grow. At the hospitals where I work, it is about 3 weeks before I get a report back. Dr. Kazazian can probably tell us how long it takes them to actually do the test.

You cannot get the fluid at all before about the 16th week.

If you have a baby of 20 weeks' gestation, it can live.

When you abort a 20-week baby, as he said they did, you are really killing a baby that you do not have to.

If it takes 3 weeks to get the reports back to me and I wait more than the 16th—or due to my procedure, the 18th week—then, of course, it is useless anyway from my point of view.

I would rather see the baby born and take care of it as best we can. If it is going to die, it will die. If it is not going to die, somebody will be happy with it for a while.

Dr. SCHMIDT. It may be important to distinguish what we are talking about in prenatal diagnosis. If we are talking about genetic studies, I would agree largely with Dr. Ryan that it is almost 100 percent.

Geneticists are very good at identifying chromosomal abnormalities, although you do have to remember that what they are really doing is cutting out a rather shadowy picture of each chromosome and working out a puzzle.

I am sure we will hear more about that, and I hope we do.

It still requires a great deal of skill, and there is an element of human error.

I would separate that from other means of prenatal diagnosis such as alpha-fetoprotein levels in amniotic fluid as an identification of neural tube defect.

That is a chemical test that is subject to considerably more error even when done properly—both from the obstetrical standpoint in timing and technique, and from a laboratory standpoint in observing proper parameters. It has a reasonably high level of accuracy. However, such chemical tests are significantly less accurate than genetic analysis.

Dr. KAZAZIAN. We finally have a question I hope I can answer. [Laughter.]

From the point of view of chromosome abnormalities, the accuracy is extremely high. There were a few errors made in the early seventies which might have put the accuracy at perhaps 99 percent.

I would say in the major centers that are doing these kinds of procedures now, it must be close to 999 out of 1,000 for chromosome abnormalities.

There are shades of gray we run into every now and then where we are not absolutely sure a particular kind of chromosome abnormality is going to lead to a disease in the fetus.

In other words, where it is not a Down syndrome and it is some other kind of abnormality, in those cases usually we can make the distinctions by looking at the parents' chromosomes, finding the same kinds of minor abnormalities in a parent, and then counseling the couple that we think the baby will be like them. If that is the case, they essentially keep the baby and do not terminate it. [Laughter.]

Even though they may not like themselves sometimes.

As far as neural tube defects, as was brought out, it is true that our accuracy there is not 99.9 percent. It is probably closer to 95 percent.

There are new procedures and new kinds of chemical tests that have just come out in the last year or so that will presumably raise that up to 99 percent. The accuracy of detection of neural tube defects I am talking about there.

The accuracy of detection for the various kinds of inborn errors of metabolism, like Tay-Sachs disease or other biochemical disorders, is essentially 100 percent. We only look for those disorders when we know there is a risk in the particular couple.

Where the couple has been identified, either because they have had a previous child with a disease or they have been identified in a screening test like for Tay-Sachs disease, in those situations the accuracy is essentially 100 percent.

The number of errors there should be, again, very, very low.

Let me see if there are any things we try to do where our accuracy may not be as good as we would like it to be.

[Pause.]

Dr. **Kazazian**. The kinds of studies where a previous child has had some kind of congenital malformation—where we are not looking for chromosome abnormality and we are not looking for inborn error of metabolism, but we are looking for a particular kind of congenital malformation and we think we may be able to see it on ultrasound examination radiologically—there the chance of error is probably, again, on the order of 10 percent or more.

We take that into account when we counsel the couple.

Dr. **Williams**. How long does it take you to do the test?

Dr. **Kazazian**. The test, amniocentesis, is done at 16 weeks and it takes 3 to 4 weeks to get the results.

I would differ with my colleague that a 20-week fetus is viable.

Mr. **Markman**. Thank you.

Dr. **Ryan**. Mr. Markman, may I make a comment?

Mr. **Markman**. Yes.

Dr. **Ryan**. I cannot let the hearing conclude without responding to Dr. Williams' slur on his professional colleagues.

He has indicated that abortion is a $500 million bonanza. As he says: "Our colleagues do not wish to give up because of the money involved."

I would point out to Dr. Williams that many of our colleagues are like myself. I am not doing abortions, and I am not receiving any money for abortions. However, I am very sincere in my beliefs.

To slur the profession like this is equivalent to having me make the statement to Dr. Williams that indeed since you do not do abortions, sir, and you deliver babies, and babies are paying much higher these days than abortions, that you hold your position in order to line your own pockets.

I would not impugn your integrity that way, sir, because I have no more reason to do so than you have to impugn your colleagues who believe differently.

Thank you.

Mr. **Markman**. I have one more question.

Dr. Ryan, this is directed to you, but I would appreciate any other thoughts from any of the other panelists.

Your thoughts on this subject have been widely disseminated in Ann Landers' syndicated column.

In one of her recent syndicated columns, you spoke of the case of a woman who had a tubal pregnancy. You were quoted as saying that some legislators believe that these few cells in her tube have all the rights that her entire family has and that we must jeopardize that woman's life in order to protect that.

Senator Hatch has spoken to a number of people inside and outside Congress about this. Frankly, he has spoken to no one who would suggest that in those kinds of circumstances, any of the amendments that have been proposed or any of the bills we have seen introduced here in Congress would not protect the mother's right to life and would not grant that a superior status.

Indeed, I think some would question whether or not that would even constitute an abortion to terminate that kind of pregnancy.

We would like to ask you to respond on that issue.

Dr. **RYAN**. I think within reason, Mr. Markman, anything that could happen under a proposed constitutional amendment must be considered.

If these considerations have potential impact upon our speciality and our profession, we must discuss these in order to present a responsible debate before the American public as to the potential ramifications of this type of legislation.

I think that in the instance given I have addressed that again today.

The question arises of when would we be safe intervening in that type of condition?

I think that is a legitimate question.

As you have indicated, the Senator does not know the answer. I do not know the answer either, but I am concerned that it is possible that this kind of detail that would be omitted from legislation of this importance.

Mr. **MARKMAN**. Thank you.

[Material follows:]

[From Ob. Gyn. News, Oct. 15, 1981]

SUCCESSFUL OPERATIONS BOOST CONCEPT OF FETUS AS PATIENT

(By Bruce Jancin)

SAN FRANCISCO.—The notion that the maternal womb need not be a barrier to the diagnosis and treatment of fetal disease has received a boost from the successful surgical correction of a congenital urethral blockage in a fetal twin, Dr. Mitchell S. Golbus said in an interview with Ob. Gyn. News.

"The philosophical implication of what we've done is that it points to the fetus as a patient," said Dr. Golbus, a perinatologist who is part of a University of California, San Francisco, team that inserted a catheter through a woman's abdomen into the bladder of her male fetus, relieving a potentially life-threatening urinary blockage 2 weeks before she gave birth to the boy and his normal sister.

The California team is one of four groups of physicians who have announced or published accounts of fetal surgery in the past year.

Last month, Drs. Fay Redwine and Robert Petres at the Medical College of Virginia, Richmond, drained the right lung of a fetus whose mother had gone into labor.

Both lungs had collapsed from the pressure of fluid in the fetus' thorax, and the physicians feared that the infant would sustain brain damage if they waited to correct the problem after birth. They had drained the lung 6 days earlier, but it had collapsed again.

This time, they left the catheter in to relieve the pressure, and it slid out of the mother's abdomen spontaneously during labor, after 175 ml of fluid had been drained. The drained lung has since remained expanded, Dr. Redwine said in a telephone interview.

Five months earlier, the two physicians had drained a cyst caused by fetal kidney blockage. The cyst had filled and expanded the fetus' abdomen, leading to polyhydramnios and triggering labor at 28 weeks.

The cyst was drained of 200 ml of fluid, the mother was kept on ritodrine for 2 days, and the fetal fluid distribution "to our amazement took care of itself," Dr. Redwine said.

In June, a group of surgeons at the University of Colorado School of Medicine, Denver, implanted a shunt in the left ventricle of a 24-week fetus with hydrocephalus.

Previously, Drs. Jason C. Birnholz and Frederic D. Frigoletto, of Havard Medical School, Boston, treated a hydrocephalic fetus with a series of six cephalocenteses between 25 and 32 weeks.

Several months ago, Dr. Golbus was involved in another ground-breaking fetal intervention in which biotin deficiency was diagnosed and treated in utero by prescribing large doses of the vitamin to the pregnant woman (see OB. GYN. NEWS July 15, 1981, page 3).

In his latest case, the fetal urethral blockage was first detected after Rosa Skinner, 41, of San Mateo, Calif., underwent amninocentesis and an ultrasound examination that showed she was bearing twins and that the male was developing ascites.

Repeat scans revealed that the problem was due to a urethral obstruction that was causing an amniotic fluid deficit and backup of urine. This was a cause of considerable concern because the continued backup or urine results in irreversible lung and kidney damage, said Dr. Golbus, who added that he sees several cases of the disorder each year.

Dr. Golbus and his associates Drs. Roy A. Filly, a radiologist, and Michael R. Harrison, a pediatric surgeon, decided to try to correct the blockage. They waited until the 30th week of gestation, however, because they wanted the normal female fetus to have a good chance of survival in the event that they accidently triggered permature labor. Mr. Skinner was given ritodrine to minimize this risk.

The first attempt wasn't totally successful because the catheter wouldn't stay in place, but 2 weeks later a second attempt succeeded in loging a differently designed catheter so as to drain urine from the bladder into the amniotic sac.

The twins, Michael and Mary, were delivered vaginally 2 weeks later, and both appear normal except for Michael's urinary tract abnormality, which will be permanently corrected at a later date.

Dr. Golbus and his associates had considerable experience in fetal manipulation prior to attempting this procedure, including fetoscopy, intrauterine transfusions, and practice on fetal lambs and monkeys.

He emphasized that others who attempt the operation should be similarly prepared.

"Otherwise we're going to have disasters, and I'm afraid that's what's happening. People have called, have gotten instructions, and I know of at least one instance where they've lost the pregnancy. You need research experience in this area," Dr. Golbus pointed out.

Dr. Redwine agreed, noting that conditions such as a fetal collapsed lung are too rare for the practicing physician to have much of an opportunity to treat them.

Although she and Dr. Petres have not done work on animals, they perform approximately 6,000 ultrasound examinations a year. Dr. Redwine estimated that she has done about 1,600 amniocenteses and numerous intrauterine transfusions.

"I would say that we were in the right place with the right expertise at the right time," Dr. Redwine said.

Senator GRASSLEY. Thank you all for your fine testimony.

I, personally, came to this because this aspect of the 3 days of hearings was one part that I have not given as much thought to as the aspects of the other two hearings.

I want to thank you for your testimony. Even though I did not hear your papers, I will have a chance to read those.

This hearing is completed, and the hearing is recessed.

[Whereupon, at 11:15 a.m., the subcommittee recessed, to reconvene subject to call of the Chair.]

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

WEDNESDAY, NOVEMBER 4, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:30 a.m., in room 6226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Stephen Markman, general counsel; Tom Parry, chief counsel; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. Today marks the fourth in a series of hearings on proposed amendments to the Constitution relating to abortion. During this hearing we will focus upon some of the social implications of the abortion right created by the Supreme Court in its *Roe* v. *Wade* decision.

While we will not be asking our witnesses today to comment upon any specific proposal that is being considered by this committee, I nevertheless would like to defend my own proposal—Senate Joint Resolution 110—from allegations that have been repeatedly made in full-page ads in the New York Times by my friends at Planned Parenthood. Let me quote from them: "Last week, United States Senate hearings were held on a constitutional amendment that could make this nightmare a reality."

The nightmare that they are apparently referring to is a full-page picture of a woman behind bars, presumably for having had an abortion. The ad goes on to say, "If this abortion becomes law, all abortions will be outlawed. Overnight."

Well, I am not quite sure what amendment they are talking about, since none of them before this committee would make a woman liable for murder for having an abortion—none of them, even the most absolute amendment.

What most of the proposed amendments would do simply is to require the States to adopt some sanctions against abortions under certain circumstances. Most likely the most serious sanctions would be imposed against the individual performing the abortion, not the one undergoing it.

If the experience of the States prior to *Roe* v. *Wade* is instructive at all—and I believe that it is—even the sanction against the doctor would fall far short of murder. No State, of which I am aware, penalized even the doctor who performed the abortion as a murderer.

Let me further emphasize, however, that Senate Joint Resolution 110 is significantly different from even these amendments. Much as I personally would like to see it, all abortions will not be outlawed overnight under this proposal. Indeed, nothing at all would happen overnight, other than the fact that the elected representatives of the people would once again possess the authority to take some kind of action with respect to abortion. As a result of the *Roe* decision, there is virtually no authority in the legislatures in this country today to act on the abortion issue.

Could they totally ban abortions? Yes, they could do this. Could they refuse to do anything at all? Yes, they could also do this. Somewhere in between, which, of course, is where most of the debate occurs in the legislative process, they could choose to limit late abortions, they could choose to require parental consent for minors, they could choose to treat abortions as infractions, or they could choose to pass statutes requiring the protection of live-born fetuses.

Given the present national mood on this issue, which is probably opposed to banning all abortions and equally opposed to the present abortion on demand—I think the two extremes in this issue—I suspect that initial legislative action would take one of these forms or another.

We will be hearing from several polling experts later during the course of these hearings to try to get some perspective on what precisely the people in this country think. I think, in fact, those perspectives will be amazing to everybody concerned. We have had polls that have been stacked one way or the other through the years rather than trying to really find out what the American people feel about it.

I, personally, believe that a vast majority of the American people feel there should be some restraint on abortion, whether it would go to the extreme of no abortions at all or whether it would go to the other extreme of abortion on demand. I think it would be somewhere in between.

I would imagine that this perspective, whatever it is, would be fairly accurately reflected through their elected representatives, which would be a pleasant change from having all of the law in this country determined by seven unelected judges.

In short, under Senate Joint Resolution 110, nothing at all would happen overnight except the re-enfranchisement of the American people on the issue of abortion, through elected representatives, to go any way they want to go on it and to get the heat out of the debate and get some light into it, giving both sides—assuming there are only two side—an equal opportunity to present their cases.

I, certainly, as a person who is opposed to abortion on demand, believe that our side can make a very persuasive case that there should be restraints on abortion. I have to believe that the other side is willing to meet at public debate on that issue and certainly through elected representatives; it is the democratic way of doing it.

I am looking forward today to the testimony of these outstanding witnesses that we are calling, and we appreciate all of you for being with us this morning.

We will begin this morning by calling upon Congressman Green, a Representative from the State of New York—New York City, to be more accurate.

We are very happy to have you with us, Bill, and look forward to hearing what you have to say.

STATEMENT OF HON. BILL GREEN, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. **Green**. Thank you, Mr. Chairman.

I am pleased to appear today before the subcommittee to offer my views on Senate Joint Resolution 110 and the other amendments pending before your committee. I feel that they pose a threat to civil liberties now guaranteed by our Constitution and determined to exist by the *Roe* v. *Wade* Supreme Court decision in 1973.

I feel it is undesirable to overturn the *Roe* v. *Wade* decision because I feel that it was a right one. I acknowledge that there are many who, for religious or moral reasons, feel that abortion is wrong and find it morally objectionable. I know that they hold their views deeply and for reasons of which I am well aware.

However, I do not perceive that this is an issue on which there is any consensus in this Nation, and I realize too that there appear to be just as many who find abortion morally acceptable—indeed, polls show that there are more—as those who find it unacceptable.

As a representative of a large number of Americans, I do not feel it is proper for me to make the important and personal decision as to whether or not abortion is morally acceptable by amending the Constitution to permit outlawing it.

The Constitution should contain basic provisions for the Government of the Nation on which there is broad national agreement. This proposed amendment plainly fails that test. In light of that failure, the decision as to whether or not to have an abortion should, within the limits of *Roe* v. *Wade*, continue to be an issue for individual moral choice.

Again, I want to thank you very much, Senator, for giving me the opportunity to appear.

Senator **Hatch**. Thank you, Bill. We appreciate your appearing, and we appreciate your viewpoint on this issue.

The only question I care to ask is this: I personally would like to see some polls that do not try to stack matters one way or the other, so we can really determine just what the American people do believe. I think we will find that they do not believe in a total prohibition on abortion; I also think we will also find that they do not believe in total abortion on demand.

Mr. **Green**. I certainly agree with you that polling is a difficult art, and it is of course possible, by how you ask the questions, to get the results you want.

Again, as I have reviewed the polls over the years, they seem to show fairly general consensus in favor of a situation much freer than existed before the *Roe* v. *Wade* case.

I would simply say that I do not think, on the basis of those polls, that there is any consensus in this country on one solution or another. It seems to me that, under those circumstances, tampering with the Constitution is not an appropriate way to go.

Senator HATCH. Keep in mind that what Senate Joint Resolution 110 basically does, is to give concurrent jurisdiction to the Congress and the States to make final determinations on this issue; it gives it to the elected representatives in Congress and the State legislatures.

Nevertheless, it is an amendment that I think you might want to look at, because it should appeal to anybody who believes in any restraint on abortion; it might be a minimal restraint, but at least something. The only people I do not think it would appeal to, would be those who believe that the present policy of abortion on demand is appropriate.

Mr. GREEN. Again, I did acknowledge in my testimony that the amendment does not purport to give a solution or impose a single solution on everyone, but it simply permits others to act.

Again, I guess I get down to the fundamental point that it seems to me that the purpose of a constitutional amendment is to put beyond popular passions those principles of governance on which there is general agreement in the country, and at this point I do not see the abortion question meeting that test.

Senator HATCH. The only way that amendment could pass is by two-thirds of both Houses of Congress and by ratification of three-quarters of the States. I suspect that if that occurred we would have a pretty good consensus in this country on that point. It would be achieved through a genuine constitutional process.

Mr. GREEN. I certainly prefer the straightforward constitutional process to some of the efforts in both of our bodies to try to proceed in a nonconstitutional way to pervert what I view as a constitutional decision of the Supreme Court.

Senator HATCH. Thank you so much. We have enjoyed having you here.

Mr. GREEN. Thank you.

Senator HATCH. Our second witness will be Representative Victor Fazio of California.

We are so happy to have you here, Vic, and will enjoy hearing your testimony at this time.

STATEMENT OF HON. VICTOR FAZIO, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. FAZIO. Thank you very much, Senator Hatch.

I appreciate the opportunity to appear before you today, but I must indicate that I was not aware until I got off the plane last night that I would be permitted to be here this morning, so I am not going to be able to submit for the record at this moment the remarks that I would like to leave.

Senator HATCH. We will keep the record open for any remarks you would care to make in writing.

Mr. FAZIO. I appreciate that very much. I would like to work over them very carefully and submit them to the subcommittee at a later time.

My remarks will therefore be brief and extemporaneous, but I simply would like to say that I feel very strongly that the effort to amend the Constitution in any of the ways discussed here this morning already between you and Congressman Green would be inappropriate. I feel very strongly that the efforts, particularly those of Senator Garn and Senator Helms, are really interfering in a decision which I believe to be one that the individual should make.

I understand how deeply felt the differences of opinion are on this very subject, but I believe that the Supreme Court's 1973 decision really does reflect the very difficult fact that we all must face, and that is that because this is a very divisive issue morally, religiously, and scientifically, the best place for the decision to be made is in the hearts and minds of the individuals.

I would also extend that reasoning to offer my opposition to your proposal, though I think you make in good faith, in an effort frankly to get around some of the impasses that people, who they feel very deeply about this issue, have met.

I feel that we would be returning to an era in our history which I think we look back on with a great deal of dissatisfaction. This is such a fundamental issue—the rights of the individual, the rights involved in this issue generally—that we cannot really allow a great variety of statutes at the State and local level to take precedence over fundamental constitutional rights.

I think already in response to the Hyde amendment we see a great divergence of approaches at the State level. It is my understanding, for example, that California and New York are providing 70 percent of all of those abortions which are rendered with public assistance for those on welfare.

We see, I think, the seeds of a kind of unequal access and varied interpretation of the law that might result from a wide diversity of positions which would be well within the Constitution, should your constitutional amendment be passed by the Congress and adopted by the States.

I think we should not expose individuals to the accident of birth, history, or residency—the kinds of differences which, in a very modern and mobile society, are constantly going to be exposing individuals to unequal application of the law, I think.

I would be very strong in my belief that whatever the decision of the Congress is, it ought to be one that applies in all 50 States across the country. We all ought to be operating equally under the law, and we all ought to understand how the law will affect us—all of those who are concerned with the way in which the law would be interpreted in this regard.

I will not go on any longer. I do have, as I indicated earlier, the intention to submit much more lengthy remarks at a later time.

Senator HATCH. Thank you. We will keep the record open for any written remarks you would care to submit. We will place them in the record, without objection.

[The prepared statement of Representative Fazio follows:]

PREPARED STATEMENT OF REPRESENTATIVE VICTOR FAZIO

Since January, 1973, when the Supreme Court issued its historic decision in Roe v. Wade, the subject of abortion has been a constant source of controversy. The issue has sparked a national debate between those who support a woman's right to choose to have an abortion, and those who believe an unborn fetus to be a full human person.

The emotional debate over this essentially religious issue has taken place in many forums, including Congress. As representatives of the American public, we have been forced to deal with this controversy in a number of ways.

The primary Congressional response to the Supreme Court decision until now has been through riders on appropriations bills, generally referred to as Hyde Amendments after my colleague from Illinois. These amendments have limited our prohibited funding of abortions for poor women, as well as military personnel and their dependents, Peace Corps volunteers, and federal employees under their health insurance plans.

I have consistently spoken and voted against these amendments, as I believe it is morally wrong to single out a class of women and deny them access to safe abortion. Nevertheless, my colleagues have seen fit to approve these restrictions and the Supreme Court, by a vote of 5 - 4 in 1980, ruled that such restrictions are not unconstitutional. Still, I believe they are poor public policy.

We have seen amendments added to other legislative programs such as family planning and the Legal Services Corporation to limit counselling, referral, and legal help in obtaining abortions. At every stage of the legislative process, restrictive amendments have been added to legislation to deny sound medical care to pregnant women.

Earlier in this session, we saw hearings on a "human life bill" (S. J. Res. 158) to declare that human life exists from conception. The Senate Judiciary Subcommittee on the Separation of Powers made this declaration by a vote of 3 - 2. While the bill was an attempt to overturn the Supreme Court decision by simple legislative majority, and is almost certainly unconstitutional, it serves to illustrate the underlying belief of the anti-abortion movement - that a fetus is a person and abortion is murder.

NO CONSENSUS ON PERSONHOOD

During the course of testimony on the bill, it became clear to all that no consensus exists on this belief. While there was little disagreement that conception is in fact the biological beginning of life, there was widespread disagreement over the personhood of the fetus. While the initial purpose of the hearings was to find that "scientific evidence indicates a likelihood that actual human life exists from conception," it became clear that this could not be done. As Dr. Leon Rosenberg of the Yale Medical School pointed out, "(S)cience, per se, doesn't deal with the complex quality called 'humanness' any more than it does with such equally complex concepts of love, faith, or trust." Further, he stated, "the notion embodied in the phrase 'actual human life' is not a scientific one, but rather a religious, metaphysical one."

Despite the widespread disagreement over the personhood of the fetus, we are now discussing placing this definition of personhood into this country's most sacred legal document - the Constitution. It seems to me that if theologians have run up against their limits, and if science has to recognize its limits, it is only proper for legislators to do the same.

ATTEMPTS TO IMPOSE A VIEW

There are three main proposals for a constitutional amendment before this subcommittee. Two of these have been introduced in previous sessions: the Garn Amendment (S. J. Res. 17), which would prohibit abortion but make an exception to prevent the death of a woman, and the Helms amendment (S. J. Res. 19), which contains no such exception. The intent of these amendments is clear - to ban abortion as murder and to protect all fetal life.

The third amendment, Mr. Chairman, your amendment, is less direct. Called the "Human Life Federalism Amendment," it would establish in the Constitution the authority for Congress and the states to act legislatively on abortion. I think we all recognize that it is your personal hope that the states will enact virtually absolute prohibitions on abortions, or that the Congress will act to impose such prohibitions on those states which fail. However, I think we also must all recognize that your hope differs with the probable effects of this proposal. It is possible that abortions will be restricted absolutely, and we must consider your proposal in that light. It is more likely, however, that it will simply become far more difficult to obtain legal abortions for many and the number of legal abortions will be greatly reduced.

Recognizing that your proposal is an honest attempt at a compromise between the status quo and the absoluteness of the human life bill and the Helms and Garn amendments, I must still oppose it. My reasons are, first, that I think governmental restriction on a individual's choice is a mistake and this amendment would result in considerable reductions in choice at the least. Secondly, I believe that your proposal encounters the same grave difficulties with the Constitution that the other three do, and in fact creates new ones.

IT SHOULD NOT BE GOVERNMENT'S CHOICE

The rationale for all governmental restrictions of abortion is based upon the faulty premise that the fetus is a person, entitled to the same rights as American citizens, "born or naturalized in the United States." While the organic beginning of human life is certainly something which should be valued, I strongly disagree with those who believe a fertilized egg is the same as someone's wife or daughter. In banning abortion, we would in some cases actually be giving the fetus rights superior to those of the woman forced to continue her pregnancy. By insisting on developing the unknown potential of a fetus, while at the same time denying a woman the right to make a choice about her own life and her potential, we in effect diminish her personhood.

This view of the fetus as a person is entirely religious and philosophical in nature. Even among major American religions there is little agreement over this point. Yet, under your proposal those of us in Congress or state legislatures would seek to decide this complex question through votes, and then enact one view into law.

Beyond the obvious negative implications of enacting a particular theological doctrine about fetal life into law, I am concerned about the great pain and suffering which would result from the passage of a constitutional amendment. I am concerned for the countless lives that would be devastated and the families that would be torn apart if legal abortion ceased to exist, or was severely restricted, in this country. S. J. Res. 110 was written to avoid all the concerns for the hard cases, by allowing elected officials to make limited exceptions where abortion would be legal. Yet, there are so many hard cases associated with pregnancy and childbearing that we in Congress could not even begin to consider them all. Even by making exceptions - allowing abortion in certain circumstances - as we have done on appropriations bills - we would still be responsible for tremendous suffering on the part of millions of women who would be denied abortions. What do we tell them? Do we say, "Abortion is wrong, and therefore you must suffer?" Do we say, "The potential life in your womb is more important than you and the lives of your family?"

There are people opposed to abortion who see problem pregnancies as somehow "character building" or "improving the quality of family life." Perhaps there are men and women in this country who can endure these tragic situations and grow as a result.

But I submit that there are many for whom they are destructive. A great deal of testimony was presented at the hearings on the human life bill which points to this fact. A constitutional amendment banning or limiting abortion would not change this. What it would do in fact would be to increase the pain and suffering which families must endure. Rather than being "pro-family" as some individuals and groups would contend, these proposals are in fact anti-family, inasmuch as they substitute the moral judgement of the federal government for that of the individuals involved. By eliminating options that the family may consider to be moral alternatives, they increase the sense of helplessness so many of our nation's families are experiencing today.

In sum, it is a mistake to impose governmental restrictions on an individual's ability to choose abortions. It is a mistake because Government does not know what it is doing. It does not know religiously, it does not know scientifically, and it should not therefore presume to know legally. Further, it does not know what the effects of its actions will be. The back alley abortions, the migrations to other states (or countries), distorted budgetary impacts, the implicit favoritism of rich over poor, the harmful impact on families and lives, and other problems have all been well articulated. One could also envision a case where prevention of one abortion could lead to future decisions to have no children or fewer children. There will be fewer lives ultimately in many cases where abortions are prohibited.

Those who demand a clear national standard for moral purposes (who must find their position severely compromised by the "federalist" approach) have an obligation to look beyond their own moral satisfaction. They must look for the result--versus the intent--of what they are doing, and they must take responsibility for those results. The results will not be as pure as their positions and in fact may be incompatible with their goals. In that light also it is presumptuous and a clear act against individual rights for them to seek to deploy governmental power to impose their views.

CONSTITUTION DIFFICULTIES

The federalism approach does not avoid the basic Constitutional difficulties raised by the other approaches and in fact creates at least two new ones.

One new difficulty is the federalistic approach says the issue of abortion is a constitutional one which should be politically resolved. This statement is self-contradictory. If it is a constitutional matter is should be beyond politics. If it is a political matter, it should not receive special treatment in the Constitution. In my view, it is a personal matter which should remain protected from the political arena by the Constitution's general limits on Government's power over the Governed.

For the past eight years, the law of the land has recognized a woman's right to choose abortion in the first three months of her pregnancy without governmental interference. Eight million women have obtained abortions and 50 million more live with the knowledge that, should they ever find themselves in what seems to be an impossible situation with an unplanned or dangerous pregnancy, they too would be able to make the choice about abortion for themselves.

S. J. Res. 110 would change much if not all of that. The amendment would make a woman's ability to obtain abortion subject to the political winds prevailing at a moment in a place. The winds would change with every election, with every calendar year, with every move to a new state.

The second way in which I feel S. J. Res. 110 introduces new constitutional complexities is simpy that one cannot have the Constitution shelter a right in one state while the Constitution authorizes another state to abridge the same right. If this is a Constitutional matter, it must apply equally to all citizens under the jurisdiction of our legal system.

DANGEROUS TRENDS

I believe that S. J. Res. 110 leads this country and its law into a very dangerous direction. We must be wary of any course of action which provides a political answer to what both sides agree is a question of fundamental rights. The Constitution is designed to protect the rights of the individual against action of the state. Constitutional amendments, with the exception of the 18th which was later repealed, have all been for the purpose of expanding these rights. If one right, such as privacy, is put up for grabs so that it can be denied by only 51 Senators and 218 Members of the House, one must wonder what will follow. This amendment could become a precedent by which legislative bodies slowly but surely chip away at our guarantees of liberty. What inroads might be made on the right to free speech or freedom of religion?

Such fundamental rights are intended to be beyond the scope of government intrusion. The principle embodied by S. J. Res. 110 nevertheless could lead us to a system of laws where no right or principle is beyond the scope of a Congressional majority. The founding fathers of our nation most certainly did not intend for this to occur.

The beauty and wisdom of our constitution is that it protects the individual rights and liberties against the imposition of the will of even the majority in areas where government is simply not necessary, or competent. S. J. Res. 110 unfortunately goes the opposite direction of all other amendments to the constitution, which were to expand the domain of the individual. Mr. Chairman, the greatest thing about this United States, its constitution, and its heritage, is a principle that is generally conceded to be conservative: the primacy of the individual. Government's capacity to interfere with the individual has been enormously increased by technology and other developments in the last year of this Republic. I find it enormously disturbing that those in the Congress who are generally regarded as the keepers of the conservative flame in our national ethic are imposing something which is only belief, something which will be forever subjective, and something the consequences of which are not understood upon individuals.

Thank You.

Senator HATCH. Thank you. We know how busy you are, so we will not keep you. Thank you for coming.

Mr. FAZIO. Thank you.

Senator HATCH. Our next witness will be Dr. William R. Stayton, assistant professor of psychiatry and human behavior at the Thomas Jefferson University Medical College in Philadelphia. He has previously taught also at the medical school at the University of Pennsylvania.

Dr. Stayton, we are delighted to have you with us, and we will look forward to hearing your testimony at this time.

STATEMENT OF DR. WILLIAM R. STAYTON, ASSISTANT PROFESSOR OF PSYCHIATRY AND HUMAN BEHAVIOR, THOMAS JEFFERSON UNIVERSITY MEDICAL COLLEGE, PHILADELPHIA

Dr. STAYTON. Thank you very much.

I have a chart I would like to use.

Senator HATCH. I will come down to the witness table. Without objection, the chart will be inserted in the record.

[Material follows:]

EXAMPLES OF TWO VALUE CONSTRUCTS

VALUE CONSIDERATIONS	MODEL A	MODEL B
Focus of Concern	The Act Itself	Motives and Consequences of the Act
Location of Authority	External	Internal
Moral Responsibility	Detached / aloof	All Involved
Purpose	Maintain Tradition	Promote growth as an Individual, Couple, Community
Reward	Divine Favor	Meaningful Life lived in the Here and Now

— Adapted from:
Lester Kirkendall, Ph.D.
Professor Emeritus
Univ. of Oregon

Dr. STAYTON. I am sure that I probably know much more about you and members of the subcommittee than you know about me, so I would like to introduce myself to you.

For 12 years I served as pastor to churches in the Commonwealth of Massachusetts, and then for 4 years I was a chaplain at the New England Baptist Hospital in Boston. For the past 10 years I have served on the medical faculties of the University of Pennsylvania and now Thomas Jefferson University Medical College.

I mention this because, in my 26 years of working with people as pastor, as teacher, as professor, as trainer, and as therapist, I have gotten to know that we have a wide variety of people who think differently, and I think my constituency probably has been much the same as your own.

My concern, as I am sure yours is, is to be able to hear and listen and know the people that we are serving. It seems to me that if we are going to understand the social impact on the family, which is the subject I am addressing today, we need to look at the family through the way in which they view their own value systems, because that view, I believe, is one that reveals the heart of our family life and of our moral concept.

A fact that I have found in working with people over these years is that people come from different moral points of view. As a psychotherapist, as a pastor, and as a teacher, it has been helpful for me to begin to understand these, to appreciate them, and to know that to the people that hold them they are sacred.

Most of the people I have worked with are very religious, sensitive, concerned, and responsible people. Therefore, I would like to present two different types of value constructs held by many people I work with.

It seems to me that when we take a look at a value—and today the value happens to be the choice regarding abortion—the first area we are concerned about is the focus of concern. [See value chart.]

Traditionally, the focus of concern of our values has been on the act itself. Today our consideration is abortion, so we would say abortion itself is right or wrong, bad or good, sinful or redemptive, or whatever; but it is the act itself that is moral or immoral.

There are others whom we serve who say, "No, it is not the act itself but rather the motive and the consequences of the act; that is what spells out what is moral or immoral." So they become concerned about developing criteria—for sorting out what are the motives and the consequences of the act of abortion.

Another consideration that we look at when we are concerned with values is: "What is the location of authority for our values?" Traditionally, the location of authority has been external. We say, "God says," or, "The Bible says," or, "Our parents say," or, "The law says," but our authority has been external.

There are others in our population who say:

> No, we really have to begin to take a look at our values and develop our own internal sense of authority, because there are so many people across the board who are good, reliable people who are giving us various viewpoints. We then have to look at these viewpoints and sort out for ourselves what is meaningful to us and then make a decision based upon the best information that we have. That decision that is in our best interest, comes then from an internal sense of authority and we are responsible for it.

I daresay that, as you gather all the material that you are going to be hearing over the next weeks and months, you are going to have to sort through all of that material, look at it from your own value stance and from the value stance of your constituents, and finally make your own decision about this amendment.

The next area that we look at is where the moral responsibility for our values lies.

Traditionally, moral responsibility has been proclaimed from a detached and aloof position; it has been somebody who is in authority telling those who are not in authority that thus and such is right or wrong because such and such says so and, "I tell you if you do it you are morally irresponsible." The problem is that so many times this person or the people who are proclaiming this have never had to struggle with the issue in a way that others do.

Others in our society are saying:

> When it comes to moral responsibility we are all involved; we are as involved in the number of abortions that are performed as the person who is getting it; we are involved in the moral climate of our family; we are all involved in the moral climate of our community, of our Nation, and indeed I think we are beginning to see how involved we are in the moral climate of our world.

Next, what is the purpose of having a value?

Traditionally, the purpose has been to maintain tradition. If our tradition is that we believe that life begins at conception, then the purpose of our value is to maintain that tradition and to hold to that.

Others are saying:

> Why do we have values? Well, the purpose of our values is to promote growth. What is going to promote our well-being? What is going to help us to be better people, as an individual, as a couple, or as a family? That is why we have values—to help us to grow and be better people.

Sometimes traditions change or need to change, like in "Fiddler on the Roof," where the father struggles with the conflict between his dearly held traditional values and the changing values of his children. We feel his struggles when he is singing his song "Tradition."

Finally, what is the reward for holding a value?

Traditionally, the reward has been:

> God will love you. Don't have an abortion, because it is wrong and we have got authorities and some church authorities who say that it is wrong, and I tell you that if you do it you are morally irresponsible. We have got to maintain that tradition, or our country is going to go right down the tubes, and if we do maintain that tradition, God will love us.

Or our parents will love us if we do not believe in God, or our Congressman or somebody will love us if we maintain this tradition.

Others are saying that the reward for holding to a value is what makes a meaningful life here and now.

What I find, as I have been serving people over these years, is that many religious, sensitive, concerned people are saying this: This is what brings divine favor for them—that they find their life meaningful in the here and now. I bring this out because to these people, this is sacred [indicating].

Senator **Hatch**. You are referring to model A.

Dr. **Stayton**. And to these people, this is sacred [indicating].

Senator **Hatch**. Now you are referring to model B.

Dr. **Stayton**. That is right.

The problem so often is that the people in concept A believe that they are moral and that concept B is immoral, and the people in concept B believe that they are moral and that the other group is immoral.

It seems to me that we need to preserve the right that is within our Constitution to exist side by side, but we also have to appreciate where each person is coming from.

I would like to present just one case briefly out of the millions of cases that could be presented. It is a recent case that shows, I think, the struggle that many of our families have in making their decisions regarding this issue.

Last month I had a woman and her daughter come to me. The daughter, 17 years old, was pregnant. I had seen the mother and the father of this girl in marriage counseling about a year ago.

After diagnosing the husband—the girl's father—I sent him to a psychiatrist to have my diagnosis confirmed, and it was; he is a borderline psychotic. This means that anything traumatic can send him into a psychotic episode and that the prescription then is to keep his life as maintained as possible, because as long as he is without trauma he is able to function very well. He is a very responsible person in a very responsible position. They were very concerned that the knowledge of the pregnancy would affect him adversely.

This family is Roman Catholic. The daughter has gone through Roman Catholic schools and graduated this past June. She had been going with a fellow for about a year, but they were going to go to separate colleges in different States.

Getting caught up in the graduation activities and in the possibilities of separation, they let their relationship go to the point of having intercourse. They did not use birth control because of their belief system and believed that they were having intercourse at a safe period in her menstrual cycle.

They broke off their relationship shortly afterwards. He went away with his family for the summer, and by the time that she had her pregnancy confirmed he had gone off to college in another State. She was to leave the next week to go to college across the United States.

So they came to me for a couple of sessions and went through the value system that they were coming from and struggled with it. I had no input other than to help them sort out the issues.

At the end of the session, they came out in a natural way selecting this—construct B—as if the situation itself had forced them to take a look at their value system and the rigidity of it, and the fact that it did not take into account the situation and what would be best for all concerned. They made the decision to go ahead and have an abortion.

I talked with them afterwards, and I have heard from the young woman since she has gone to college. She said that her basic feeling is one of relief and appreciation that she could make this kind of a choice and that as a result she was going to be much more sexually responsible in the future, but it had been a traumatic experience.

I point out this case because I do not know of any woman who has ever gotten pregnant in order to have an abortion. I think it is a serious matter, and I have never known anyone who has not taken the matter seriously.

I think there are many religious, sensitive, concerned, responsible people who, as they take a look at what resources they have, where they are in their life, what they can give at that time, and what will make life meaningful for them and for their children in the future, decide to make that decision.

I really, again, appreciated the fact that, as a therapist, I could help that family wade through their issues and be able to have the free choice of operating in a moral context which I sensed they spent more time working through than any other in their lifetime.

Part of the problem here is that, when they talked with persons who maintained their construct A, they felt intimidated and they felt as if they were judged and, really, as if they were not able to think through and come out responsibly with their own decisions.

This past summer, Senator, I had the real privilege of being part of a study program in the area of marriage, family, and sexuality in the People's Republic of China. It was a fascinating experience for me. I had really little knowledge about the Chinese people in the People's Republic of China, and I came back with a lot of impressions and a lot of feelings but a much greater appreciation for my own heritage, both as a religious person and as an American.

I really began to see the contrast—and they would point it out too—between a country that has controled mind thinking versus our kind of Government which has prided itself and cherished its values in terms of people being able to make choices within a responsible framework.

I really began to see how important it is that we have provided for our people the opportunity to make choices and not to control their minds according to what one group, person, denomination, or faith group believes.

I feel that if we begin to limit our Constitution, we will be, in the end, accepting a value system that does not allow for other value systems. I would be just as against limiting group A from their sacred beliefs.

It seems to me that the difference—and there is a big difference—is that group A has a belief in one way:

> The act itself is wrong; such and such an authority says so; and if anybody violates that, they are morally irresponsible. We have got to maintain that tradition, or otherwise we are going to lose an America that we have known, and God will not favor us.

This is against construct B where we have people who say:

> Look, we really have to remain free to look at a situation, to be able to weigh the motives and the consequences and to act responsibly within that. We have to really begin to develop our own internal sense of authority in making our decisions. We are as involved in the moral climate of our family and our children as we are in our community and our Nation. We have developed these values so that we can promote our growth and live a meaningful life. And that may mean choosing not to have an abortion.

It seems to me that we need to preserve the opportunity for our people here to exist [indicating model A], as we want our people here to exist [indicating model B], and to appreciate that for both this is sacred and, according to our American Government, a right.

Senator HATCH. Thank you, Dr. Stayton.

I might ask this while I am sitting here: Those who are antiabortion would say that construct B fits their position just as much as construct A—in fact, maybe even more so. As you admitted, people may well adopt construct B and still conclude that they should not have an abortion. The best thing for them to do is of course not to have an abortion. I think you would agree with that.

Dr. STAYTON. It seems to me that what the amendments are moving towards is adopting a construct A. I think that what I am here to do is to help to see that we need to keep the options—the free choice—open, which is what the 1973 Supreme Court decision did.

Senator HATCH. It does more than that; it keeps it so open, some argue, that the 13-year-old young woman, or the 14-, 15-, 16-, or 17-year-old woman, who does not have to have parental consent, cannot truly make a considered judgment. There is no assurance of parental advice, counseling, therapy, or apprisal of abortion alternatives.

Dr. STAYTON. I am not familiar with any clinic that does not provide counseling for a person before an abortion.

It seems to me that abortion is a very important issue. It is nothing that anyone should take lightly. We need to maintain the ability to provide the opportunity for choices, to provide the kind of counsel that we have, and to provide the kind of medical care that will help the person have the safest.

Senator HATCH. You are aware of course, as a professor of medicine, that there are many clinics that will not have the benefit of your kind of expertise and counseling. There are some undoubtedly that, with approximately 1.1 million to 1.5 million abortions in this country, do not provide therapy at all and who run them in and out as quickly as they come. Are you aware of that?

Dr. STAYTON. My purpose here is to talk about the impact, if we are to limit the choices, on the family. It seems to me that the impact on the family when we begin to limit them is devastating. My concern is that we not undermine our families.

In my experience in working with families through the years and in working with clinics, people do not make a decision lightly. People do not go through abortion mills. That, I think, is a myth. People do take this seriously.

If at no other time, when women are pregnant they are really forced to take a look at themselves, maybe for the first time; they are forced to take a look at where they are going, what they are going to do, what they are all about, and to make a decision. Hopefully, if we can give the kind of guidance and counsel that most clinics that I know of do, the person then can make a decision, and we know that as a result the majority of people do become more responsible.

Senator HATCH. Your experience is considerably different from mine. I come from two States; I was born and raised in Pennsylvania, and now live in Utah. I practiced law in both places, and I saw all kinds of young women, post *Roe* v. *Wade*, who had no counseling whatsoever, who basically did not make much of a considered judgment at all but just thought that this was the thing they had to do.

Dr. STAYTON. It seems to me we have got to preserve the right of the majority of people who get an abortion and who are sensitive. We have to preserve their right to be able to make that choice.

Senator HATCH. We also have to preserve, it seems to me, the right of the community as a whole to make value judgments with regard to what is legal and what is illegal, what strengthens the social fabric and what weakens it.

For instance, a lot of people feel that marihuana should be totally decriminalized. There is, I suppose, a very good argument to that. But let us say that construct A and construct B enter in, and construct A adopts the traditional approach to marihuana in opposition to marihuana.

The second one adopts another conclusion, perhaps with the help of a therapist. In fact, I know of a number of situations where therapists have helped people to feel that marihuana is not all that injurious.

But society has a right, it seems to me, to say, "Well, since 73 or 78 percent of heroin addicts come from beginning with marihuana usage, maybe we should restrict marihuana usage." It is not the perfectly analogous, we all know, but I am just saying that there are a lot of fine lines society may very well draw and want to assert its influence through the democratic process.

Dr. STAYTON. The thing I am concerned about, Senator, is that the important point is to preserve the rights of the individual to make a decision that is a free choice decision.

What you are getting at, which I believe is as important as anything, is that we need to then upgrade our educational system. It is in education, both through our schools and through our religious organizations, that we are going to be able to help people to know the facts about whatever it is—marihuana, heroin, or abortion—to be able to look at the issues and become educated.

One of the problems that we have in this country is that we by and large do not have a very good educational system into sexuality. Adequate sexuality education is the answer and that is where the local group has a real moral responsibility.

Senator HATCH. Doctor, do you feel any differently about the same two constructs with regard to the second and third trimesters? I will give you an illustration.

In one of our hearings, I asked one of the physicans who deals in this area, "In the third trimester, if a woman wants an abortion, how do you abort that baby?" He indicated that you either separate the fetus from the placenta and let it suffocate to death—and this is a baby in the third trimester which is likely to survive abortion—or you reach in and crush its skull.

Do you think any differently about therapy advice with regard to the second or third trimester than you do with regard to the first trimester? Or would you say that, if the people feel good about their lives, if they feel that they can have a meaningful life in the here and now, if their growth as an individual will not be impaired, if they are involved, if they have good internal feelings about it, and if they personally rationalize their motives that there is nothing wrong with anyone's abortion decision, at whatever stage of the pregnancy?

Dr. STAYTON. Most late abortions—and I have never heard of a third trimester abortion, are performed on young adolescents who have a lot of things that are creating the reason for its being late. That is, they are afraid, maybe, to admit the fact that they are pregnant; they are afraid to go to their parents; they have this idea that it may go away; it may be some distance to go; they may not know where to go; and their periods are often so irregular that they are not sure. It seems to me that, again, the answer to your question is getting into the area of education—to educate our people before they get into that kind of situation.

I am not for late abortions. I am not for having abortions for no reason. I do not know anybody who takes the decision lightly. I do not know anyone who just waited and said, "Well, you know, my motives and my consequences—it is going to promote my growth," and so on.

Senator HATCH. I hate to tell you this, but I have met them. In other words, I have met a number of young women who have taken this decision very lightly and have not had any counseling whatsoever.

Dr. STAYTON. All I can speak from, sir, is my experience over the years with literally thousands of people who are religious, who are sensitive, who want to be responsible, and who carefully consider what they are doing. They take what they are doing very seriously after weighing the issues, and many times painfully, making their decision, and yet years later still believing that they made the right decision even though it was a painful one at the time; and they wished they had had the kind of knowledge and understanding that would have helped them beforehand, because they would not have gotten into this situation.

Senator HATCH. I have enjoyed your testimony, doctor, and I certainly believe in your sincerity in what you are saying.

Dr. STAYTON. I think you are right.

I was brought up with the concept, "I may not agree with what you believe, but I will fight for your right to believe it."

Senator HATCH. So was I.

Dr. STAYTON. There are people under construct A who are for abortion and who would like to outlaw the people in construct A who are against it. I would be as much against that.

Senator HATCH. You say that you would be just as opposed to limiting the value system of those falling within model A as model B. How precisely would this be done?

Dr. STAYTON. We could pass a law that would say, "You have to have an abortion after two children if you become pregnant again."

Senator HATCH. I see. You would not believe in that?

Dr. STAYTON. I absolutely would not at this point.

Senator HATCH. The value system of model A has already been violated by the concept of liberalized abortion in the minds of many people. Many people within model A look upon abortion as killing, and they see it as a public issue. That is their value system.

Dr. STAYTON. But they can make the choice not to do it.

Senator HATCH. That is right.

Dr. STAYTON. You see, that is the important thing. We do not want to limit their choice, as we do not want to limit the sincere, sensitive people——

Senator HATCH. But you have got to recognize that these people feel that it is a public issue, not a personal one. That is the point. That is where we have some difficulty, and that is where I think your constructs perhaps break down. And who is to say they are wrong?

I believe that, should my amendment pass and be submitted to the State legislatures, a vast majority of people in this country will want some restraint on abortion. They may not want as much as certain Members of Congress want, but they would want some restraint on abortion rather than indiscriminate abortion or abortion on demand.

Is it your personal value system that abortion is purely a personal matter? Is that what you are saying here today?

Dr. STAYTON. I cannot argue your amendment; I can only talk about the impact on our families if they are kept from the ability to make choices according to what their value systems say.

It seems to me that both of us—you and I—serve people who come from both constructs and that it is our responsibility in this kind of a society to keep the choices open and to allow both to exist and not to undermine the other.

Senator HATCH. I see.

When you counseled this young woman who came into your office, what kind of recommendations did you make to her about alternatives to abortion?

Dr. STAYTON. I did not recommend.

Senator HATCH. You did not?

Dr. STAYTON. I did not. I asked her what her——

Senator HATCH. You let her make her own decision, in other words.

Dr. STAYTON. I helped her to sort out the issues. I had her collect information.

Senator HATCH. Were any of the issues you went into issues, for instance, of how abortion might affect her goals and values for the future?

Dr. STAYTON. I think it is important to know that, as a psychotherapist, if I ever impose my own personal value system on a client or patient, I am liable for malpractice, and I think it is really important that part of my job as a psychotherapist is to help people to look at the issues, to sort out for themselves these factors, and to help them then to make up their own mind as to what is right, which may be that they must follow what the dictates of their church, their parents, or whatever might be.

Senator HATCH. Did the impact upon the fetus, whether or not you want to characterize it as life at all, come into play as one of the issues she had to sift through?

Dr. STAYTON. Twenty-six years ago when I was in the seminary, we were debating the issue of when life begins, and I cannot settle that one here because philosophers, moral theologians, and medical people cannot make that decision; that is not what we are here for. All I can say is that on the basis of my work with families, if we restrict people's right of choice, we are going to devastate and undermine a very sacred position that we have held regarding family values.

Senator Hatch. Let me briefly pursue this particular issue. Did the young woman whose story you relate seem to consider that there was at least arguably another life involved in the abortion transaction? Nothing in your statement seems to suggest that she did. In fact, everything seems to be entirely self-centered in her consideration. Did she indicate enough maturity to suggest that she even recognized that issue?

Dr. Stayton. Yes, she did. We really took into consideration the unborn fetus, maybe not in the way that you might want it but certainly in a way that she took into account the fact that she really had a conception going on inside of her, what she could offer to that child right now, what it would mean having a child and not being married or in a relationship with anyone, and supporting her own life goals. She wants to be a mother, she wants to be married, but she wants to plan it in her way. And she blamed herself—it was a mistake that she made—but she took very much into account the fact that she had conceived and that there was a potential person growing in her.

Senator Hatch. In your statement you indicated that she and her mother, in speaking to you, were not able to sort out the value system that they had been raised in—in other words, that of the Catholic Church.

Dr. Stayton. They were able to sort it out; they were just not able to make it make any sense.

Senator Hatch. You said they could not understand the value system with which they were struggling. With that statement, how then can you justify your subsequent conclusion that their consideration of the decision to abort or not was a particularly meaningful decision, if they could not even sort out their own value system?

Dr. Stayton. They could sort it out; they could not understand it; it did not make sense to them.

Senator Hatch. OK.

Senator Grassley.

Senator Grassley. I have no questions, thank you.

Senator Hatch. Thank you, Dr. Stayton. We appreciate your taking time to be with us today.

[The prepared statement of Dr. Stayton follows:]

PREPARED STATEMENT OF DR. WILLIAM R. STAYTON

Thank you for this opportunity to make this presentation today. I probably know you much more than you know me, so I would like to start by introducing myself to you. For twelve years I served parishes as a minister in the Commonwealth of Massachusetts. Then for four years I served as the Chaplain at the New England Baptist Hospital in Boston. During those four years I also taught classes at St. John's Roman Catholic Seminary in Brighton, Massachusetts and Andover Newton Theological School in Newton Centre, Massachusetts. During the past ten years I have served on the medical faculties of two historic medical schools in Pennsylvania. At the University of Pennsylvania Medical School I served in the Department of Psychiatry, Division of Family Study, for six years as Chief of Family Life and Sex Education. For the past four years I have served on the faculty of Thomas Jefferson University Medical College in Philadelphia as an Assistant Professor of Psychiatry and Human Behavior in the field of human sexuality. My pastoral training was at Andover Newton Theological School and I have a Doctorate in Theology in the field of psychology from Boston University. Thus, for the past 26 years, through teaching, pastoring and counseling, I have met with and worked with thousands of persons. Like you, the families I have served have represented a great variety of viewpoints and value systems. I am convinced that, as an American and as a religious person, one of the most sacred possessions that our families have is their value systems.

In order to understand the social impact of the proposed constitutional amendment on our families, I believe it is important to look at that impact through the framework of our various value systems. The question before us is one that certainly has at its heart our values regarding human life and human expression. When I was a seminarian some twenty to twenty five years ago, we were debating the issue of when life begins.

I am sure I cannot settle that in the next twenty minutes, as theologians, philosophers and medical professionals have not reached any consensus after years of research and debate. I would, however, like to address the subject of values and the range of value constructs that exists among sensitive, religious, responsible Americans. First, I have chosen two constructs which are often in conflict to illustrate my point. Second, I would like to briefly present a representative case illustrating the struggle that families often have between these two value constructs. Finally, I would like to make a summary comment based upon a study program in marriage and family planning that I was involved in, just this past summer, in the People's Republic of China.

I. VALUE CONSTRUCTS

Here we have two columns, each representing a value system, sacred to the individual who holds it. When we look at values, one of the first things we are concerned with is the focus of concern of that value. Traditionally, the focus of concern has been on the act itself - for our purposes the act being abortion. In this view, the act of abortion itself is seen as right or wrong. To others, the focus of concern is not on the act, but rather on the nature of relationships in terms of the motives and consequences of that act. It is the motives and consequences that define what is moral or immoral.

Another dimension is the location of authority for our values. Traditionally the location of authority has been external. We say that "God says" or the "Bible says" or the "law says" or the "parents say" or "such and such an expert says". Others in our population believe that the location of authority really has to be internal. As a psychotherapist, part of my task in working with individuals and couples is to help them sort out all the issues around their concerns and come to their own decision - their own internal sense of authority; what is right or wrong for them after weighing the motives and the consequences of their act. Regarding abortion, there are many authorities representing the spectrum of viewpoints about this issue. There are the precepts and concepts of a particular faith group or religious denomination; there are the perspectives of experts in the field of family and marriage; there are official positions of organizations like Planned Parenthood and other family planning agencies. Based upon the information from these resources, persons are urged to come to their own conclusions and make up their own minds concerning the issues. You, sitting here representing the American people, will be hearing from a wide variety of professional people about the issue of abortion. It must boggle your mind because they represent such a broad spectrum of thinking. And I dare say that each of you, after hearing all the evidence, then has to call on his own internal authority system as to what is the right course of action. Inevitably your position will differ from many of your constituents.

The third thing that we consider regarding values is where moral responsibility for our actions lies. Moral responsibility is often proclaimed from a detached and aloof position. It has been an authority, saying to a person who is not in authority, this is right or this is wrong. The detached, aloof person may never even have had the experience or had to struggle with the issue on a very personal level. Others proclaim that moral responsibility is something that involves all of us. The moral climate of our family, of our community, of our country, indeed of our world is something we all have to share in. Moral responsibility is not something that we can sit back and remain detached and aloof about, proclaiming moral irresponsibility on the part of others. This view says that if the proposed amendment passes then each of us is as involved in the moral responsibility for an illegal abortion as the woman and the abortionist.

The fourth dimension of a value is its purpose. Some believe the purpose of our values is to maintain a tradition. If that tradition is that we revere human life as beginning at conception, then our purpose in dealing with the abortion issue is to maintain that tradition. Others say that the purpose of values is whatever will promote their own personal growth as an individual, or as a couple, or as a family, or community or nation. They say values should help us to be better people - in fact, this group contends that is why we have values, rather than to maintain some tradition that is not held by all.

Finally, when we look at values, we also look at what is the reward for holding that value. Some say the only reward for holding to a value is Divine favor - that somehow God will be happy with us if we do this - or if one does not believe in God that someone will be happy: maybe parents or some government official. Others, including many religious people, believe that the reward for holding particular values is that life can be lived more meaningfully in the here and now. Further, many believe that living a meaningful life now is ultimately what their God wants for them, if they have taken into account the motives and consequences of their acts and if they are continuing to grow to be better human beings.

Here we have, then, two value constructs. You, like me, serve people from both viewpoints. Both groups believe that they are moral and that the other group is immoral. Each group has within its camp responsible, dedicated, caring people. Each also has irresponsible, hostile, self-serving adherents. The group in the first column believes very firmly and strongly in the act itself being right or wrong; they claim one external authority above all others; they maintain the importance of holding to a tradition that is consistent with their beliefs and they often use guilt-inducing and intimidation techniques to make their point. The group in the second column believes in the principle of free choice on matters where there are important differences among responsible people. For them, morality has to be weighed according to the motives and consequences for the act. They believe they need to make up their own minds based upon the best choices available to them after sorting through the various positions of authorities. Their purpose to holding to values is based upon what will help them to be better persons and live a more meaningful life in the here and now.

II. CASE EXAMPLE

I have chosen one case to present today because I think it points up the dilemma that is faced by multitudes of our people who are sincerely struggling with these two conflicting value constructs. Early in September a distraught mother and her recently graduated 17 year old daughter came to my office. The family is very devout and active in their local Roman Catholic Church. I saw the parents in marital therapy over a year ago. The husband (and father of this girl) is a borderline psychotic person, which means that it is important for him to maintain emotional equilibrium without trauma. When he is emotionally upset he becomes psychotic. The daughter had been going with a fellow through high school. With graduation and their impending separation, due to the fact that they were going to separate colleges in different states, they got caught up in the emotions of these events and had sexual intercourse, which they had heretofore refrained from. Being Roman Catholic, they did not use birth control as they thought they were in a safe period in her menstrual cycle. Shortly afterwards, they broke off their relationship and the boy went away for the summer with his parents. By the time that she confirmed that she was pregnant, her former boyfriend had already started to college in a state a thousand miles from Pennsylvania. She was to leave the following week for college three thousand miles away from home. She could not tell her father because of what it could and possibly would do to his mental stability. She and her mother worked with me for a couple of sessions struggling with the two value systems which I outlined above. I had no other input than to help them sort through their own issues. They finally decided jointly that she would have an abortion, after weighing the motives and consequences of abortion, after looking at what various authorities had to say about the issue, and after looking at the young woman's goals for her future. They considered what would be meaningful and growth producing for her and the young man involved. He was called and told about the situation and had a say in the final decision.

I saw the mother and daughter after the abortion and have heard from the daughter since she started college and began pursuing her career goals. She wrote to me saying that after her abortion she felt relieved and grateful. Above all else, she felt that from now on she would be more responsible sexually.

I experienced this mother and daughter struggle with a value system that they could no longer understand or agree with. They made their decision after much prayerful and thoughtful consideration of all the factors I have mentioned in Construct B. Their struggle created again in me a profound appreciation for the opportunity they had to make a choice. My experience in my work with families is that most young people do tell their parents and the final decisions are made from the perspective of a family value system.

III. CONCLUDING REMARKS

As a concluding remark, this summer I had the privilege of being on a scholar exchange program in the field of marriage and family planning to the People's Republic of China. It was an exciting and eye-opening experience for me. I came home with an even greater understanding and appreciation for my American heritage. We have prized and valued individualism and free choice.

In China, individualism and free choice are greatly curtailed and discouraged. I experienced the dichotomy of a controlled state where people are programmed to have one point of view towards life and values versus a government such as ours, based on an appreciation for and a valuing of each individual and individual differences. As a culture, we are raised historically to cherish individualism and tolerate values different from ours. "I may disagree with you, but I will fight for your right to hold your belief" is a concept I was reared on. My fear is that this proposed constitutional amendment moves us closer to a controlled state, where the views of one person or group control the whole. My concern is that it could have a devastating effect on our historical stance as an open and free society. In my judgment, it would be divisive and further polarize our people while at the same time, opening the way for unscrupulous and untrained individuals who will take advantage of the hundreds of thousands of women, caught at a time when they are most vulnerable, with an unwanted and/or an ill-advised pregnancy. It seems to me that by keeping open the possibility of choice, by providing the best in counsel, and in maintaining the high standards in our treatment procedures, we are insuring our future to be able to handle and creatively cope with the concerns of our families.

Thank you.

Senator **HATCH**. Our next witness will be Prof. Vincent Rue, professor of family relations at California State University at Los Angeles, Calif. He has written widely on the impact of abortion upon the family, and is director of the Sir Thomas More Clinics of Southern California.

Dr. Rue, we are very happy to have you with us today.

STATEMENT OF VINCENT RUE, ASSOCIATE PROFESSOR OF FAMILY RELATIONS, CALIFORNIA STATE UNIVERSITY AT LOS ANGELES, CALIF.

Mr. **RUE**. Thank you, Mr. Chairman. It is a privilege to be here today and to comment on the important decisions surrounding the possible enactment of a human life amendment.

Rather than concentrating on any specific amendment, I will confine my remarks to the need for rescinding our national policy of abortion on demand, but I would like to go on record as favoring some type of amendment to create a turnaround from the 1973 Supreme Court ruling.

Unlike any other dimension of human consideration, abortion has within a decade become nothing less than a national fissure. The agony of abortion is rendering this Nation divided and weakened. This debate penetrates the very heart of family life and pits wife against husband, lover against lover, sister against siblings, and daughter against parents. Every year abortion impacts nearly 1.5 million women, and—I underscore this—their partners, their relationships, and their families.

By no means an individual solution to an individual problem, abortion is neither simple nor singular in its nature, context, or consequence. Rather than a social problem alleviator, abortion has become a problem escalator with nearly one out of three pregnancies today terminated in this manner. Yet problem pregnancies, especially those with minors, abound.

Women are supposed to be better off—that is, with their absolute procreative right to self-fulfillment—yet their disillusionment rises. Witness the rapid increases in female suicide, relationship disillusions, husband abuse, child abuse, and substance abuse.

What has gone wrong?

ABORTION AS A NATIONAL POLICY

First, our national abortion policy is a counterfeit. Abortion has been heralded as the solution for a problem pregnancy, and a host of other social ills, I might add; it is not.

Abortion has furthered our national obsession with "me-ism" by overconcentrating on individual well-being with no concern for relational fallout.

Abortion never occurs within a relational vacuum; rather, it is the unhappy consequence of a relational union of two persons and their relationships with others.

The causes and solutions to a problem, then, must be related. Complex problems require complex solutions. Abortion is a simplistic and naive solution to a complex social, psychological problem. Faulty thinking, then, has led to faulty social rules.

ABORTION AS AN ANTIFAMILY POLICY

Second, a national policy of unrestricted abortion is an antifamily policy. Over the centuries, the family has been the most adaptable institution known to man, able to expand and contract its structure and functions as needs and crises arise. Yet since 1976 in pregnancy deliberations the roles of father, husband, or parent have been deleted by the Supreme Court as well as the traditional guidance rules commonly understood as parenting.

Families have been truncated and subverted in clear violation of an abundant body of tradition, research, and clinical knowledge that affirms the family as a powerful and effective problem-solving unit. Correspondingly, abortion negatively impacts on family communication, parental roles, spousal roles, individual and family problem-solving abilities, self-perceptions, and future family relations.

ABORTION AND ADOLESCENT ABUSE

Third, abortion promotes adolescent abuse and developmental immaturity. All teenagers are at risk because they are in a critical stage of psychosexual development and interpersonal relationships.

A minor may obtain an abortion more easily than a driver's license. Minors are vulnerable, prone to excessive influence, and unable to make critical decisions in an informed and mature manner. By law, they have been deprived of the decisionmaking resources of the family bond and have too often become victims of their own misguided fears of inadequacy and parental rejection. The psychological burden of a secret abortion for them is overwhelming, a major barrier to future heterosexual relationships.

I have always recommended parental advice and consent in this delicate human crisis and have continually been amazed at the healing power parents muster and the familial regeneration of closeness that openness and honesty yield.

Numerous clinical studies corroborate this process, and in fact this is the very same conclusion that has been reached by a group of eminent scholars here in Washington, D.C., at the George Washington University Family Impact Seminar. The study was recently published by Theodor Ooms entitled "Teenage Pregnancy in a Family Context."

ABORTION AND THE GENERATION GAP

Fourth, abortion widens the generation gap. By excluding parental involvement from a minor's decisionmaking process, our abortion policy negates the critical role mothers play in helping their daughters mature and be sexually responsible.

Numerous studies have found nonvirgins to have poor relationships with their mothers. Abortion weakens an already bad situation. More recent studies suggest the problem is cyclical in that teenage mothers are more prone to have daughters who themselves become pregnant.

Why cannot abortion be added to the list of other crises family members encounter and use family assistance in resolving—for example, identity crises, drug abuse, rape, rejection, school problems, suicide, death of a family member, et cetera? Unfortunately, abortion means more abortions and more parent-daughter alienation.

ABORTION AND MEN

Fifth, abortion emasculates males. Studies by Shostak and others have reported that most men have a difficult time with the abortion experience and encounter painful role conflict—that is, trying to protect.

Studies by Furstenberg, Francke, and Milling have shown that most relationships did not survive 30 to 90 days post abortion and that a sizable minority report persistent day and night dreams about the child that never was and considerable guilt, remorse, and sadness.

ABORTION AND THE SEXES

Sixth, abortion reescalates the battle between the sexes. Please consider the following. While women may choose motherhood, men may not choose fatherhood. If women choose motherhood, men are obligated in paternity actions. While women may choose an abortion over the male's objection, men typically shoulder the bulk of the financial cost. When men promote abortion for their partners, it is typified as coercion, lack of caring, abdication of traditional male roles, et cetera; whereas when women choose abortion it is the exclamation of women's rights, freedom from male oppression, and self-determination. Abortion is granted ipso facto for the woman, insuring a continuance of normalcy in prepregnancy relationships with parents, peers, and significant others, yet typically negating the relationship with her sexual partner without his consideration. Regardless of her sexual partner's religious orientation or religious estrangement concerning abortion, the woman may proceed with the pregnancy termination. Males and females have equal rights with respect to adoption but not with abortion. While a child is allowed recovery for the wrongful death of the putative father, the unwed father is not allowed to recover for the wrongful death of his aborted illegitimate child.

ABORTION AND WOMEN

Seventh, abortion is a psychological Trojan Horse for women. Countless authors have exclaimed the merits of this medical procedure and asserted only temporary, nonpathological, and limited adverse emotional sequelae. Yet the only consistent, positive reaction reported in an exhaustive literature review is that of relief.

Virtually no study that I have seen reported additional positive feelings void of negative reaction. However, rank ordered negative feelings may include guilt, anxiety, depression, a sense of loss, anger, relational changes with partner, a feeling of being misled by misinformation or lack of information, deterioration of self-image, regret or remorse, nightmares, anxiety, possible infertility, loneliness, alienation, marital disruption, physical concerns, disturbance in sleep patterns, imagining the aborted child, flashbacks, psychotic reaction, hopelessness, helplessness, powerlessness, and changes in significant relationships.

According to Illsley and Hall, guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will.

ABORTION AND MARITAL RELATIONS

Eighth, our national abortion policy disrupts marriages. When couples disagree over a problem pregnancy, abortion promotes dishonesty, denial, and inequality in marital decisionmaking. For some, it signals the very end of their relationship. Abortion may even be antithetical to marriage in that it eliminates procreative responsibility and occurs most frequently among those who cohabit. One study found that 75 percent of the aborting respondents asserted that a child at this time would "interfere with my career, education, or personal freedom."

Abortion also disguises and increases marital dysfunction in that a problem pregnancy from an extramarital affair can be secretly disposed of. Many studies identify being married as the dominant sociodemographic correlate of a difficult abortion decision.

ABORTION AS SYMPTOM

Ninth, abortion is not the problem; it is a symptom. Abortion shreds the soul of humanity and the fabric of relationships. It exists for women, yet it is against women, men, and children.

Developed from the belief of compulsive self-fulfillment, abortion leads us to become our own object of worship. In our struggle to find ourselves, abortion as a national myopia signals we are losing our way. In such a struggle, how then is a woman who finds herself frustrated and wants to abort any different from a husband who is continually enraged in arguments with his unsympathic spouse and feels like strangling her; or an adult offspring who feels imposed upon by sick and aging parents and wishes they would disappear; or the harried freeway commuter who continually feels oppressed by job strains, family responsibilities, and deadlocked traffic, who wants to smash through others; or the parents of a handicapped child who feel overwhelmed at times and wish they were still alone?

As a nation, and as individuals, is it not how we view the decisions concerning these conflicting desires that is the crux of the problem?

Last, let me add a case example that occurred in my office last week. A woman came to me in her early thirties; she was nearing the end of her marriage and said she was seeking a divorce.

In pursuing the background involved in this and tracing this woman's pathetic steps through a series of relationships and much self-abuse, I found out that 10 years earlier this woman was involved with her husband's—at that time—best friend, and she became pregnant. She said she had no choice but to abort the child, which she did. The abortion ultimately cost her her marriage in that she kept this information from husband but could not live with herself. She divorced and went through a series of relationships. She is now in her third marriage and seeking to divorce him, and all of this from an abortion that occurred many years prior.

There is abundant clinical evidence to suggest that abortion is not a simple medical procedure; rather, it has the most profound relational and psychological impact. Thank you.

Senator **Grassley** [acting chairman]. Senator Hatch will be right back. In the meantime, I will start the questioning.

What are your views on the suggestion that unplanned children are severely handicapped in their career potential? Putting aside for the moment the question of teenage pregnancy, can we fairly make conclusions with respect to the relative quality of life between planned and unplanned children?

Mr. **Rue**. I think that this is an argument that is badly misunderstood. I know of no research that has proven beyond a statistical doubt that unplanned children lead to child abuse, juvenile delinquency, et cetera. I know abundant research that suggests that, for families that are dysfunctional and when there is poor communication, these circumstances lead to problems with children later on.

To suggest that an unwanted child will then become victimized by parents, from my research review, is unfounded.

Senator **Grassley**. What are your general observations on the notion of unwanted babies? How could I get an answer to the question of whether or not unwanted babies are generally happy or unhappy to have been brought into the world? Have any studies ever been made of women who seriously considered abortion but chose not to terminate their pregnancies? Can any conclusions be drawn about such women and their children?

Mr. **Rue**. I would say that the research that has been conducted is too spurious to answer that question thoroughly, Senator.

I think child abuse does not know socioeconomic status; it occurs at all different levels. I think child abuse occurs regardless of whether or not a child is wanted or unwanted. I think child abuse has everything to do with the parents' backgrounds, their own family of orientation, and the lack of bonding and appropriate modeling that did not take place at that point.

Senator **Grassley**. I have one more question. How do you feel about abortions necessary for reasons of health, rape, or incest?

Mr. **Rue**. I believe that abortion should only be allowed to prevent the death of the mother.

With respect to rape and incest, I am not in favor of abortion for those particular means. When a woman is ovulating and even if she were raped at that point, there is only a 1-in-10 chance that she would become pregnant. I believe that nationwide statistics have been flaunted and blown up and very much misinterpreted on this particular point.

Senator **Grassley**. Thank you.

Senator **Hatch**. Thank you, Senator Grassley. I appreciate your taking over. I had to go to another committee for just a minute to ask some questions.

Dr. Rue, one question that we are repeatedly asked is this: "How could anybody possibly view it as a desirable social phenomenon that a million or a million and a half teenage women be required every year to give birth, as would be required under some of the proposals pending before this committee?"

Mr. Rue. Senator, I cannot see how the wholesale reduction in our population of 1.5 million human beings is a socially desirable occurrence. I think it is a tragedy of the grandest scale, and I think that what we need to do is reexamine how we deal with social problems in this country.

Abortion promotes dishonesty. I have frequently heard a woman say, "A child is going to interfere with my career, my education," et cetera. I am here to say that I believe a woman would be better off to take 1 year out of college and go through the 9 months of that pregnancy, and at the end of that pregnancy make the decision whether or not to adopt or whether or not to keep the child if she is not married.

I simply believe that we have lost our belief in human beings; we are promoting dishonesty; we are promoting sexual irresponsibility.

We know even, for example, that contraceptive education is not enough. From 1971 through 1976, when Planned Parenthood mounted a major campaign to halt problem pregnancies. We witnessed by 1976 a 41-percent increase in premarital sexuality and a 45-percent increase in pregnancies.

We are taking the wrong approach. We are not dealing with the causes, the context, or the original place where a problem pregnancy occurs, and that is not in a woman's stomach but in her relationships.

Senator Hatch. Do you agree with Dr. Stayton then that we need more sex education in this society in order to deal with this problem more effectively?

Mr. Rue. Professors Inazu and Fox, who also participated in the family impact seminar, have studied the research thoroughly, and I believe it was their conclusion that all programs and policies directed toward a problem pregnancy ought to be redirected toward the parents. It does not work to focus on the youthful decisionmaking of a teenager in the sexual area; it simply has not worked.

We need to turn attention to the family; we need to try and help parents understand what is involved—the different values and attitudes—but to simply talk about sex education, which in my State has frequently been referred to as sexual plumbing instructions. I do not believe this is the answer.

Senator Hatch. How would you respond to Dr. Stayton's discussion of the teenager whose sense of sexual responsibility was enhanced by having been able to undergo a difficult abortion? What would your comments be on the suggestion that had this girl been required to notify her parents prior to the abortion there might have been serious repercussions for her emotionally disturbed father who was a borderline psychotic?

Mr. Rue. Senator, I work with a number of families. Just a couple of weeks ago, I had a situation that is that very case. A 16-year-old girl came to me and said, "I'm pregnant; I only had intercourse two times with this young man. My dad is an alcoholic, and my mother is barely around." They are a large family, non-Catholic. She was very, very concerned that her father was going to kill her or kill this young man.

I said to her, as I have said to 100 percent of every young, troubled, pregnant teenager I have seen: "Your parents can help you. Be honest." Through the encouragement of therapy and bringing her parents in, she found that her parents, rather than taking the approach that says, "I hate you; I'm going to destroy you," took the exact opposite, and it brought the three together.

Why? Because it is a human tragedy, it is a crisis, and we know from family systems theory and from clinical research evidence that, when you deal with a problem openly and communicate about it, there are tremendous potentials for reorganization and the development of intimacy not present had the entire problem remained a secret.

Senator HATCH. You are a doctor at the Thomas More Clinic in Los Angeles?

Mr. RUE. Yes.

Senator HATCH. How many of these types of situations has that clinic been confronted with?

Mr. RUE. Senator, we have seen hundreds of girls in this particular situation.

Senator HATCH. In that particular situation?

Mr. RUE. Yes, sir.

Senator HATCH. Could you clarify that for me?

Mr. RUE. The particular situation where an unmarried minor comes to us and is pregnant and says, "What do I do?"

I would like to add that I believe it is irresponsible therapy to not consider all options in talking with an unmarried minor. For me, that also includes abortion. Even though I am particularly not in favor of abortion, I do discuss that with all of my patients.

I would like to say that therapy not only fully explores a patient's feelings, thoughts, and personal choices for conflict resolution, but it also very definitely imposes a way of thinking on the patient. For example, this is the essence of psychotherapeutic intervention in a neurosis.When an individual feels that they are unloved, it is the therapist trying to reeducate the patient to a belief system that says, "Your belief system isn't working; it's irrational." "You are loved."

Senator HATCH. Do you feel that, as Dr. Stayton indicated, he should not impose a belief system upon patients and should not allow that to enter into the therapeutic relationship? He suggested that this might even be malpractice.

Mr. RUE. I do not think I would go so far as to say it would be malpractice. I think forms of EST, lifespring, rational-emotive therapy, psychoanalysis, and all of these things could be subject then to malpractice. I do not believe that is the case.

I believe that a responsible therapist must explore all options with a patient. I also believe that, if a responsible therapist is to try and help a patient, he or she must lay on the table for that person a perception that they cannot see; it is the point of persuasion, the offering of new information; and if this means a suggestion that your belief that your parents will disown you is faulty thinking, then very definitely that should be suggested, and it should be strongly stated if it is the belief of a therapist.

Senator HATCH. What would be your attitude toward legislation requiring a woman to notify her husband prior to having an abortion performed? Would you believe that the husband has an appropriate role in this process?

Mr. RUE. I believe that a husband has a vital role in all decisionmaking in marriage.

Senator HATCH. What if a woman has committed a sexual infidelity unknown to her husband, and she is afraid to tell her husband, that she has become pregnant? What about that situation?

Mr. RUE. It is an excellent example of the healing power of communication and honesty when a situation is dealt with from openness as opposed to secrecy.

If a pregnancy occurs from an affair, is the problem the pregnancy, or is the problem the affair? Or is the problem the marital relationship out of which the affair and the pregnancy took place?

Therefore, we come in with a medical eraser and erase out the relational problem pregnancy. Have we truly helped the woman? I do not believe we have, because I see them weekly in my office, and I see them saying, "Well, now that I have gotten that out of the way, how do I live with my husband? I don't even want to make love with him."

You see, we have not solved the problem; we are not dealing with the issue. All we are dealing with is the symptom of the problem.

Senator HATCH. What is the youngest woman you have had come in for abortion counseling?

Mr. RUE. I believe she was 12.

Senator HATCH. Do you believe that a 12-year-old, using the method that Dr. Stayton has described here today, can make a value judgment as to what is best herself?

Mr. RUE. It would be absolutely impossible for a minor of that age to make that determination.

Senator HATCH. How about a 13-year-old?

Mr. RUE. I do not believe that a 13-year-old could.

Senator HATCH. When do you think they reach an age where they actually can, with appropriate therapy like Dr. Stayton believes in, actually make these correct value judgments by themselves or by therapy?

Mr. RUE. In the whole area of value judgments and value decisionmaking, abundant clinical and research evidence suggests that parents play a critical role. When we delete them, we find that a teenager is simply caught in a mire of ambiguity, peer influence, myths, and platitudes.

I do not believe that a minor can make a responsible sexual decision generally without parental guidance. There are exceptions, but I believe she needs the guidance of her parents. She can make a decision certainly, but can she make a mature and an informed decision? I think that is why we have laws to protect her, and I think we need to continue making laws to protect her.

Senator HATCH. Dr. Stayton has indicated—and I have been somewhat surprised—that he knows of no abortion clinic where appropriate counseling is not given prior to an abortion. Do your findings and does your experience confirm that?

Mr. RUE. Mr. Chairman, I conducted a research study in 1974 in Greensboro, N.C. In fact, there I helped develop Problem Pregnancy Counseling Service while I was in graduate school.

What we found was that counseling in abortion clinics is a misnomer. In fact, it is unfair to even use that word. Counseling is nothing more in the majority of abortion clinics, than decision, expediting, namely, "Do you want an abortion?" "Yes, I do." "This is what is involved, and please be sure and use some contraceptive protection after the abortion."

We found that decisionmaking—the process of exploring feelings, looking at religious background, values, and parents—to be absent.

In a study by Milling and Shostak on the male experience with abortion, concerning abortion counseling at clinics, males are not involved, parents are not involved, and Milling found in her study that 70 percent of those males had to get counseling outside because they felt so estranged from this girl that they had some feelings for.

Senator HATCH. Then you have the question of what is good counseling, and that may be as variable as the counselor?

Mr. RUE. Very definitely. I have sat in on many seminars in North Carolina to try and help problem pregnancy counselors. Frequently these were nurses or LVN's—people with no psychotherapeutic experience or background—and these people put themselves out to be problem pregnancy counselors. Please note: There is absolutely no licensure for such a designation; too many are not qualified or trained individuals.

Senator HATCH. My experience has been that even where you have the qualifications, such as full psychiatric certification, there is a wide disparity of psychiatric treatment in this country.

I used to be a medical malpractice defense lawyer. I defended these cases. I would have no problem defending either of you by the way you have described your therapy approaches here today, but I can tell you this: Every doctor is a different human being, with different motivations, different value judgments, and different approaches.

They have all kinds of different approaches to similar problems, some of which may be good, some of which may be bad, and some of which may be merely experimental. That is what psychiatry has been through the years—primarily an evolving practice of medicine.

Would you disagree with that?

Mr. RUE. No; I would largely agree with your comments, Mr. Chairman.

I would add that frequently the kind of therapy or counseling that is received in abortion clinics is so skewed and biased toward the business of the operation of the clinic and toward the whole emotional environment of the clinic that to really work with a person who is having negative feelings about this, to spend time with her, and to try and help her really deal with her values, is sort of antithetical to the whole belief system of the abortion clinic.

It is sort of like the Playboy Foundation talking about abstinence and counseling people on that. The entire involvement in such clinics is for abortion, and it does not leave room for family involvement or concern for the sexual partner—the male.

Senator HATCH. Dr. Stayton, I do not mean to be unfair to you. Are there any comments you would care to make?

Dr. STAYTON. No; I think he can stand on his own.

Senator HATCH. Yes; I think he is doing a good job.

I have to say to both of you that through my own more limited experience with abortion clinics, both as an attorney and as a church leader, I have not seen very much counseling. In fact, it has generally been counseling for abortion, not for alternatives.

In Planned Parenthood, I have seen counseling both ways. Some of my colleagues would not like me to say that, but I have seen it both ways. But I have to question the quality of the counseling at some of the Planned Parenthood places. Then again, you can question that any time you disagree with psychiatrist, therapist, or family adviser.

Mr. RUE. Senator, there is one other point that I think is germane here. To really corroborate what I am saying, if we are solving the problem via abortion and via abortion counseling, how then do we explain abortion recidivism rates? I have seen estimates today ranging anywhere from 15 percent on up to 38 or 40 percent.

Senator HATCH. That is women who have had another abortion?

Mr. RUE. Precisely.

Senator HATCH. Is that your experience, Dr. Stayton?

Dr. STAYTON. I am sorry, what was that?

Senator HATCH. He said that as many as 40 percent of women who have had a first abortion go on and have additional abortions.

Dr. STAYTON. No.

Senator HATCH. That is not your experience?

Dr. STAYTON. Fifteen percent.

Senator HATCH. Fifteen percent in your experience.

But yours is 40 percent? Of course, you are from California; he is from Pennsylvania. [Laughter.]

Mr. RUE. Senator, I gave you the range there, and there are highs and lows, of course. But do we really know?

If it is true that, let us say conservatively, a 30-percent estimate are repeat abortions, research indicates that these women are physiologically more prone to other problems, not to mention the question of infertility later on from subsequent abortions.

They are more prone to serial relationships that fail; they have more sexual partners; they tend to lose jobs more. These women are at risk, and yet we are simply throwing them a carrot and saying, "Well, if you get pregnant, we'll get you out of this one; here's your abortion." We are not dealing with the problem.

There is a tremendous program called Project Redirection. It is, I believe, in four or five cities at this point. I am not extensively familiar with it, but I know there is one in Riverside, Calif.

What they are doing is taking young women who are pregnant; they have not held jobs; they are on welfare. They are saying to them:

> We will match you up with a volunteer in the community, a woman who can help you with your emotions, who can help you with the pregnancy, and we will try and give you job training and try to get you off welfare, have your child, and move on, feel good about yourself, and know that you are loved.

This accrues through the bonding—the pairing—of the volunteer with the adolescent girl. I think it is a splendid, creative approach, and hopefully a program that will have some rather large implications for this whole abortion arena.

Senator HATCH. Personally, I find the 15-percent recidivism rate fairly high, but if it is 40 percent, that is unconscionably high.

Dr. Stayton, you had a desire to say something?

Dr. STAYTON. It just seems to me, Senator, that the reason we are here is to discuss a constitutional issue. What is being discussed is local issues. I would be very much against an abortion factory. I believe that is a local issue. If I found in my community that there was an agency that was not providing counseling or was being irresponsible, I as a local person would want to take some action at that point.

Senator HATCH. There is not a lot you can do under present law, though. That is the problem.

Dr. STAYTON. Today we are talking about a constitutional issue of even providing the choice and making that choice, hopefully, responsibly.

Senator HATCH. I see. That very often is not the option that you have under present law. That is where people like Dr. Rue have a real difference with you.

We all agree we should not have abortion mills that prey on confused women. Unfortunately, there are a lot of people who are on the other side of your viewpoint who feel that we do have this situation; I happen to be one of them.

I also believe there are some who really do what you have indicated you do and that is try to counsel, provide good therapy, and apprise women of the various choices that they can make. I suspect that of the 1.5 million abortions in America, very few have that kind of treatment and have the benefit of your kind of help.

Dr. STAYTON. I think it should be noted that the majority of abortions are on women who are over 20. Of the abortions in the United States, 70 percent are on women who are over 20. This comes out of the Atlanta Center Disease for Control.

Senator HATCH. We have heard both estimations. I am not sure what are the right figures.

Mr. RUE. My understanding is that a third of the 1.5 million abortions are abortions to minors.

Senator HATCH. OK. You both seem to agree on that issue. We are glad to have that.

Thank you, Dr. Rue. We very much appreciate your testimony here today.

Mr. RUE. Thank you.

[The prepared statement of Mr. Rue follows:]

PREPARED STATEMENT OF VINCENT M. RUE

Abortion, unlike any other dimension of human consideration, has within a decade become nothing less than a national fissure. With equal velocity for both opponents and proponents, the agony of abortion has broadened the gnawing schism between the meaning of life and death, the rights of the individual versus another, between the relations of wife and husband, daughter and parents, sister and siblings, lover and lover, and between the psychology of individualism and the cultural context of traditional values. Contrary to current beliefs, expectations, and public pronouncements, abortion is neither simple nor singular in its nature, context or consequence. This presentation seeks to examine those complex issues germane to the familial and/or relational context in which abortion occurrs.

Abortion in Macro Context

No longer an individual solution to an individual problem, abortion has gone mainstream.[1] From the Supreme Court[2] to the states,[3] from the 1980 White House Conference on Famililes[4] to family values,[5] abortion has become a national headache that does not go away. Originally heralded as a remedy for problem or unwanted pregnancies, has abortion become more of a problem escalator than a problem alleviator? With twenty-eight percent of pregnancies terminated by abortion in 1977,[6] abortion is increasingly becoming a common form of fertility control.[7] While one-third of all abortions were concentrated on women under nineteen years of age,[8] and with four out of ten girls in this age group expected to become pregnant at least once,[9] in the period of 1971-1976, teenage sexual behavior actually increased by forty-one percent and teenage pregnancy by forty-five percent.[10] Hence, abortion in its social context seemingly solves fewer problems than it creates. Perhaps surmising this dilemma, societal attitudes favoring abortion are waning.[11]

In its psycho-cultural context, abortion has gained prominence at a time when the psychologies of affluence and self-fulfillment have reined supreme. The typical self-fulfillment strategy presupposes economic well-being as a virtual right,[12] including the right to be free of economic strain and the burden of responsibility for a problem pregnancy and subsequent childbearing. The presumption of an ever expanding affluence is also rapidly colliding with a new awareness of diminished resources, material and individual limitations, and expectational downsizing. This search for self-fulfillment has in the words of Lasch evolved into a "culture of narcissism" characterized by the "liberated personality" and typified by pseudoawareness, promiscuous pansexuality, and shallow protectiveness.[13]

In 1973, the Supreme Court in its Roe v. Wade ruling gave women the absolute procreative right for self-fulfillment.[14] And yet, female disillusionment as evidenced by relational dissolutions, husband abuse, child abuse, female violent crime, psychological complaints, female alcohol and drug abuse, abortion, and female suicide are all on the increase.

Neglected in research, presumed to be nonsignificant in the process of abortion decision making, and more powerful than any Planned Parenthood or Department of Health and Human Services, the family is emerging as a major force to be reckoned with in the delivery of health care services and the development of individual well-being. Every year abortion impacts nearly one and a half million women,[15] their partners, their relationships, and their families. What then are the emotional and relational risks, the risks for future heterosexual relationships, the risks for sexual decision making, the risks for subsequent pregnancies, the risks of value congruency, the risks of marital and family fragmentation and alienation, and the risks of self-alienation?

The Family and Crisis Management

Beyond a doubt, the family is the most adaptable institution known to man. Over the centuries, families have changed form, structure, membership, even functions, and yet have survived better than any nation or institution. Such a perception is derived from the family's ability to expand and contract with the development and recission of problems and/or needs. Hill said it well:

> In a society of rapid social change, problems outnumber solutions, and the resulting uncertainties are absorbed by the members of society, who for the most part are also members of families. Because the family is the bottleneck through which all troubles pass, no other association so reflects the strains and stresses of life. The family today is not only the focal point of frustration and tensions, but also the source for resolving frustrations and tensions . . . . . .Through its capacity for sympathy, understanding, and unlimited support, the family habilitates personalities bruised in the course of competitive daily living.[16]

This is no less true with the challenges and responsibilities posed by a problem pregnancy.

And yet, in Planned Parenthood of Missouri v. Danforth[17] in 1976, the Supreme Court held that a father or a husband or a parent has no rights in the abortion area other than those which the state might have and which the state deigns to delegate. In effect, then, in pregnancy deliberations, the roles of father, husband, or parent are deleted. As the shrouds of secrecy and absolute female autonomy regarding pregnancy resolution are positioned, the traditional structure and functions of the family are truncated and subverted. This is clearly in violation of an abundant body of tradition, research and clinical knowledge that affirms the family as a powerful and effective problem solving unit.[18]

Three systems of classification of family problems have been used by investigators in cataloging crises: (1) by source, i.e., intra or extra-familial; (2) by effects upon the family configuration; and (3) by type of event impinging on the family. In the first classification, abortion is both intra and extra-familial. It is an individual family member's pregnancy, and a socially sanctioned solution imposed from outside the family for an intra-family conflict. The second type of classification first suggested by Eliot[19] and later expanded by Hill[20] involves the combination of the loss of a family member (dismemberment), or addition of an unprepared-for member (accession), and the loss of morale and family unity (demoralization), or all three. According to this framework, a problem pregnancy commences as an accession conflict, seeking resolution in abortion and concommitant dismemberment, concluding with considerable demoralization.

Clearly, the consumption of abortion services does have profound impact on families. It self-evidently prevents increases in family size and it prevents or delays family formation by those who might otherwise choose a forced marriage solution, or start by default, a single parent family. Correspondingly, abortion also impacts on family communication, parental roles, spousal roles, individual and family problem solving abilities, self-perceptions, and future family relations. In particular, the decision making process involving an unwanted pregnancy and consequent abortion serves to illustrate well the centrality of the family and the significance of the relational context.

Abortion Decision Making: The Micro Context

Abortion and the problems of decision making associated with it have all too often placed the highest value on the individual over relational priorities, focusing on the pregnant woman in her urgent need to make a decision. Emerging from the position that a woman has total control over her own body, women's advocates have failed to differentiate between a woman's body and the fetus that is the product of the relationship between two people and their relationship to their families. To ideological advocates of women's rights, the woman is assumed to be the sole factor in decision making. While this may be understandable according to archaic ideologies that excluded and exclude women's rights and needs from forthright consideration, nevertheless, this position is an overreaction. Paradoxically, such a posture runs the risk of becoming ideologically rigid and counterproductive to women in their long-term relationships to men, and relationally negating for men in their relationships with women. As Cotroneo and Krasner[21] have noted, it is impossible to lift a pregnant woman out of her primary loyalty system, i.e., her present and future family network, for the purpose of decision making without manifesting a complementary therapeutic concern for the relationship fallout of her decision on her mate, parents, children (born and unborn), siblings, grandparents, and other significant relationships. Their findings suggested the long-term wisdom of facing the implications of each person's situation within their relationship system especially as crises are generated by unanticipated events like problem pregnancies.

A primary therapeutic goal then ought to be to help the pregnant woman face the impact of her relational legacies on her present capacity to make decisions. In this sense, the present and past do indeed have consequences for the future. Therapeutically then, it is not optimum to reinforce relational evasion by family members, nor is it desirable to promote the fantasy that decision making can occur in a relational vacuum.

Likewise, often ignored is the woman's unspoken wish to face her parents or mate with her ambivalence and to draw on their support, even when it comes in the form of disagreement or conflict.[22]

Then too, the pregnancy decision making drama unfolds quickly. Perhaps a pregnant woman has made a firm decision that abortion is her answer to the problem pregnancy, and perhaps she is fully accepting of that decision. However, she is apt to have made that decision under extreme pressure. Probably shocked by the knowledge that she is pregnant and realizing there is very little time to make up her mind about the abortion, she may well overreact with intense anxiety and impulsivity to her situation. To exclude communication with her mate or parents at this vital point is to deprive her unnecessarily of the resources of the family bond. Wilson[23] found that appropriate communication at this time is invaluable, helping to explore feelings, values, options, and resources.

Understanding the nature of crisis and appropriate crisis intervention is also important. Typically, an individual negotiates problems by employing a variety of problem solving mechanisms, one of which hopefully solves the problem. Before the solution occurs, the person is in a state of tension or disequilibrium, which usually does not become excessive if the state is short-lived and if the person is accustomed to such periods of tension. In a crisis, however, the tension is much greater, not only because the problem is more significant, but also because the individual's usual way of dealing with the problem offers no solution. This is particularly true in the case of a minor with a pregnancy since there very often has been no prior problem solving experience of this nature or magnitude.

The Pregnant Minor and Parental Roles

Chilman[24] in a major review of adolescent sexuality noted that the uncomfortable state in which the pregnant minor finds herself is of a much longer duration than it is in her usual problem solving activities, and that she develops a feeling of helplessness and ineffectiveness. These feelings are often associated with some functional disorganization which may consist either of attempts at discharging inner tension or trial and error attempts to solve the problem. Through this mechanism the pregnant minor may either develop new methods of dealing with her problem or fail and simply avoid a solution. The new methods of problem solving developed during the crisis are typically added to her repertoire of behaviors, and if effective, will be likely to reoccur in the future. The inability to deal with the problem, or an inadequate understanding of the nature of the problem and its causes, and/or a poor solution will considerably impair future coping abilities of the pregnant minor.

Halpern and others[25] take this one step further in their systems approach to family treatment. From their perspective, at the more general systems level, a system in crisis may be best defined as a system under such a high degree of environmental stress that both the system's ability to adapt and its ability to maintain its steady state are overwhelmed, resulting in a disorganization of the system. Following such disorganization the system will reorganize itself, but the potential for change is much greater in the reorganizing system than had the crisis not occurred. Thus, the potential exists that the family will be more functional after crises have been identified, verbalized, discussed, and resolved than if secrecy had prevailed. Mandersheid, Silbergeld, and Dager[26] have further elaborated on the resulting stresses from a crisis situation and the corresponding alienation and dysfunction in perception that can accompany fragmented and insulated crisis decision making.

So much more than a child yet so much less than an adult, an adolescent with a problem pregnancy deserves far more careful analysis and assistance than she has been afforded. All teenagers are at risk because they are in a critical stage of psychosexual development and interpersonal relationships.[27] They are socially, psychologically and educationally ill-equipped to meet the demands of adult responsibility, especially those of marriage and parenthood. Insecure about their identities as men and women and only at the beginning of heterosexual interaction, it becomes easy to discern the enormous havoc a non-marital pregnancy injects into their lives. These adolescents are ashamed, frightened, alone, and unable to communicate their predicament to others, largely because of their own fears and self-disapproval. Sometimes the victims of their own destructive game playing with their parents,[28] they find the crisis changes everything: relationships within the community, with parents, siblings, friends, and God, as well as their own attitude toward themselves. The loss of self-esteem can be monumental, demanding much attention and empathy. Why must this loss be irreparable within the family of origin? And why at a time when adolescents most need potential guidance and assistance, should they be robbed of this invaluable resource?

From a number of different sources, a questioning attitude regarding parental exclusion is becoming more prevalent. The Sex Information and Education Council of the United States clearly stated: "As an isolated approach, abortion does little to help the individual work out basic conflicts about herself and may add to feelings of guilt and depression."[29] Hence, it is not unusual to see teenagers who have had an abortion return without counseling a year later with another unwanted pregnancy. Sarrel[30] has noted that the occurrence of a pregnancy often indicates a psychological need to become pregnant which is greater than the need not to be pregnant, and unless a therapeutic approach addresses itself to an understanding of that need and an adjustment of basic life situations, the need will persist and abortion will accomplish little with respect to the well-being of the individual. The same observation, of course, could be made of adoption or of marriage because of pregnancy or of keeping the baby without marriage. Indeed, if the basic factors which led to the pregnancy are not understood and are not altered, then the problem is likely to persist. Aguirre[31] underscores this point in his findings which demonstrated the centrality of man-woman relations for a thorough understanding of repeat abortion behavior.

Beyond a doubt, the pregnant minor needs help in developing a "realistic plan" which takes into account her relationship with her family and the characteristics of her current living situation.

Foster[33] surveyed four hundred pregnant minors, and concluded this can best be done through actual home visits and family conferences. From her perception, parental involvement becomes all the more important when the girl's own family is a single parent family.

To attempt to eliminate parental involvement from a pregnant minor's decision making process is both unrealistic and unnatural. It promotes a false sense of independence and a misguided notion of personal freedom. Adamek[34] has asserted that personal freedom is only enhanced by helping people appreciate the facts of the situations they find themselves in, and encouraging them to deal with the facts in ways which permit self-acceptance and personal growth toward others.

Cobliner, Schulman, and Romney[35] reporting on a clinical study of pregnant adolescents found many of the adolescent patients examined were restricted in their self-awareness, rather mechanical in their attitudes toward the expression of sex, basically lonely and isolated although members of peer groups, frequently hurt by their partner's disinterest in the pregnancy and lack of communication in the relationship, often in poor communication with their parents, and lacking reality appraisal of what it means to care for a baby. When patients consented, interviews were held with their mothers. These interviews often were helpful in establishing much better parent-daughter communication and in working out an appropriate variety of plans for handling the pregnancy.

Chilman found that a number of small studies have shown that abortions are less distressing to the young woman if she has the psychological and financial support of both her parents and her partner. She also noted that case studies, rarely reported in the literature, also have shown that the young woman often mistakenly feels that her parents would not be able to accept her situation and that her partner would be unwilling to help her. She is, however, frequently mistaken about her assumption. Though parents may be shocked and upset by their daughter's pregnancy, Chilman feels that usually they adapt to the situation. It is her concerted opinion, that whatever decision the young woman, her parents, and her partner make together, the sharing they have had in the situation probably would have beneficial effects in most instances. According to Chilman, a secret abortion, without this prior sharing, would seem to create a psychological burden for the young woman and a barrier to her future relationships with those people in her life who are most significant to her.

In dealing with problem pregnancies the Consortium on Early Childbearing and Childrearing of the Child Welfare League of America has asserted that "Parents have a primary influence on their children's development of feelings of self-worth and ego strength. Parents are motivated to seek help in a crisis." According to the Consortium, opening lines of communication between parent and child is seen as one of the important goals of sex and parenting education programs. They added, "Although young people are often asked how they think their parents feel about it (sexuality), parents themselves are seldom asked." In communication about adolescent sexuality, the Consortium felt that often the experience provides "both parent and teenager with his or her first realization of the other as a sexual being. Frequently, parents are reassured that young people are not as 'far out' as they thought, and the young people often find their parents' values more liberal than they had anticipated."[37]

Perhaps the most comprehensive and current assessment of teenage problem pregnancies has recently been undertaken by the Family Impact Seminar of the Institute for Educational Leadership at George Washington University. One of the participants, Greer Litton Fox, writing on the role of the family concluded:

> With regard to policies concerning teenage sexuality, the evidence from existing research suggests a rather simple cardinal

> principle: ways of involving the parent or parents of teens must be developed; implemented as a core component of the program; and evaluated, whether the specific program is primary prevention, sex education, contraceptive service provision, or pregnancy and post-partum assistance. Policies that ignore familial support, and undermine, rather than supplement, the efforts and effectiveness of parents are likely to yield programs that are wasteful, inefficient, and ineffective; and, what is more serious, are likely to do a considerable disservice to the teenagers about whom we are so concerned.[38]

Furstenberg, another participant, reviewed the kinship roles of families in dealing with a problem pregnancy and strongly criticized pregnancy counseling for not involving parents and perhaps other interested relatives or parties in the decision. In his words, "if they are not consulted, or at least considered, the decision reached may be disruptive, unrealistic, or perhaps even destructive to the interests of both the adolescent and her family."[39]

And finally, T. Ooms who was the deputy director of the Seminar and report editor developed eight family impact principles based on the findings of the contributors, two of which are germane here:

> #3. Policies should recognize that an adolescent's pregnancy and childbearing can have profound effects on other members of her family, and that the family, therefore, has an interest in being consulted about the decisions she makes about her pregnancy.
>
> #6. Policies should reflect an understanding that families with adolescents are in a stage

> of transition in which parents' and children's roles and responsibilities undergo a process of negotiation and readjustment. Some disputes between them are to be expected as a natural part of this process.[40]

Maternal Role and Sibling Role Modeling

To exclude parental involvement from a daughter's pregnancy crisis is at best naive and at worst detrimental for future familial and interpersonal relationships. Parents are the primary reference group for most adolescents.[41] As Honig[42] has noted, clinical and research evidence make it abundantly clear that the heritage of parent-child relationships that a young person carries into and through adolescence can have impact on how she feels about herself and others. In order for an adolescent to develop into a reasonably self-reliant, adaptable, creative and self-disciplined person there must be many opportunities to learn these patterns during the years of growing up.

Mothers in particular play a critical role in their daughter's sexuality. According to Inazu and Fox,[43] mothers can be expected to influence their daughter's sex behavior indirectly through their presence and their availibility in providing socioemotional support. They found that daughters whose socioemotional needs are met at home are less likely to become involved in intimate relationships outside the home to fulfill these needs. Evidence from numerous studies suggest non-virgins are more likely to have poorer communication with their mothers,[44] to be lower on parental involvement,[45] and to have less affectional relationships with their mothers.[46] Studies by Card[47] and Presser[48] have even shown that teenage mothers are more prone to have daughters who themselves become teenage mothers. Hence, the mother's role, be it positive or negative, is incontrovertible in her daughter's sexual development.

The multigenerational context of families is another key aspect which has received little attention in the abortion literature. The abortion decision interfaces directly with the developmental agenda of both daughters and mothers. Eriksonian developmental theory postulates adolescent growth spanning various stages: autonomy and separation, the establishment or consolidation of one's identity, the establishment of appropriate attachments to people outside the realm of the family, and self mastery over impulses including the ability to anticipate future consequences of present actions. Abortion subverts each of these stages in its over-emphasis on the individual and its separation from the relational context. It negatively impacts on self-identity mainly through guilt production, which is especially unnecessary and damaging at this stage of development. Abortion fosters pseudo trust and attachment with abortion personnel and aligns the individual with those who hold concurrent opinions. And lastly, abortion reinforces impulsivity, secrecy, and denial, increasing the probability of future dysfunctional problem solving.

The demanding roles of mothering and her developmental agenda interact concurrently with her daughter's stages of growth. According to Litton Fox,[49] the parent of a maturing daughter must serve as both protector of the daughter-as-child and as guide for the daughter-as-woman. Abortion confounds these roles in that it can be a "silent solution" with no parental awareness or involvement, or the roles may be mistakenly interchanged. In addition, abortion impacts upon the mother's stages of development, i.e., the crisis of being (finding meaning beyond the maternal role), doing (accomplishment of re-entry into non-familial activities or responsibilities), and aging (coping with the loss of culturally valued youthfulness and beauty). Abortion not only voids motherhood, it also deifies "meism," and promotes insecurity via mother-daughter competitiveness.

In their latest research, Inazu and Fox[50] after studying over four hundred mothers and their fourteen to sixteen year old daughters concluded:

> The mother's presence as a role model for her daughter, both in terms of her salience as a significant other in her daughter's life and in terms of her own non-marital sexual experiences, was significantly related to the daughter's sexual status...this study would suggest that policies which are directed at strengthening family functioning through undergirding adult family members in their roles as parents are as likely to be fruitful as policies targeted directly at teenagers.

This research, similar to the growing body of related studies, underscores the ultimate importance of the family unit as the primary context within which individual behavior is defined, developed, and differentiated.

And yet, how many teenagers involve their parents in their sexual decision making, including abortion? One study of fourteen hundred parents in Cleveland suggested most teenagers don't,[51] and on abortion, estimates vary from one out five to maybe half who do.[52]

In spite of fears raised as to parental condemnation, it should be realized that open and honest communication is a requisite for maturity and healthy personality development. Hence, it is not only expected that a problem pregnancy be disruptive of family dynamics, it is desirable, since it is away from this familial context that the minor daughter has turned, and where ultimately she must return and be accountable for her choice. On the other hand, it seems unfair to minimize the responsible concern of significant persons in a woman's life, or to act on the assumption that they are unconcerned or indifferent. Helping agents or family members who overlook relationship considerations in favor of unilateral prerogatives evade the basic human issues of mutuality and fairness, and injure the possibilities of future trusting relationships.

For those adolescents who involve their parents in abortion decision making, the initial emotional risks are high: fear of parental rejection, hurt, embarassment, loss of approval, and privileges. And yet, the potential for maturity, intimacy, and future familial and relational closeness is also high. For those who don't, there is a plethora of possible negative consequences: excessive guilt, intrapsychic conflict, alienation, self-rejection, damaged interactional abilities, increased fears, depression, loss of identity, and the likelihood of repeat abortions with their attendant physiological sequelae.

To think then in terms of crisis decision making within the context of a relational vacuum is to program failure. Abortion as a crisis should be equivalently added to the list of other crises family members encounter, and need familial assistance in resolving: e.g., identity crises, rape, suicide, rejection, drug addiction, school problems, sibling hostility, phobias, death of a family member, emotional disturbances, etc. Rueveni[53] and many others have advocated family network intervention, i.e., mobilizing support for families in crisis. Umbarger and White[54] further illustrate the need for redefining the problem away from the notion of individual "symptom bearer" to the healing of the family system as a whole.

Male Abortion Experience: The Double Standard Revised

Extensive research has focused on abortion and women, while men have largely been legally, psychologically, and medically bypassed. Milling[55] in interviews with over four hundred males at an eastern abortion clinic found that while most of the males studied were consulted regarding the abortion, most of the relationships (70%) failed one month post abortion.

Shostak[56] observed that a sizable minority of males find their abortion experience more frustrating, trying, and emotionally costly than public and academic neglect of this subject would suggest. He also noted that three out of four male partner respondents stated they had a difficult time with the abortion experience, that most relationships did not survive the abortion stresses, and that a sizable minority reported persistent day and night dreams about the child-that-never-was, and considerable guilt, remorse, and sadness.

While most males deny negative or emotional consequences from abortion, research by Jaffee,[57] Luker,[58] Luscutoff and Elms,[59] and Zorabedian[61] suggest a distinct minority of those men studied have found the abortion experience to be bewildering and painful beyond their coping abilities.

Becoming a father is of course far more complex than intromission and conception. Rather it is an ongoing process begun long before the actual entrance into fatherhood signaled by pregnancy and childbirth. This process includes the development of certain personal qualities, goals, attitudes, self-representations, expectations, roles, object relationships, conflicts, and defense mechanisms. For men as well as women, abortion abruptly arrests this process and creates a role vacuum in which confusion, ambivalence, guilt and hostility abound.

Francke,[62] in part drawing on her own abortion experience which nearly ended her marriage, warned of considerable role conflict for males in that they are so eager to protect the female's well-being that they tended to discount or suppress their own needs, a realization that added to a man's unexpressed guilt and anger which can fester for months afterward. Francke found men devastated, that is, the ones who cared. While legally the right to abdicate future motherhood is guaranteed, the right to insist on future fatherhood is not. This alone is very disturbing and unfair to many men. This societal impotency has for a number of men produced sexual impotency, typified by a feeling of helplessness and hostility.

In addition, Francke found men to be "silent sufferers, bewildered and frustrated by their emotional responses" to abortion. Furthermore, she concluded that abortion is a far greater dilemma for men than researchers, counselors, and women have even begun to realize.[63]

For men who don't care about the women they impregnate, abortion is a neat disposal system of the evidence of their sexuality and a rather conclusive abdication of caretaking responsibilities.[64] This too typifies the cultural imperative of self-fulfillment and "meism", thereby denigrating human sexual interaction to the level of secrecy, denial, irresponsibility, and future problematic relationships and pregnancies.

In a very real sense, the double standard has been revisited and revised with abortion. Consider the following: (1) While women may choose motherhood, men may not choose fatherhood; (2) If women choose motherhood, men are obligated in paternity action; (3) While women may choose an abortion over the male's objection, men typically shoulder the bulk of the financial costs; (4) When men promote abortion for their partners, it is typified as coercion, lack of caring, abdication of traditional male roles, insensitivity, and selfishness. Whereas, when women choose abortion it is the exclamation of women's rights, an affirmation of the right to health and freedom from male oppression, and a confirmation of sovereign territoriality over the female body and reproductive functions;[66] (5) Abortion is granted ipso facto for the woman, insuring a continuance of "normalcy" in pre-pregnancy relationships with parents, peers, and significant others, yet typically negating the relationship with her sexual partner without his consideration;[67] (6) When sexual partners, be they married or not, have different religious orientations, regardless of the male beliefs of traditionalism or religious affiliation which may condemn abortion or his accompanying religious estrangement, the woman may proceed with the abortion;[68] and (7) In the resolution of a problem pregnancy, both male and female have equal rights with respect to adoption, but not with abortion. In both adoption and abortion, at least one parent wishes to terminate involvement of parental rights and responsibilities. Such a termination, in either case, completely forecloses the rights of both parents. Hence, when the parents' interests in the child conflict, the determination of rights in one conflict should have a significant application to the other. Therefore, if due process and equal protection are guaranteed for the male in adoption, no parallel provisions exist in abortion;[69] and (8) While a child is allowed recovery for the wrongful death of the putative father, the unwed father has not been allowed to recover for the wrongful death of his aborted illegitimate child.[70]

To state the case succinctly, the Supreme Court in protecting the privacy of the mother in abortion, may well have violated the constitutional rights of the father, married or not.

Abortion and Its Psychological Consequences

Beyond legalities, the abortion experience confronts the very nature of a woman's identity. Countless authors have exclaimed the merits of this medical procedure and asserted only temporary, nonpathological, and limited adverse emotional sequelae.[71] And yet, the only consistent positive reaction reported in an exhaustive literature review is that of relief. Virtually no study reported additional positive feelings, void of negative reactions. However, rank ordered negative feelings may include: guilt, anxiety, depression, a sense of loss, anger, relational changes with partner, crying, a feeling of being misled by misinformation or lack of information, deterioration of self image, regret or remorse, nightmares, anxiety about possible infertility, loneliness/alienation, marital disruption, physical concerns, disturbance in sleep patterns, imagining the aborted child, flashbacks, psychotic reactions, hopelessness, helplessness, powerlessness, and changes in significant relationships.[72] According to Illsley and Hall,[73] guilt and abortion have virtually become synonymous: "...it is superfluous to ask whether patients experience guilt - it is axiomatic that they will."

Correspondingly, it is becoming increasingly clear that abortion is a far more physiologically complicated procedure than was previously thought.[74] Psychologically, the negative potential reactions span anxiety and depression to psychosis and suicide. It is beyond the scope of this discussion to provide an in-depth analysis of this phenomenon. However, in Table 1, thirty-four studies concerning these negative reactions are briefly reported.

That there are so few studies and that negative reactions are typified as "minority reports" might be partially explained in the following manner. First, a number of investigations have been funded by organizations or agencies dedicated to abortion, and many investigators have personally favored abortion, which can create a potential systematic bias in design, execution, and reporting of the findings.[109] Second, American women have known relatively little about the physiological and/or psychological dangers of abortion, and rather, have focused primarily on the immediacy of problem pregnancy solution. In a very real sense then, if there is no awareness or concern, there is little or no verbalization. Third, with greater publicity of the fetal stages of development and greater controversy over abortion, American women are beginning to realize that abortion does indeed destroy human life and that negative reactions to this dehumanization are appropriate and legitimate. Fourth, and inversely, with societal sanctioning of abortion, there has been a "mainstream effect" of pressuring women to deny negative post-abortion feelings because they are unacceptable and incompatible with social and peer perceptions favoring the procedure. Fifth, women participating in research frequently feel the pressure of conformity to conventional and acceptable post-abortion responses, and are perhaps even fearful of the loss of confidentiality and the reporting of any negative sequelae in order to avoid any stigma of deviancy.[110] Sixth, few long term longitudinal studies have been conducted which assess personal, relational and familial consequences. Such durational investigations are needed in order to validly examine the actual extent of relational disruption. And seventh, there is evidence to suggest that only in-depth post-abortion interviews with a trusted person truly reveal the personal agony and relational trauma that abortion induces;[111] questionnaires may then be of dubious value because of the complexity and ambivalence of human attitudes and because answers to survey questions are notoriously sensitive to the wording of the questions.[112]

Abortion as a Social Problem

Promoted by social, judicial and political engineers, abortion has been heralded as the solution for problem pregnancies. And if this myopic thinking were not enough, there are those who advocate induced abortion as cure for poverty,[113] elixir for marital and self-fulfillment,[114] remedy for defective humans,[115] treatment for mental health,[116] antidote for sexual inequality,[117] and prevention for child abuse.[118] Evidence presented here would suggest otherwise. Abortion in itself solves nothing; in fact, it regenerates failure in increasing risks for repeated abortions.[119]

Like the Trojan horse, abortion is only beginning to be seen for what it truly is and does. There is evidence to suggest that induced abortion promotes "mystification and masking" within the family which is dysfunctional for the individual in every context.[120] In relationships, abortion provides "pseudo-homeostasis," i.e., a stability thru nonadjustment rather than thru readjustment, which promotes even more serious relational disequilibrium, particularly for parents and daughters.[121] For men it provides relief, alienation, role conflict, and masculine insecurity. For women it provides relief, but it also induces a heavy burden of guilt, secrecy, and intrapsychic conflict. Clinically, if an unwanted pregnancy is a mistake or a problem, then abortion becomes a denial of the problem. Psychologically, abortion then reinforces defective problem solving behavior.

Of much interest recently has been the relationship between child abuse and abortion. If violence begets violence,[122] and abortion is the violent truncation of life, then to what extent does abortion actually enable child abuse? Even the language of abortion has been typified as "dehumanizing" as it refers to fetal removal as "pieces of tissue" or a "clump of cells."[123] Ney[124] examined demographic data and found abortion was increasing as rapidly as child abuse and reported that unrestricted abortion diminishes restraint against rage, the taboo against aggressing the defenseless young, the value of children, increases hostility between generations, escalates the battle of the sexes, and breaks down the pair-bonding ability in mothers with their infants and hence, promotes child abuse. Studies by Calef[125] and Kumar and Robson[126] lend corroboration to these findings.

Abuse, of course, is a behavior that manifests itself in degrees. Abortion as a process of elimination or termination likewise is accomplished in varying degrees from the initial crisis decision making to the post-abortion sequelae. Both child abuse and abortion exist because of denial, hostility, frustration, the elevation of self, and the negation of life. Even if at the present time it cannot be empirically demonstrated that abortion "causes" child abuse, abortion does cause personal and relational abuse.

It may also be said that abortion weakens the marital structure. In the case of an interfaith or varying degrees of religiosity marriage, the decision to abort by the spouse with the less conservative belief system necessarily collides with that of the other partner.[127] Abortion may even be antithetical to marriage in that it eliminates procreative responsibility, and occurs most frequently among those who cohabit.[128] One study found that seventy-five percent of the aborting respondents asserted that "a child at this time would interfere with my career, education, or personal freedom."[129] Abortion also disguises and increases marital dysfunction in that a problem pregnancy from an extramarital affair can be secretly disposed. In short, being married is frequently referred to as the dominant sociodemographic correlate of a difficult abortion decision.[130]

Conclusion

With the recent psychocultural obsession with self, faulty thinking has led to faulty social rules. Abortion is one of the more painful social lessons to learn. From the imperative of compulsive self-fulfillment, each of us have become our own object of worship. As selves, we have been culturally commanded to "do our own thing," liberate ourselves from repressive traditionalism, concentrating on our feelings, potentials, needs, wants and desires. The pied piper of "meism" has nearly led us to our demise, for nothing has subverted self-fulfillment more thoroughly than self-indulgence. Yankelovitch said it well:

> Even moderate forms of the assumption that selves are culture-free and wholly autonomous run the risk of alienation, loneliness, meaninglessness, and futility. We are not our own work of art. We do not create ourselves as an artist paints a picture or writes a novel. Constant changes in commitments and outlook are not the route to real self-fulfillment. Suppression of needs is not always bad; in fact, some suppression is required if one is to avoid becoming a blob of contradictions.[131]

In a broader sense, selfhood is integrated with caring, even intuitively. When one ceases to care, about family, children, the future, the helpless, friends, the world, the meaningfulness of experience vanishes and so does the essence of selfhood and individual fulfillment.

Abortion then is an undesirable symptom of a far greater problem. There is of course a benefit to abortion. It provides relief, which in turn feels good. But at the core of abortion there is a moral and social absurdity. Desires are morally sanctioned which do not contribute to either the individual's or society's well-being. At this core there is no discrimination between socially valuable and socially destructive desires, and there is no principle other than hedonism for interpreting human sexuality and the sacrifices inherent in human reproductive functioning.

Abortion shreds the soul of humanity and the fabric of relationships. It exists _for_ women, yet it is _against_ women, men, and children. Like an anesthesia, abortion comfortably numbs all from experiencing the burden of pregnancy. Abortion has become a social eraser, individually, quickly and secretly eliminating all traces of the problem that is pregnancy. And yet, traces always remain. Within the depths of humankind, the indelible marks of violation appear. How long must we continue to stigmatize ourselves and socially sanction this self-perpetuating problem?

The battle though has just begun. The ethical status of desire is pitted against what moral meaning to assign needs and wants. In such a struggle, how then is a woman who finds herself frustrated and wants to abort, any different from a husband who is enraged in an argument with his unsympathetic spouse, and feels like strangling her, or an adult offspring who feels imposed upon by sick and aging parents, and wishes they would disappear, or the harried freeway commuter, feeling oppressed by job strains, family responsibilities, and deadlocked traffic, who wants to smash through others, or the parents of a handicapped child who feel overwhelmed at times, and wish they were still alone. As a nation and as individuals, is it not how we view the decisions concerning these conflicting desires that is the crux of the problem?

Table 1: Major Studies on Psychological Ill Effects of Induced Abortion

Study	Date	Major Findings
Sim[75]	1963	Abortion is poor treatment for mental illness or prevention.
White[76]	1966	Abortion increases bitterness toward men, especially the father.
Pare and Hermione[77]	1970	More motherly and more mature women feel more post-abortion guilt.
Colman and Colman[78]	1971	The stress from previous abortions can delay preparation for subsequent childbearing and retard mother child bond formation.
Calef[79]	1972	Clinical study suggesting post-abortion anxiety and disruption of marital sexual relations.
Bracken and Suigar[80]	1972	Self-reported negative abortion reactions were associated with being single, young, and lacking support from partner and parents.
Osofsky and Osofsky[81]	1972	Sixteen percent of abortion patients were judged unhappy and twenty-five percent expressed guilt.
Perez-Reyes and Falk[82]	1973	Fifteen percent of post-abortion adolescents expressed adverse feelings of depression, guilt, anger and anxiety.

Study	Date	Major Findings
Kaltreider[83]	1973	Reported on the increased emotional difficulties in midtrimester abortion patients, noting that those women who perceived the fetus as a human being, i.e., baby, felt guilty or sad.
Ewing and Rouse[84]	1973	Nineteen percent of post-abortion patients expressed immediate negative reactions, especially if there is prior history of emotional disturbance.
Hutcherson[85]	1973	Women who abort were found to be low in self esteem.
Lawrence[86]	1973	Abortion does little to reduce anxiety, especially in second trimester saline procedures.
Barglow and Weinstein[87]	1973	Post-abortion mourning period correlated with heavy decision influence by parents, peers, and partners.
Martin[88]	1973	Negative abortion adjustment related to emotional involvement in pregnancy, few close friends, poor parental relations, and no support from sex partner.
Moore-Caver[89]	1974	Review of abortion literature finding severe guilt in 2 to 23 percent of patients.
Bracken,Hachmovitch and Grossman[90]	1974	Lack of parental emotional support to aborting daughters or pressure by parents for abortion were associated with negative reactions.

Study	Date	Major Findings
Blumberg, Golbus and Hanson[91]	1975	Higher rate of depression for genetic vs. elective abortion, plus post-abortion family disharmony and flashbacks.
Adler[92]	1975	Some post-abortion patients experience relief and happiness with guilt, shame, fear, loss, anger resentment, depression, or remorse.
Evans, Selstad and Welcher[93]	1976	Twenty percent regretted the abortion experience. Conservatism, religious affiliation, pressure to abort were highly related.
Lipper, et al.[94]	1976	Repeat aborters experienced acute obsessive-compulsive reactions to viewing the limp fetus.
Greenglass[95]	1976	Twelve percent of aborted women experienced negative psychological reactions with three percent attempting suicide. Psychiatric patients pre-abortion were three times as likely to require therapy post-abortion.
Jacobsen, Perris and Espvall[96]	1977	Psychological profile of women who had aborted identified traits of dominance, aggressiveness, nurturance and autonomy suggesting a sado-masochistic orientation.
Kent[97]	1977	Abortion in patients' histories were major precipitants in seeking psychotherapy, including vicarious suicide.

Study	Date	Major Findings
Burke[98]	1977	Abortion patients utilize denial of agressiveness and projection onto unborn child.
Bracken[99]	1978	Being married was highly correlated with a difficult abortion decision. Fifteen percent of the sample experienced a difficult abortion decision, anxiety, depression, and pain.
Blumfield[100]	1978	Evidence of underlying psychological conflict in women seeking abortion and thirty four percent had underlying conflictual wish to be pregnant.
Spaulding and Cavenar[101]	1978	Post-abortion guilt and psychoses, and consternation and anniversary reactions.
Cavenar,Maltbie and Sullivan[102]	1978	Describes psychiatric sequelae of abortion in potential grandparents and other family members, and psychogenic problems post-abortion for some women for twenty years after the procedure.
Cavenar[103]	1978	Report of psychogenic abdominal pain after abortion and anniversary reactions.
Brewer[104]	1978	Twenty percent of sample reported negative psychic trauma.

Study	Date	Major Findings
Fisher[105]	1979	Abortion patients in therapy experienced poor relationships with men, poor impulse control, and masochistic tendencies.
Shusterman[106]	1979	Positive abortion reactions were related to satisfaction with decision to abort, non-upset over pregnancy, and sharing with their partner. Negative reaction with the inverse.
Cavenar, Spaulding and Sullivan[107]	1979	Reported on the impact of abortion on family members, and in particular, the intrapsychic conflict experienced by children whose mother had aborted a pregnancy known to them.
Liebman and Zimmer[108]	1979	Reported twenty four immediate and long term post-abortion abreactions affecting self image, relationships, and future coping abilities.

NOTES

1. "The Battle Over Abortion." Cover Story *Time*, April 6, 1981, pp.20-28.

2. Peter Riga, "The Supreme Court's View of Marriage and the Family: Tradition or Transition." *Journal of Family Law*, Vol. 18 (1979-80), pp.301-330.

3. Charles F. Crutchfield, "Medical Treatment for Minor Children: The Roles of Parents, the State, the Child, and the Supreme Court of the United States," *Family Relations*, Vol. 30 (1981), pp.165-178.

4. John J. Dempsey, *The Family and Public Policy* (Baltimore: Paul H. Brookes, 1981) pp.71-100.

5. Jake Garn and Lincoln Oliphant, "Abortion and the American Family: A Note on a Court Long Overdue," *Human Life Review* Vol. VI (1980), pp.16-36.

6. U.S. Bureau of the Census. "Perspective on American Fertility," *Current Population Reports*, Series P-23, No.70. (Washington, D.C.: U.S. Government Printing Office, 1978).

7. J.D. Forrest, C. Teitze and E. Sullivan, "Abortion in the United States, 1976-1977," *Family Planning Perspectives* Vol. 10 (1978), pp.271-279.

8. Richard S. Krannich, "Abortion in the United States: Past, Present, and Future Trends," *Family Relations* Vol.29 (1980), pp.365-374.

9. The Alan Guttmacher Institute, "Continued Increase in Teen Sex, Pregnancy," *Family Therapy News* Vol.12 (1981), p.13.

10. James Ford, Testimony before the Senate Labor and Human Resources Committee, March 31,1981, Washington, D.C.

11. H. Fuchs Ebaugh and C. Allen Haney, "Shifts in Abortion Attitudes: 1972-1978," *Journal of Marriage and the Family* Vol.42 (1980), pp.491-499.

12. Daniel Yankelovich, *New Rules* (New York: Random House, 1981).

13. Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (New York: Norton, 1979), p.30.

14. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

15. *Abortion Surveillance Annual Summary, 1978*. Washington, D.C.: Center for Disease Control, Public Health Service, USDHEW, 1980.

16. R. Hill, *Families Under Stress* (New York: Harper, 1949).

17. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

18. For a legal review see, G. Crook, Brief of Amicus Curiae, Committee to Defend Reproductive Rights v. Myers, California Supreme Court, S.F. No. 24069, 1979; for reviews in the family literature see J. Aldous, et al. eds. *Family Problem Solving* (Hinsdale, Illinois: Dryden Press, 1971); D. Klein and R. Hill,"Determinants of Family Problem Solving Effectiveness" in W. Burr, R. Hill, F. Nye and I. Reiss, eds., *Contemporary Theories About the Family* Vol. 2, (New York: Free Press, 1979), pp.493-548; E. Shorter, *The Making of the Modern Family* (New York: Basic Books, 1975); M. Sussman, "Family" in J. Turner, ed., *Encyclopedia of Social Work* 17th ed. (Washington, D.C.: National Association of Social Workers, 1977); and R. Hill, "Status of Family Research, 1900-70," in J. Calhoun et al. eds. *The Status of Children, Youth, and Families*, (Washington, D.C.: U.S. Department of Health and Human Services, 1980).

19. T. Eliot, "Handling Family Strains and Shocks" in H. Becker and R. Hill eds., *Family, Marriage and Parenthood* 2nd ed. (Boston: D.C. Health, 1955).

20. W. Waller, *The Family: A Dynamic Interpretation*, revised by R. Hill, (New York: Dryden Press, 1951).

21. M. Cotroneo and B. Krasner, "A Study of Abortion and Problems in Decision Making," *Journal of Marriage and Family Counseling* Vol.3 (1977), pp.69-76.

22. R. Rosen, "Teenage Pregnancy and Parental Involvement: Changing Trends." Paper presented at the Annual Meeting of the Society for the Study of Social Problems, Chicago, Illinois, 1977.

23. R. Wilson, *Problem Pregnancy and Abortion Counseling* (Saluda, North Carolina: Family Life Publications, 1973).

24. C. Chilman, *Adolescent Sexuality in a Changing American Society: Social and Psychological Perspectives*. (Bethseda, Maryland: DHEW, 1978).

25. H. Halpern et al., "A Systems Approach to Family Treatment" *Journal of Marital and Family Therapy* Vol.5 (1979). pp.87-94.

26. R. Manderscheid, S. Silbergeld, and E. Dager, "Alienation: A Response to Stress" *Journal of Cybernetics* Vol.5 (1975), pp. 91-105.

27. P. Blos, *The Adolescent Passage* (New York: International Universities Press, 1979).

28. S. Gedan, "Abortion Counseling with Adolescents" in R. Kalmer ed., *Abortion: The Emotional Implications* (Dubuque, Iowa: Kendall Hunt, 1977), pp.102-107.

29. *Teenage Pregnancy: Prevention and Treatment* (New York: Sex Information and Education Council of the United States, 1971).

30. P. Sarrel, "Teenage Pregnancy," *Pediatric Clinics of North America* Vol.16 (1969), pp.121-129.

31. B.E. Aguirre, "Repeat Induced Abortion: Single, Married and Divorced Women," *Journal of Biosocial Science* Vol.12 (1980), pp.275-286.

32. B. Braen, "The School Age Pregnant Girl," *Clinical Child Psychology Newsletter* Vol.10 (1971), pp.17-20.

33. S. Foster, "Pregnancy Among School Age Girls - A Local Evaluation of a National Problem," *Public Welfare* Vol.11 (1972), pp.73-78.

34. R. Ademak, "Abortion, Personal Freedom and Public Policy," *The Family Coordinator* Vol.23 (1974), pp.411-419.

35. G. Cobliner, H. Schulman, and S. Romney, "The Termination of Adolescent Out-of-Wedlock Pregnancies and the Prospects for

Their Primary Prevention," *American Journal of Obstetrics and Gynecology* Vol.115 (1973), pp.432-444.

36. C. Chilman, *Adolescent Sexuality*, p.302.

37. Consortium on Early Childbearing and Childrearing, *Prevention of Adolescent Pregancy: A Consideration of Adolescent Sexuality* (New York: Child Welfare League of America, 1974) p.18.

38. G. Litton Fox, "The Family's Role in Adolescent Sexual Behavior," in T. Ooms ed., *Teenage Pregnancy in a Family Context* (Philadelphia: Temple University Press, 1981), pp.124-125.

39. F. Furstenberg, Jr., "Implicating the Family: Teenage Parenthood and Kinship Involvement," in T. Ooms ed., *Teenage Pregnancy in a Family Context* (Philadelphia: Temple University Press, 1981), p.162.

40. T. Ooms ed., *Teenage Pregnancy in a Family Context* (Philadelphia: Temple University Press, 1981), p.373.

41. J. Conger, *Contemporary Issues in Adolescent Development* (New York: Harper & Row, 1975).

42. A. Honig, "What We Need to Know to Help the Teenage Parent," *The Family Coordinator* Vol.27 (1978), pp.113-119.

43. J. Inazu and G. Litton Fox, "Maternal Influence on the Sexual Behavior of Teen-age Daughters," *Journal of Family Issues* Vol.1 (1980), pp.81-102.

44. C. Chilman, "Some Psychological Aspects of Female Sexuality," *Family Coordinator* Vol.23 (1974), pp.123-131; G. Litton Fox and J. Inazu, "The Effects of Mother-Daughter Communication on Daughter's Sexual and Contraceptive Knowledge and Behavior." Presented at the Annual meetings of the Population Association of America, Philadelphia, Pennsylvania, 1979.; J. Kantner and M. Zelnik, "Sexual Experience of Young Unmarried Women in the United States," *Family Planning Perspectives* Vol.4 (1972),pp.9-18.

45. P. Miller and W. Simon, "Adolescent Sexual Behavior: Context and Change," *Social Problems* Vol.22 (1974), pp.58-76.

46. S. Jessor and R. Jessor, "Maternal Ideology and Adolescent Problem Behavior," *Developmental Psychology* Vol.10 (1974), pp.246-254.

47. J. Card, "Long-term Consequences for Children Born to Adolescent Parents," American Institute for Research in the Behavioral Sciences, Palo Alto, California, 1978.

48. H. Presser, "Some Consequences of Adolescent Pregnancies," Presented at the National Institute of Child Health and Human Development Conference, Bethseda, Maryland, 1975.

49. G. Litton Fox, "The Family's Role," p.112-113.

50. Inazu and Fox, "Maternal Influence...," 1980, pp.98-99.

51. E. Roberts, D. Kline, and J. Gagnon, *Family Life and Sexual Learning: A Study of the Role of Parents in the Sexual Learning of Children*, Population Education, 1978.

52. R. Rosen, "Adolescent Pregnancy Decision Making: Are Parents Important?" *Adolescence* Vol.XV (1980), pp.43-54.

53. U. Rueveni, "Family Network Intervention: Mobilizing Support for Families in Crisis," *International Journal of Family Counseling* Vol.5 (1977), pp.77-83.

54. C. Umbarge and S. White, "Redefining the Problem: Individual Symptoms and Family System," *International Journal of Family Counseling* Vol.6 (1978), pp.19-24.

55. E. Milling, "The Men Who Wait," *Woman's Life* April, 1975, pp.48-49, 69-71.

56. A. Shostak, "Abortion as Fatherhood Lost: Problems and Reforms," *The Family Coordinator* Vol.28 (1979), pp.569-574.

57. C. Jaffee, "What Abortion Counselors Want from Their Clients," *Social Problems* Vol.28 (1978), pp.112-121.

58. K. Luker, *Taking Chances: Abortion and the Desire Not to Contracept* (Berkeley, California: University of California Press, 1975).

59. S. Luscutoff and A. Elms, "Advice in the Abortion Decision," *Journal of Counseling Psychology* Vol.30 (1975), pp.140-146.

60. J. Smetana, Personal and Moral Concepts: A Study of Women's Reasoning and Decision Making about Abortion. Unpublished Doctoral Dissertation,University of California, Santa Cruz, 1978.

61. T. Zorabedian, The View From Our Side: Sex and Birth Control for Men (Atlanta, Georgia: Emory University Family Planning Program, 1975).

62. L. Francke, The Ambivalence of Abortion (New York: Random House, 1978).

63. L. Francke,"Abortion and Men," Esquire September, 1978, pp.58-60.

64. A Rothstein, "Adolescent Males, Fatherhood, and Abortion," Journal of Youth and Adolescence Vol.7 (1978), pp.203-214.

65. Shostak, "Abortion as Fatherhood Lost," p.573.

66. S. Levy, "Abortion and Dissenting Parents: A Dialogue" Ethics Vol.90 (1980), pp.162-163.

67. Shostak, "Abortion as Fatherhood Lost," p.574.

68. R. Osborn and B. Silkey, "Husbands' Attitudes Towards Abortion and Canadian Abortion Law," Journal of Biosocial Science Vol.12 (1960), pp.21-30.

69. R. Blackwood and R. Blackwood, "What are the Father's Rights in Abortion?" Journal of Legal Medicine Vol.3 (1975), pp.20-28.

70. See Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972).

71. R. Illsey and M. Hale, "Psychosocial Research in Abortion: Selected Issues," in H. David et al., eds., Abortion in Psychosocial Perspective: Trends in Transnational Research (New York: Springer, 1978), pp.11-34; G. Walter, "Psychologic and Emotional Consequences of Elective Abortions: A Review," in R. Kalmar ed., Abortion: The Emotional Implications (Dubuque: Iowa, Kendall Hunt, 1977), pp.24-37.

72. M. Liebman and J. Zimmer, "Psychological Sequelae," p.131.

73. R.Illsley and M.Hall,"Psychological Research," p.12.

74. V.Logrillo, P.Quickenton, G.Therriault, and M.Ellrott, "Effect of Induced Abortion on Subsequent Reproductive Function." Final Report. National Institute of Child Health and Human Development, Contract No.1-HD-6-2802, April 18, 1980.

75. M. Sim, "Abortion and the Psychiatrist," *British Medical Journal* Vol.2 (1963), pp.145-148.

76. R. White, "Induced Abortion: A Survey of Their Psychiatric Implications. Complications, and Indications," *Texas Reports in Biology and Medicine* Vol.24 (1966), pp.531-535.

77. C.Pare and R.Hermione, "Follow-up of Patients Referred for Termination of Pregnancy," *Lancet* Vol.1 (1970) pp.635-637.

78. A. Colman and L. Colman, *Pregnancy: The Psychological Experience* (New York: Herder and Herder, 1971).

79. V. Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse, and Abortions," *International Journal of Psychoanalytic Psychotherapy* Vol.1 (1972), pp.79-96.

80. M. Bracken and M. Suigar, "Factors Associated with Delay in Seeking in Induced Abortions," *American Journal of Obstetrics and Gynecology* Vol.113 (1972), pp.301-309.

81. J. Osofsky and H. Osofsky, "The Psychological Reaction of Patients to Legalized Abortions," *American Journal of Orthopsychiatry* Vol.42 (1972), pp.48-60.

82. M. Perez-Reyes and R. Falk, "Follow-up after Therapeutic Abortion in Early Adolescence," *Archives of General Psychiatry* Vol.28 (1973), pp.120-126

83. N. Kaltreider, "Psychological Factors in Mid-trimester Abortions," *Psychiatry and Medicine* Vol.4 (1973), pp.129-134.

84. J. Ewing and B. Rouse, "Therapeutic Abortions and a Prior Psychiatric History," *American Journal of Psychiatry* Vol. 130 (1973), pp.37-40.

85. J. Hutcherson, "The Self Concept of Women at the Time of Elective Abortion," *Dissertation Abstracts International* Vol.33 (1973), 5493.

86. W. Lawrence, "Anxiety-adjustment and Other Personality Factors in Teen-age Patients before and after Abortion," Proceedings of the 81st Annual Convention of the American Psychological Association, 1973, pp.413-414.

87. P. Barglow and S. Weinstein, "Therapeutic Abortion During Adolescence: Psychiatric Observations," Journal of Youth Adolescence Vol.4 (1973), pp.331-342.

88. C. Martin, "Psychological Problems of Abortion for the Unwed Teenage Girl," Genetic Psychiatric Monographs Vol.88 (1973), pp.23-110.

89. E. Moore-Caver, "The International Inventory on Information on Induced Abortion," International Institute for the Study of Human Reproduction, New York: Columbia University, 1974.

90. M. Bracken, M. Hachamovitch, and G. Grossman, "The Decision to Abort and Psychological Sequelae," Journal of Nervous and Mental Disease Vol.158 (1974), pp.154-162.

91. B. Blumberg, M. Golbus and K. Hanson, "The Psychological Sequelae of Abortion Performed for Genetic Indication," American Journal of Obstetrics and Gynecology Vol.22 (1975), pp.215-224

92. N. Adler, "Emotional Responses of Women Following Therapeutic Abortion," American Journal of Orthopsychiatry Vol. 5 (1975), pp.446-454.

93. J. Evans, G. Selstad and W. Welcher, "Teenagers: Fertility Control Behavior and Attitudes before and after Abortion, Childbearing or Negative Pregnancy Test," Family Planning Perspectives Vol. 8 (1976), pp.192-200.

94. S. Lipper, et al., "Obsessive-compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion," American Journal of Psychotherapy Vol.30 (1976), pp.666-674.

95. E. Greenglass, "Therapeutic Abortion and Psychiatric Disturbance in Canadian Women," Canadian Psychiatric Association Journal Vol.21 (1976), pp.45-460.

96. L. Jacobsen, L. Perris, and M. Esquall, "Personality Patterns in Induced Abortion," in R. Kalmar, Abortion: The Emotional Implications (Dubuque, Iowa: Kendall Hunt, 1977), pp.5-16.

97. I. Kent, "Emotional Sequelae of Therapeutic Abortion," Presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon, September, 1977.

98. F. Burkle, "A Developmental Approach to Post Partum Abortion Depression," *Practitioner* Vol.218 (1977), pp.217-225.

99. M. Bracken, "A Causal Model of Psychosomatic Reactions to Vacuum Aspiration," *Social Psychiatry* Vol.13 (1978), pp.135-145.

100. M. Blumenfield, "Psychological Factors Involved in Request for Elective Abortion," *Journal of Clinical Psychiatry* Vol.39 (1978), pp.17-25.

101. J. Spaulding and J. Cavenar, "Psychoses Following Therapeutic Abortion," *American Journal of Psychiatry* Vol.135 (1978), pp.364-365.

102. J. Cavenar, A. Maltbie, and J. Sullivan, "Psychiatric Sequelae of Therapeutic Abortion," *North Carolina Medical Journal* Vol.39 (1978), pp.101-104.

103. J. Cavenar, "Aftermath of Abortion: Anniversary Depressions and Abdominal Pain," *Bulletin of Menninger Clinic* Vol.42 (1978), pp.433-438.

104. C. Brewer, "Induced Abortion after Feeling Fetal Movements: Its Causes and Emotional Consequences," *Journal of Biological and Social Sciences* Vol.10 (1978), pp.203-208.

105. H. Fisher, "Abortion: Pain or Pleasure?" in D. Mall and W. Watts eds., *The Psychological Aspects of Abortion* (Washington, D.C.: University Publications of America, 1979), pp.39-52.

106. L. Shusterman, "Predicting the Psychological Consequences of Abortion," *Social Science and Medicine* Vol.13A (1979), pp.683-689.

107. J. Cavenar, A. Maltbie, and J. Sullivan, "Psychiatric Sequelae of Therapeutic Abortion," *North Carolina Medical Journal* Vol.39 (1978), pp.101-104.

108. M. Liebman and J. Zimmer, "The Psychological Sequelae of Abortion: Fact and Fallacy," in D. Mall and W. Watts eds., *The Psychological Aspects of Abortion* (Washington, D.C.: University Publications of America, 1979), pp.127-138.

109. M. Zelnik and J. Kantner, "Attitudes of American Teenagers Towards Abortion," Family Planning Perspectives Vol.7 (1975), pp.89-91. See also: "Forward" by Christopher Tietze in H. David et al., eds. Abortion in Psychosocial Perspective (New York: Springer, 1978), p.vii.

110. J. Watson and V. Rue, "Problem Pregnancies: Analyzing the Counselor's Role," Sharing Spring (1974), pp.15-17.

111. I. Kent, "Emotional Sequelae," p.12.

112. D. Granberg and B. Granberg, "Abortion Attitudes, 1965-1980: Trends and Determinants," Family Planning Perspectives Vol.12 (1980), p.251.

113. S. Rothman, "Sterilizing the Poor," Society Vol.14 (1977), pp.36-40.

114. J. Miller, Toward a New Psychology of Women (Boston: Beacon Press, 1976), and M. Skowronski, Abortion and Alternatives (Millbrae, California: Les Femmes Publishing, 1977).

115. J. Oliver and K. Dewhurst, "Six Generations of Ill-used Children in a Huntington's Pedigree," Postgraduate Medical Journal Vol. 45 (1969), pp.757-760.

116. A. Lebensohn, "Legal Abortion as a Positive Mental Health Measure in Family Planning," Comprehensive Psychiatry Vol.14 (1973), pp.95-98.

117. A. Mander and A. Rush, Feminism as Therapy (New York: Random House, 1974).

118. T. Lowry, "Abortion as a Preventive for Abused Children," Psychiatric Opinion Vol.8 (1970), pp.19-25.

119. C. Tietze, "Repeat Abortions - Why More?" Family Planning Perspectives Vol.10 (1978), pp.286-288.

120. H. Lennard and A. Bernstein, Patterns in Human Interaction (San Francisco: Jossey-Bass, 1970), p.180.

121. Ibid., p.181.

122. M. Strauss, "Husbands and Wives as Victims and Agressors in Marital Violence." Paper presented at the Annual meetings of the American Association for the Advancement of Science, San Francisco, 1980.

123. D. Mall, "Abortion and the Cognitive Foundation of Dehumanization," in D. Mall ed., The Psychological Aspects of Abortion (Washington, D.C.: University Publications, 1979), pp.139-151.

124. P. Ney, "Relationship Between Abortion and Child Abuse," Canadian Journal of Psychiatry Vol.24 (1979), pp.610-620.

125. V. Calef, "The Hostility of Parents to Children."

126. R. Kumar and K. Robson, "Previous Induced Abortion and Antenatal Depression in Primiparae: Preliminary Report of a Survey of Mental Health in Pregnancy," Psychological Medicine Vol.8 (1978), pp.711-715.

127. D. Granberg and B. Granberg, "Abortion Attitudes."

128. L. Shusterman, "Predicting the Psychological," p.685.

129. Ibid., p.686.

130. M. Bracken, "A Causal Model."

131. D. Yankelovitch, New Rules, p.239.

Senator HATCH. Our final witness here today will be Mrs. Joy G. Dryfoos, who has taught in the schools of public health at Columbia University and the University of Michigan. She has also been a consultant at the National Center for Health Statistics.

Mrs. Dryfoos, we are happy to have you with us today.

STATEMENT OF JOY G. DRYFOOS, WRITER AND RESEARCHER ON FAMILY PLANNING, SCHOOLS OF PUBLIC HEALTH, COLUMBIA UNIVERSITY AND UNIVERSITY OF MICHIGAN

Ms. DRYFOOS. Thank you very much.

I have been asked to provide the subcommittee with statistical evidence of the impact of unintended child bearing on adolescent mothers, fathers, and their babies.

I would like to begin with an overview of the latest figures of births to adolescent mothers, so we can review those, and then to present a very brief summary of major findings from research about the consequences of adolescent pregnancy.

Before I do that, I would like to make two points. First, it is clear that not all adolescent parenthood has negative connotations. Many 18- and 19-year-old women are in stable marital situations, they choose to bear children, and they are able to rear them without any special difficulty.

My concern is for the girls aged 17 or under, not yet themselves finished with childhood, who are becoming mothers, and for those 18- and 19-year-olds who become pregnant unintentionally.

Second, I know from very long experience that statistics can be both dismal and controversial and that anyone can generate a set of data to reinforce his own position. Yet tables are composed of the sum total of people's lives. They can tell us in symbolic language about the aggregate of experience, about social and economic differentials, and about disadvantage.

Underlying these objective-seeming tabulations, there are very real people; there are individuals. In this case, we are talking about very young and vulnerable people who desperately need our attention to help them start life with as many options as possible.

The potentially devastating effects of this administration's budget cuts on educational enrichment, welfare, maternal and child health, and family planning services add more urgency to my concerns.

I have attached a number of tables to my testimony, which I hope subcommittee members will be able to review at their leisure.

INCIDENCE OF ADOLESCENT CHILDBEARING

The 1979 vital statistics only became available last month, and they show once again that the United States has a very high teenage birth rate. In 1979, 560,000 women—more than half a million women—in their teenage years became mothers; 210,000 of them were aged 17 or less. More than a quarter of a million of these teenage mothers in 1979 were not married, bringing the proportion of adolescent births that occurred out of wedlock to an alltime high of 46 percent.

The first table in my testimony is an analysis of births in 1979 by marital status, age, and race of the mother, and it includes something that you will not find in the vital statistics—estimates of whether or not the pregnancy was intended by the mother.

Whether or not the pregnancy was intended is important, since the negative consequences of early childbearing that is unplanned are much more profound, in my opinion, for both the parents and the children they produce. Table 2 shows the percents of total births intended and unintended according to material status, age, and race.

Of all teen mothers in 1979, only one-fourth were married and had planned this pregnancy; another fourth were married, but their pregnancies were not intended. But not all of these married mothers were married when they became pregnant, and in fact half of all first births to married teenagers were conceived premaritally. In all, nearly three out of four births to adolescents in 1979 were conceived out of wedlock.

The other half—262,600—of the teenage mothers were not married even when the baby arrived, and two-thirds of those young women had not wanted to become pregnant at the time. More than 100,000 of the unmarried adolescents who became mothers before they wanted to were aged 17 or less, and a disproportionate number—104,000—were nonwhite. Altogether, more than 300,000 young women—55 percent of all teenage mothers in 1979—experienced an unplanned birth.

Not every one of these mothers or their children suffered negative consequences, and the problems that resulted differed widely, depending on the age, marital status, and race of the mother, and the socioeconomic circumstances of the mother's family.

IMPACT OF EARLY CHILDBEARING

The Center for Population Research of the National Institute of Child Health and Human Development of NIH has supported research addressed at studying the social consequences of adolescent childbearing. Most of the research has used existing data bases to analyze the unique effects of early childbearing on the parents' marital stability, education, employment, income, and the children's social and cognitive development. Tables 3-15 show major findings largely from NIH research and describe the sources for these studies.

EDUCATION

As you know, high school graduation has become a minimal educational standard in the United States, and almost half of all young people now continue on for some form of higher education.

Perhaps the most crippling effect of early childbearing is the truncation of education. It has been documented in a carefully controlled study that fewer than half of young women who became mothers before they were 18 had graduated from high school, compared to virtually all those who did not become mothers until they were older.

For men, only two-thirds of those who were fathers at an early age ever finished high school or at least finished by the time they were 29, and even those men and women who became parents at 18 and 19 had a very high dropout rate. One in five did not finish high school.

Adolescent parenthood also decreases the probability of college completion. Less than 2 percent of all women who became mothers at early ages had finished college by age 29, compared to 22 percent of women who deferred childbearing, and about 1 in 10 men who were adolescent fathers had completed college, compared to 30 percent of those men who had no child by the time they were aged 24.

It is entirely possible that some young people choose parenthood rather than education, but it is clear that such a choice in our society places severe limitations on the potential income and occupational aspirations for the young family.

INCOME

Census data show clearly that families in which first births occur at early ages have much lower annual incomes than others, even when they are older; they do not make up the difference.

During the mid-1970's, the differential was almost a factor of 2. For families in which the first birth occurred to mothers when they were very young, the annual income was $7,500, compared to about $14,000 in families with mothers who were 25 or older at their first birth.

It has been well documented that young families with young children are much more likely to be poor, particularly when the father is not present in the home. Almost two-thirds of all female-headed families with a young mother and young children were living in poverty in 1978. More than one-half million families fell into that category, 61 percent of whom were white.

Income is also a determinant of socioeconomic status, but there are other determinants such as occupation, education, and other lifestyle variables. One such analysis found that by age 24 more than half of the mothers who had births before 18 had low SES compared to only 15 percent of those women who had no births in their midtwenties.

WELFARE

Given the high probability of poverty among early childbearers, it would be expected that a high proportion of young mothers would require public assistance in order to support their families.

About 16 percent of all women aged 14 to 30 in households with children were on AFDC in 1976. However, 1 in 3 women who became mothers at early ages were on welfare, compared to 1 in 10 who became mothers at age 20 or older.

Thus, about 61 percent of all AFDC mothers had been teenage mothers, while only 38 percent of non-AFDC mothers had been teenage mothers. As you probably know, it has been estimated that more than half of all AFDC expenditures are on families in which the mother had her first child while still a teenager.

MARITAL STABILITY

A decreasing proportion of teenage mothers are married when they deliver. In 1970, 71 percent of teenage births were to married women; in 1979, the proportion was 54 percent.

For those who are married, the probability that they will separate from their husbands is very high. Within 5 years of marriage, 1 out of 5 married women who became mothers at age 17 or under were separated, and within 15 years this proportion had risen to 44 percent. These rates are more than three times as high as the rates for married women who had their first births at age 20 or older.

As a result, fully 70 percent of all first-born children to mothers aged 17 or less were living in a single-parent household by the time they were 8 years old. This dire statistic demonstrates the high probability of welfare dependence associated with teenage parenthood.

FAMILY SIZE AND INTENTION

Early childbearing predicts a larger family size, a fact which by itself does not indicate any particular problem. Some couples start young because they know they want to have a large family. However, it has been shown in repeated national fertility surveys that early childbearing can also be a predictor of unintended childbearing.

Some mothers report that certain births are mistimed; the baby comes before the mother wants it. Other births, usually later in childbearing history, are reported by the mothers as unwanted; the mother did not want any more children ever.

White mothers who had their first baby at age 17 or under averaged 3.7 births. One-fourth were characterized as unwanted, and 29 percent were mistimed. Thus, fewer than one-half of the children of these white mothers were planned.

Black women who became mothers at age 17 or under averaged a total of 4.1 births. Only a third of their children were classified by them as planned; 44 percent were unwanted, and 23 percent mistimed.

Having a first child at age 25 to 29 significantly changed the outcome. These white mothers had borne 2.6 children on the average, 60 percent planned, while black mothers had 2.3 children, 44 percent planned.

If women who were teenage mothers had borne only those children they intended and had not borne those they themselves classified as unwanted, they would have had on the average one fewer child.

CHILDREN OF TEEN PARENTS

The problems experienced by children of teen parents reflects the social and economic disadvantages often experienced by their parents. They are more likely than children of older parents to grow up in poverty areas, in single-parent households, in welfare dependency. Their mothers often lack the basic knowledge and skills to give them a good start. Because many children of teenage parents are black, they suffer the compounded consequences of minority status and economic deprivation.

It has been demonstrated that many of the negative health consequences for children of teenage parents can be alleviated through quality prenatal and infant-care programs, Head Start, and other day care efforts. Classes in parenting education help upgrade teenage mothers' performances in relating to and caring for their children, yet there may be some long-term cognitive effects of adolescent childbearing.

One study showed slightly lower IQ scores among children of younger versus older mothers. However, the strongest effect on IQ resulted from the mother's educational status. The higher the mother's level of education, the better her child did on IQ tests. This suggests that teen parenthood alone was not the cause of the lower test scores, but rather it was the disadvantaged situation in which the family lived.

We are all familiar with the phrase "cycle of poverty." There also appears to be a "cycle of adolescent parenthood." In one study of very young mothers aged 15 or less, 82 percent had been borne to their mothers while their mothers were still teenagers.

POLICY IMPLICATIONS

The impact of unintended childbearing on adolescent parents and their children and parents of the adolescent parents are multiple and highly interrelated. From my interpretation of the data, it would appear that, as a matter of social policy, bearing children before parents are ready to assume the responsibility for nurturing them is not a desirable goal either for the parents or the society, and for the unplanned child that is born it creates a handicapping condition that may limit his life potential.

These unplanned pregnancies result from many circumstances—failure of contraception, ignorance of pregnancy risk, chance-taking behavior, and other reasons. It is not the intent of this testimony to explore the causes of unplanned pregnancies but to urge the subcommittee to acknowledge the effects—the consequences—when unplanned pregnancies become, perforce, unplanned babies.

The availability of safe and legal abortions to terminate unwanted pregnancies occurring to young teenagers is an absolute necessity. Their access to this procedure must be assured, regardless of their age, marital status, race, or which State they happen to live in.

I have shared with you the most current statistics about adolescent childbearing, showing the large number of teenagers who are suffering the consequences of too early maternity. But this report would be even more distressing if legal abortion had not been available.

Since 1973 more than 2 million women under the age of 20 have sought and been able to obtain legal abortions. Without that access to abortion, literally millions of unwanted babies would have been born to immature, disadvantaged girls.

While many statements have been made to the effect that the unborn children would have been taken care of by the society, the evidence is clear that those children who have already been born to teenage parents are receiving less care than ever.

There are currently living in the United States more than 1.3 million children whose mothers are teenagers. Many of their mothers are unmarried, poverty stricken, and of minority status. They are faced with simultaneous cutbacks in welfare support, maternal and child health services, family planning services, day care centers, public employment programs, and educational enrichment. Unemployment rates for youths are skyrocketing, approaching the 50-percent mark for young blacks in some parts of this country.

Think of the impact of an unwanted pregnancy on today's youngsters. Do not deny them the essential option to terminate the pregnancy with abortion before they are ready to assume that ultimate responsibility and pleasure—to bear a wanted child in an environment of support and nurture.

Thank you.

Senator HATCH. Thank you, Mrs. Dryfoos.

Could you please share with us some generalizations about the consequences of unplanned pregnancies for teenagers before and after *Roe* v. *Wade?* You might consider what typically happened prior to the *Roe* decision in these circumstances. Was the abortion void filled by illegal abortion, emotionally scarred women, or broken families? What was life like before *Roe?* You have pretty well described what it has been like since *Roe.*

Ms. DRYFOOS. I do not know that there is any particular agreement on exactly how many illegal abortions took place. I have heard, from testimony in hearings such as this, ranges from 200,000 to 1,100,000 per year.

First of all, we know that although people have many unwanted births now, they had more before. In fact, if you go back to the hearings on the title 10 legislation on family planning services and the early 5-year plan that was made for family planning, you see very good evidence there that the reason that family planning services became a Federal responsibility was that there was a very, very large differential in unwanted fertility between poor people and nonpoor people.

In fact, the rates were something like 50 to 60 percent then of all births to poor people which were unwanted. It is much, much lower now; it is somewhere down around 15 or 20 percent, and there still is this problem, but I think in some ways it is not as great as it was.

Lots of things have changed since before *Roe* v. *Wade*, so you cannot simply take one isolated social phenomenon and separate it from everything else.

Senator HATCH. I agree.

You say that children born to teenage parents today are receiving less care than ever before. Why is that, especially given the availability of abortion today? Why would those children who are brought into the world by their mothers at this time receive less care than ever before?

Ms. DRYFOOS. I would have to turn that question back to you. My statement is very *au courant.* I do not understand why there are the budget cuts in human services, but that is what I perceive is happening. Let us just take maternal and infant care.

Senator HATCH. Do you attribute it to budget cuts in human services?

Ms. DRYFOOS. If they are getting less care, yes, I do.

Senator HATCH. In your statement, you categorize a number of the people as being poor but certainly self-sufficient. Am I wrong in that?

Ms. DRYFOOS. Some are, and some are not.

Senator HATCH. I see.

You indicate that unplanned children may be permanently handicapped in their life potential. What is your evidence in this regard?

Ms. DRYFOOS. Obviously, I did not put every piece of research that has ever been done in here. I did not want to bore you to death.

Senator HATCH. We would love to have your research.

Ms. DRYFOOS. When I said tons, I was not kidding. I have drawers full of studies. It is certainly true that anyone can pull out a study to prove anything he wants to; I acknowledge that. There is a very good longitudinal study by Dytrych which was done in Czechoslovakia on children born to women denied abortion.

One of the problems in studying the impact on unwanted children—first of all, you need a sample of women who were denied abortions. Then you have to follow them over a period of years and find out what happened to those children. That is the only way you could measure the impact on the children. Is that right? Are you following me?

Senator HATCH. I suppose that would help.

Ms. DRYFOOS. OK. And the only place this has ever been done is in Czechoslovakia, where because they had a lot of external location of authority, they could keep track of populations over that long a period of time. They also had a health system that was so tight that they knew who was denied abortion, and they had records.

We do not have any such lists here. When we look at these tables and look at the women who had unwanted births, we do not know who they are. I cannot go to some community and find those women. I just know that in every community there are probably many women who have had an unwanted pregnancy, but I cannot go and locate them because we do not have any tracking system on people's behavior.

Senator HATCH. All right. Thank you.

I may want to submit some questions to you in writing.

Ms. DRYFOOS. I hope you will.

[The prepared statement of Ms. Dryfoos follows:]

PREPARED STATEMENT OF JOY G. DRYFOOS

Mr. Chairman and members of the Subcommittee, I am Joy Dryfoos, a researcher and writer on the subject of family planning and other fertility related services in the U.S. I also teach at the Schools of Public Health of Columbia University and the University of Michigan. In recent years, I have been involved particularly in gathering and analyzing data about the incidence and outcomes of adolescent pregnancy, a matter that concerns us all because of its compound effect upon the lives of individuals and the society in which we live.

I have been asked to provide the subcommittee with statistical evidence of the impact of unintended childbearing on adolescent mothers, fathers and their babies. I would like to begin with an overview of the latest figures on births to adolescent mothers and then to present a summary of major findings from research about the consequences of adolescent pregnancy. I will conclude with a few remarks, discussing the problem of adolescent childbearing in the social context of the 1980s.

But before that I would like to make two points: first, not all adolescent parenthood is problematic. Many 18 and 19 year old women in stable marital situations choose to bear children and are able to rear them without any special difficulties. My concern is for the girls age 17 or under, not yet themselves finished with childhood, who are becoming mothers, and for those 18 and 19 year olds who become pregnant unintentionally.

Second, I know that statistics are both dismal and controversial and that anyone can generate a set of tables to reinforce his own position. Yet, tables are composed of the sum total of people's lives; they can tell us in a symbolic language about the aggregate of experience, social and economic differentials and disadvantage. Underlying these objective tabulations, there are real live people -- individuals -- and in this case very young and vulnerable people -- who desparately need our attention to help them start life with as many options as possible. The potentially devastating effects of this Administration's budget cuts on educational enrichment, welfare, maternal and child health and family planning add more urgency to my concerns.

I have attached 15 tables to my testimony which summarize research on the incidence and consequences of teenage childbearing. I will comment briefly on these statistics in my presentation and hope that subcommittee members will take the opportunity to review the tabulations.

Incidence of Adolescent Childbearing

The 1979 Vital Statistics only became available last month and they show once again that the United States has a very high teenage birth rate. In

1979, more than half a million women aged 19 or under became mothers -- 210,000 of them were aged 17 or less. More than a quarter of a million of these teenage mothers were not married, bringing the proportion of adolescent births that occurred out-of-wedlock to an all-time high of 46 percent.

The first table in my testimony is an analysis of 1979 teenage births according to marital status, age and race of mother and estimates of whether or not the pregnancy was intended by the mother. Whether or not the pregnancy was intended is important since the negative consequences of early childbearing that is unplanned are much more profound for both the parents and the children they produce. (Table 2 shows the percents of total births in each category intended and unintended.) Of the 560,100 women aged 19 or under who became mothers in 1979, only one-fourth (157,600) were married and had planned this pregnancy. Another fourth (139,900) were married but their pregnancies were not intended. Not all of these married mothers were married when they became pregnant; about one-half of all first births to married teenagers were conceived premaritally. In all, nearly three out of four births to adolescents in 1979 were conceived out-of-wedlock.

Almost half (262,600) of the teenage mothers were not married when the baby arrived and two-thirds of these young women (170,700) had not wanted to become pregnant at that time. More than 100,000 of these unmarried adolescents who became mothers before they wanted to were age 17 or less, and a disproportionate number (104,000) were nonwhite.

Altogether, an estimated 310,600 young women, 55 percent of all teenage mothers in 1979, experienced an unplanned birth. Not every one of these mothers or their children suffered negative consequences from this event; the problems that resulted differed widely, depending on the age, marital status and race of the mother and the socioeconomic circumstances of the young mother's family.

Impact of Early Childbearing

The Center for Population Research of the National Institute of Child Health and Human Development (NIH) has supported research addressed at studying the social consequences of adolescent childbearing. Most of the research has used existing data bases to analyze the unique effects of early childbearing on the parents' marital stability, education, employment and income and on the children's social and cognitive development. Tables 3-15 show major findings largely from the NIH sponsored research and describe the sources for these studies.

Education (Tables 3,4,5)

High school graduation has become a minimum educational standard in the U.S. and almost half of all young people now continue on for some form of higher education. Perhaps the most crippling effect of early childbearing is the truncation of education. It has been documented that fewer than half of young women who became mothers before they were 18 had graduated from high school by age 29 compared to virtually all of those who did not become mothers until they were older. For very young fathers, only two-thirds finished high school. Even those who became parents at 18 and 19 had a high drop-out rate; one in five did not finish high school.

Adolescent parenthood also decreases the probability of college completion. Less than two percent of all women who became mothers at age 19 or under had finished college by age 29 compared to 22 percent of women who had no child at age 24. About one in 10 adolescent fathers had completed college compared to 30 percent of those men who had no child at age 24.

It is entirely possible that some young people choose parenthood rather than education. But it is clear that such a choice places severe restraints on the potential income and occupational aspirations for the young family.

Income (Tables 6,7,8,9)

Census data show clearly that families in which first births occur at early ages have much lower annual incomes than others. During the mid-1970's the differential was almost a factor of two -- for families in which the first birth occurred to mothers aged 16 or less, the annual income was $7,550 compared to $13,900 in families with mothers who were 25 to 29 at their first birth.

It has been well documented that young families with young children are much more likely to be poor, particularly when the father is not present in the home. Almost two-thirds of all female headed families with a young mother (under 25) and young children (under six) were living in poverty in 1978. More than half a million families fell into that category, 61 percent of whom were white.

Using median income as a measure, for families headed by a woman under 25 with one child, the median income in 1978 was $4,205 compared to $15,954 for husband-wife families with one child in the same age group. The larger the family, the lower the median income.

Income is an important determinant of socio-economic status (SES). SES has also been measured using indicators that combine occupation, education and other life style variables. One such analysis found that by age 24, more than half of young mothers who had births before 18 had low SES compared to only 15 percent of those women who had no births by their mid-20's. For black women, three-fourths of young mothers had low SES compared to more than 50 percent of those who did not have any children.

Welfare (Table 10)

Given the high probability of poverty among early child-bearers, it would be expected that a high proportion of young mothers would require public assistance in order to support their families. About 16 percent of all women aged 14 to 30 in households with children (10.9 million women) were on AFDC in 1976; however, one in three women who became mothers at early ages were on welfare compared to one in 10 who became mothers at age 20 or older. Thus, about 61 percent of all AFDC mothers aged 14 to 30 had been teenage mothers while only 35 percent of non-AFDC mothers aged 14 to 30 had been teenage mothers. It has been estimated that more than half of all AFDC expenditures are on families in which the mother had her first child while still a teenager.

Marital Stability (Table 11, 12)

A decreasing proportion of teenage mothers are married when they deliver. (In 1970, 71 percent of teenage births were to married women; in 1979, the proportion was 54 percent.) For those who are married, the probability that they will separate from their husbands is very high. Within five years of marriage, one out of five married women who became mothers age 17 or under were separated and within 15 years, this proportion had risen to 44 percent. These rates were more than three times as high as the rates for married women who had their first birth at age 20 or older.

As a result, fully 70 percent of all first born children to mothers aged 17 or less were living in a single parent household by the time they were eight years old. This dire statistic demonstrates the high probability of welfare dependence associated with teenage parenthood.

Family size and intention (Table 13)

Early childbearing predicts a larger family size, a fact which by itself does not indicate any particular problem. Some families start young because they know they want to have a large family. However, it has been shown that early childbearing can also be a predictor of unintended childbearing. Some mothers report that certain births are mistimed, the baby comes before the mother wants it; while other births, usually later in the childbearing history, are unwanted, the mother does not want any more children. White mothers who had their first baby at age 17 or under averaged 3.7 births; one-fourth were characterized as unwanted and 29 percent were mistimed. Thus, fewer than half of the children of these white mothers were planned. Black women who became mothers at age 17 or under averaged a total of 4.1 births; only a third of their children were classified by them as planned, 44 percent were unwanted and 23 percent mistimed.

Having a first child at age 25 to 29 significantly changed the outcomes. These white mothers had born 2.6 children on the average, 60 percent planned while black mothers had 2.3 children, 44 percent planned.

If mothers had born only those children they intended and had not born those classified as unwanted, very young white mothers would have had 2.9 children, older white mothers 2.3 children, very young black mothers 2.3 children and older black mothers 1.6 children.

Children of teen parents (14, 15)

The problems experienced by children of teen parents reflect the social and economic disadvantages often experienced by their parents. They are more likely than children of older parents to grow up in poverty areas, in single parent households, in welfare dependency; their mothers often lack the basic knowledge and skills necessary to give them a good start. Because many children of teenage parents are black, they suffer the compounded consequences of minority status and economic deprivation.

It has been demonstrated that many of the negative health consequences for children of teenage parents can be alleviated through quality pre-natal and infant care programs, Head-start and other day care efforts. Classes in parenting education help upgrade teenage mothers' performances in relating to and caring for their children. However, there may be some long-term cognitive effects of adolescent childbearing. One study showed slightly lower IQ scores among children of younger versus older mothers. However, the strongest effect on IQ resulted from the mother's educational status; the higher the mother's level of education, the better her child did on the IQ tests. This suggest that teen parenthood alone was not the "cause" of lower test scores, but rather it was the disadvantaged situation in which the family lived.

We are all familiar with the phrase "cycle of poverty". There also appears to be a "cycle of adolescent parenthood." In one study of very young mothers aged 15 or less, 82 percent had been born to their mothers while their mothers were still teenagers.

Policy Implications

The impacts of unintended childbearing on adolescent parents and their children are multiple and highly-interrelated. From my interpretation of the data, it would appear that as a matter of social policy, bearing children before parents are ready to assume the responsibility for nurturing them is not a desirable goal either for the parents or the society. And for the unplanned child that is born, it creates a handicapping condition that may limit his or her life potential.

These unplanned pregnancies result from many circumstances: failure of contraception, ignorance of pregnancy risk, chance-taking behavior and other reasons. It is not the intent of this testimony to explore the causes of unplanned pregnancy, but to urge the subcommittee to acknowledge the consequences when unplanned pregnancies become perforce unplanned babies. The availability of safe and legal abortion to terminate unwanted pregnancies occurring to young teenagers is an absolute necessity.

I have shared with you the most current statistics about adolescent childbearing, showing the large number of teenagers who are suffering the consequences of too early maternity. But this report would be even more distressing if legal abortion had not been available. Since 1973, more than two million women under the age of 20 have sought and been able to obtain legal abortions. Without access to abortion, literally millions of unwanted babies would have been born to immature, disadvantaged girls. While many statements have been made to the effect that the unborn children would have been taken care of by the society, the evidence is clear that those children who have already been born to teenage parents are receiving less care than ever.

There are currently living in the United States more than 1.3 million children whose mothers are teenagers; many of these 1.1 million mothers are unmarried, poverty-stricken, of minority status. They are faced with simultaneous cut backs in welfare support, maternal and child health services, family planning services, day care centers, public employment programs and educational enrichment. Unemployment rates for youth are sky-rocketing, approaching the 50 percent mark for young blacks in some parts of the country.

Think of the impact of an unwanted pregnancy on today's youngsters. Do not deny them the essential option to terminate the pregnancy with abortion before they are ready to assume that ultimate responsibility and pleasure -- to bear a wanted child in an environment of support and nurture.

Table 1. The number of births to women aged 19 or under by whether or not the pregnancy was intended according to race, age group and marital status, 1979 (000s)

Age at birth and marital status	Intention and race								
	Total			Intended			Unintended		
	Total	White	Non-white	Total	White	Non-white	Total	White	Non-white
Total	560.1	388.2	171.9	249.5	197.7	51.8	310.6	190.5	120.1
Under 15	10.7	4.4	6.3	--	--	--	10.7	4.4	6.3
15-17	200.1	128.0	72.1	46.3	38.4	7.9	153.8	89.6	64.2
18-19	349.3	255.8	93.5	203.2	159.3	43.9	146.1	96.5	49.6
Married	297.5	268.5	29.0	157.6	144.7	12.9	139.9	123.8	16.1
Under 15	1.2	1.1	0.1	--	--	--	1.2	1.1	0.1
15-17	80.0	73.7	6.3	23.4	22.1	1.3	56.6	51.6	5.0
18-19	216.3	193.7	22.6	134.2	122.6	11.6	82.1	71.1	11.0
Unmarried	262.6	119.7	142.9	91.9	53.0	38.9	170.7	66.7	104.0
Under 15	9.5	3.3	6.2	--	--	--	9.5	3.3	6.2
15-17	120.1	54.3	65.8	22.9	16.3	6.6	97.2	38.0	59.2
18-19	133.0	62.1	70.9	69.0	36.7	32.3	64.0	25.4	38.6

Source: *Births*: National Center for Health Statistics, DHHS (NCHS), "Final Natality Statistics, 1979," *Monthly Vital Statistics Report*, Vol. 30, No. 6, Supplement (2), Sept. 29, 1981, Tables 2 and 13.

Intentions: *for married women*, from unpublished tabulations of the 1976 National Survey of Family Growth, NCHS, provided by John Anderson, Centers for Disease Control, Atlanta, Georgia

for unmarried women, based on trends from 1971 and 1976, projected to 1978, Johns Hopkins Survey of Young Women in M. Zelnik and J.F. Kantner, "First Pregnancies to Women Age 15-19", *Family Planning Perspectives*, Vol. 10:1, Tables 5 and 11; 1978 estimated rates have been applied to 1979 births.

Table 2. Estimated percent of births to women aged 19 or under that were intended and unintended according to race, age group and marital status

Age at birth	Total			Married at birth			Unmarried at birth		
	Total	White	Non-white	Total	White	Non-white	Total	White	Non-white
				Intended					
Total	45	51	30	53	54	45	35	44	27
Under 15	0	0	0	0	0	0	0	0	0
15-17	23	30	11	29	30	20	19	30	10
18-19	58	62	47	62	63	51	52	59	46

Source: Intentions: See Table 1.

				Unintended					
Total	55	49	70	47	46	55	65	56	73
Under 15	100	100	100	100	100	100	100	100	100
15-17	77	70	89	71	70	80	81	70	90
18-19	42	38	53	38	37	49	48	41	54

Table 3. Mean educational score* 11 years after expected high school graduation, by age of parent at birth of first child for the cohort who were in grade 9 in 1960

Age at 1st birth	11 years out of high school Mothers	 Fathers
<17	3.7	4.5
17	3.7	4.6
18	4.1	4.8
19	5.1	5.5
20-24	6.3	6.5
25-29	7.0	7.0
No child at 29	7.1	7.4

*A score of 12 indicates a doctoral degree or equivalent; 8, a college graduate; 7, some college; 6, post-high-school but noncollege training; 5, a high school graduate; 3, completed grade 11; 2, completed grade 10; 1, completed grade 9.

Source: J.J. Card and L.L. Wise, "Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives," Family Planning Perspectives, 10:199, 1978, Table 1. Based on Project TALENT, a sample survey of 375,000 high school students in 1960 with follow-up surveys one, five and 11 years after expected date of high school completion.

Table 4. Percentage of respondents in matched samples who received a high school diploma, by age of parent at birth of first child and age diploma was awarded, for the cohort who were in grade 9 in 1960

Age diploma received	Age at 1st birth							
	Mothers				Fathers			
	<18	18-19	20-24	No child at 24	<18	18-19	20-24	No child at 24
17	13.7	42.0	47.0	50.7	31.9	36.2	47.5	49.6
18	21.9	72.8	87.6	89.7	57.4	70.2	82.3	89.4
19	26.1	75.7	93.4	95.0	63.1	73.0	90.1	94.3
20	29.0	76.3	94.2	96.0	63.1	73.8	91.5	94.3
21	32.2	76.8	94.2	96.0	63.1	73.8	92.2	96.5
22	34.6	77.3	94.2	96.0	66.0	73.8	92.2	96.5
23	36.7	78.1	94.7	96.3	66.0	74.5	92.2	96.5
24	38.5	78.9	94.7	96.3	67.4	74.5	92.2	96.5
25	41.4	78.9	94.7	96.3	67.4	74.5	93.6	96.5
26	44.1	79.9	94.7	96.3	67.4	74.5	93.6	96.5
27	46.4	79.9	95.3	96.3	68.1	78.0	93.6	96.5
28	48.3	80.5	95.8	96.5	58.1	78.7	93.6	96.5
29	49.9	81.5	96.0	96.6	69.5	79.4	93.6	97.2

Note: The maximum 95% confidence interval for these data is ±.05 for females, ±.11 for males in the <18 group, and ±.08 for males in the other groups.

Source: J.J. Card and L.L. Wise, op. cit., 1978, Table 5. See Table 3.

Table 5. Percentage of respondents in matched samples who completed college, by age of parent at birth of first child and age degree was awarded for the cohort who were in grade 9 in 1960

Age degree awarded	Age at 1st birth							
	Mothers				Fathers			
	<18	18-19	20-24	No child at 24	<18	18-19	20-24	No child at 24
20	0.0	0.0	1.3	0.8	0.0	0.7	0.0	0.0
21	0.0	0.3	5.0	10.3	2.2	3.6	8.8	5.1
22	0.3	1.1	6.9	18.5	2.2	6.6	12.4	12.4
23	0.3	1.3	8.9	20.3	3.6	6.6	13.1	15.3
24	0.5	1.3	7.4	21.4	5.1	7.3	14.6	16.8
25	0.8	1.3	7.7	22.2	6.6	8.0	15.3	20.4
26	0.8	1.3	7.9	22.2	6.6	8.8	16.8	24.8
27	1.3	1.6	7.9	22.4	9.5	9.5	17.5	28.5
28	1.3	1.8	7.9	22.4	9.5	9.5	17.5	29.2
29	1.6	1.8	7.9	22.4	10.9	9.5	17.5	29.2

Source: J.J. Card and L.L. Wise, op. cit., 1978, Table 6. See Table 3.

Table 6. Estimated mean family income in 1975 by age and time period at first birth, white women

Age at First Birth	Period in which first birth occurred		
	1930-45	1946-60	1961-75
≤16	$ 7,870	$ 9,750	$ 7,550
17	7,810	11,000	8,290
18	8,270	11,500	8,995
19	8,400	12,500	9,875
20-24	9,390	14,500	11,980
25-29	9,070	14,833	13,900

Source: C.M. Suchindram, "Consequences of Adolescent Pregnancy and Childbearing," Report to The National Institute of Child Health and Human Development, DHEW (NICHD), 1978, Table 13. This table is based on the 1975 Current Population Survey.

Table 7. Percent of all families and families with children under six below 100 percent of federal poverty index* by type of family head, 1978 (numbers in 000s)

Type of family	Total		White		Black	
	Number	Percent below poverty	Number	Percent below poverty	Number	Percent below poverty
Families						
All families	57,804	9.1	50,910	6.9	5,906	27.5
Head <25	3,837	18.5	3,239	13.2	542	49.0
Female head	8,458	31.4	5,918	23.5	2,390	50.6
Female head <25	801	60.2	468	53.6	316	69.5
Families with children <6						
All families	7,477	13.0	6,401	10.2	903	32.9
Head <25	1,930	26.5	1,565	20.3	343	53.1
Female head	1,162	51.2	755	46.5	387	59.8
Female head <25	581	65.4	353	61.3	215	71.1

*The poverty level in 1978 was $6,628 for a family of four.

Source: U.S. Bureau of the Census, "Characteristics of the Population Below Poverty Level: 1978," Current Population Reports, Series P-60, No. 124, GPO, 1980, Table 19.

Table 8. Number of families with head 14 to 24 years old according to size and type of family by income strata and median income, 1978 (numbers of families in 000's)

Family income	Husband-wife families by size of family				Female headed families by size of family			
	Total	2	3	4 or more	Total	2	3	4 or more
Total	2,857	1,390	945	522	801	476	229	96
Below $5,000	155	69	57	31	487	267	155	65
$5,000-$9,999	642	240	276	126	232	156	60	16
$10,000 or more	2,060	1,081	612	365	82	53	14	15
Median income	$13,784	$15,195	$12,439	$12,903	$3,953	$4,203	$3,830	$3,704
Mean income	$14,439	$15,601	$13,102	$13,765	$5,494	$5,635	$4,632	$6,845

Columns may not add to totals because of rounding.

Source: U.S. Bureau of the Census, "Money Income of Families and Persons in the United States: 1978," Current Population Reports, Series P-60, No. 123, GPO, Washington, D.C., 1980, Table 23.

Table 9. Percent of women of low socioeconomic status at age 24 according to age at first birth and race, 1976

Age at first birth	Percent low socio-economic status*		
	Total	White	Black
<15	51.4	41.7	72.7
16-17	54.6	49.2	76.7
18	34.1	30.1	61.9
19-20	31.7	28.2	61.1
21-23	22.8	20.5	59.0
No births by age 24	15.2	14.7	54.2

*SES is measured as the mean of four variables; occupation of head of household, mother's education, father's education and presence of reading materials in the home of origin.

Source: Based on data from K. Moore, L.M. Waite, S.B. Caldwell and S. Hofferth, "The Consequences of Age at First Childbirth: Educational Attainment," The Urban Institute, Washington, D.C. 1978, Table 5 (mimeo). This is an analysis of the National Longitudinal Study of High School Seniors, 1976.

Table 10. Percent of females aged 14-30 in households with children who were in an Aid to Families with Dependent Children (AFDC) household by current age and age at first birth, 1976

Age at first birth	Number of females aged 14-30 in households with children (000s)	Percent of females in households with children in AFDC households by current age				Per cent distribution of females aged 14-30 by age		
		<20	20-24	25-30	Total<30	In AFDC households	Not in AFDC households	Total
Total	10,914	32.9	22.4	11.7	16.2	100.0	100.0	100.0
<16	371	33.6	29.2	22.8	27.1	5.7	3.0	3.4
16-17	1,223	38.9	33.3	24.7	30.7	21.2	9.3	11.2
18-19	2,727	27.0	26.4	17.1	22.0	34.0	23.2	25.0
20-30	6,593	na	16.2	8.6	10.5	39.1	64.5	60.4

na = not applicable.

Source: 1976 Current Population Survey; unpublished tabulations conducted by the Urban Institute, Washington, D.C. and provided by Kristin Moore; Kristin A. Moore, "Teenage Childbirth and Welfare Dependency," Family Planning Perspectives, 10:233, 1978, Table 1.

Table 11. Percentage of women who separate within five and 15 years of marriage, by woman's race and age at birth of first child

Years since marriage	Age at first birth											
	Total				White				Black			
	Total	14-17	18-19	≥20	Total	14-17	18-19	≥20	Total	14-17	18-19	≥20
5 years	8.6	20.5	12.6	4.4	7.2	17.1	11.4	3.9	20.3	30.5	20.4	11.5
15 years	21.7	43.6	28.8	13.9	19.0	39.3	26.8	12.4	44.7	57.0	43.5	34.6

Source: J. McCarthy and J. Menken, "Marriage, Remarriage, Marital Disruption, and Age at First Birth," Family Planning Perspectives, 11:27, 1979, Table 3 based on the 1973 National Survey of Family Growth, NCHS.

Table 12. Percent of first born children living in a single parent household at age eight according to the age of the mother at her first birth and race, 1973

Age at first birth	Total	White	Black
Under 18	70	69	92
18-19	41	48	73
20-24	25	21	61
25-29	12	7	46

Source: Jane Menken and James McCarthy, "Childhood Residence Patterns and Changes in Relation to Maternal Age at First Birth", Final Report to NICHD, 1979; Table 3 based on 1973 National Survey of Family Growth, NCHS.

Table 13. Number of children ever born 15 years after first birth and percent distribution by intention, according to mother's age at first birth and race

Intention	Age at 1st birth							
	White				Black			
	15-17	18-19	20-24	25-29	15-17	18-19	20-24	25-29
Total children born after 15 years since 1st birth	3.72	3.32	3.04	2.55	4.06	3.98	3.47	2.32
Percent of total births:	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Intended	47.5	48.9	55.6	59.5	32.9	33.7	39.5	44.2
Unintended	52.5	31.1	44.4	40.5	67.1	66.3	60.5	55.8
Mistimed	29.3	30.3	29.7	29.9	23.4	26.1	25.5	26.3
Unwanted	23.2	20.8	14.7	10.6	43.7	40.2	35.0	29.5

Source: Adapted from J. Trussell and J. Menken, "Early Childbearing and Subsequent Fertility," Family Planning Perspectives. 10:209, 1978, Table 9, based on the 1973 National Survey of Family Growth, NCHS.

Table 14. Maternal age and IQ scores of children*: findings from three data sets, 1963-1973

Age group of mothers	IQ's of children*		
	Health Interview Survey		Collaborative Perinatal Project, 1973
	Cycle II, 1965	Cycle III, 1970	
Young teens, aged 14-17	94.41	91.36	91.66
Older teens, aged 18-19	95.53	97.87	95.31
Adults aged, 20 or more	101.23	100.90	97.81
Total	100.56	100.29	96.81

*Wechsler Intelligence Scale for Children (WISC)

Source: L. Belmont, P. Cohen, J. Dryfoos, Z. Stein and S. Zayac, "Maternal Age and Children's Intelligence," in Teenage Parents and Their Offspring, edited by K.G. Scott, T. Field and E. Robertson, Grune & Stratton, N.Y., 1981, Table 5.

Table 15. Selected findings from a study of single mothers aged 15 or less, 1980 (N=182)

Grandmother's* age at her first birth	
≤15	26%
16–19	56%
20 or more	18%

Grandmother's marital status	
Single	10%
Married	32%
Divorced	22%
Separated	27%
Widowed	6%
Deceased	3%

Living arrangements of teenage mother	
With her mother only	58%
Both of her parents	20%
Mother and stepfather	16%
Her father	3%
Her father and stepmother	3%
Other relatives	9%
Husband/boyfriend	2%
Other	2%

Planning status of pregnancy	
Unplanned	92%
Planned	8%

Contraceptive method at time of pregnancy	
Pill	5%
Condom	9%
Other	10%
None	76%

When pregnancy realized	
1st month	28%
2nd month	27%
3rd month	20%
4th month	14%
5th month	8%
6th or higher	3%

*Grandmother is the mother of the teenaged mother.

Source: Unpublished tabulations provided by Shelby Miller, Child Welfare League of America, New York.

Senator **Hatch**. Thank you. I will just state that the final scheduled witness today, Mr. Joseph Sobran, unfortunately could not make it here today at the last minute.

We will hold another hearing tomorrow beginning at 9:30 in 2228 on the moral dimension of the abortion issue. We will have a number of distinguished religious leaders and theologians: Adrian Rogers of the Southern Baptist Conference, the former president of that conference; Rabbi Seymour Siegal, from the Jewish Theological Seminary; Cardinal Terrence Cock, the archibishop of New York; Archbishop John Roach of Minneapolis/St. Paul, the president of the U.S. Conference of Catholic Bishops; Charles Reynolds, chairman of religion at the University of Tennessee; Rabbi Henry Siegman of the American Jewish Congress; and Bishop George Hunt from the Providence, R.I., diocese.

I would think it should be a very interesting day tomorrow. We will be happy to invite all of you to attend again.

We feel that the hearings have certainly been very interesting up to now, and we appreciate all those who have contributed. Thank you so much.

[Whereupon, at 11:25 a.m., the hearing was recessed, to reconvene the following day at 9:30 a.m.]

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

THURSDAY, NOVEMBER 5, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Grassley, DeConcini, and Leahy.

Staff present: Stephen Markman, chief counsel; Randy Rader, general counsel; Claire Greif, clerk.

Senator HATCH. The hearing will come to order.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Today marks the fifth in a series of hearings by the Subcommittee on the Constitution on proposed amendments to the Constitution relating to abortion. The emphasis during this session will be on the moral dimension of the abortion issue. We will be hearing from a diverse cross section of witnesses today.

I would like to introduce today's hearing by sharing very briefly my own views on the argument that antiabortion initiatives are to be opposed on the grounds that it is improper for any individual or religious group to impose their religious convictions upon anybody else.

To draw upon an unlikely source in the abortion controversy, I would like to quote from the Supreme Court's opinion in the 1980 case of *Harris* v. *McRae*. In that case, the constitutionality of the Hyde amendment limitation on public funding of abortion was challenged.

In upholding the constitutionality of this measure, the Court observed:

> Although neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the establishment clause because it happens to coincide or harmonize with the tenets of some or all religions.

I note in passing that a number of theologians and religious leaders who are quick to suggest that the antiabortion effort is a violation of the first amendment had no compunctions about joining the plaintiffs in the *Harris* case and arguing that every U.S. citizen, whatever their moral or religious views on this question, should, through their tax dollars, be compelled to finance the practice of abortion.

Let me just make a few additional observations on this matter. I would look forward to the perspectives of our witnesses today on this issue.

First, in a society in which something less than unanimity is required to establish public policy, including among which are democracies, ideas and values and principles are imposed upon people all the time. In a free society, it is of course necessary to minimize these instances. However, they occur, they occur commonly, and they often involve issues that many see as issues of high morality. There are some, for example, who view the income tax as a form of slavery.

Second, with respect to the abortion issue, there are many, including myself, whose personal moral principles are offended by making the issue of abortion a purely private or personal issue. To those who would argue that I am threatening to impose my own views of morality upon them, let me suggest that in casting the abortion issue as a solely private issue, they have already imposed their morality upon me and countless others.

While there is no member of this body who is more interested in limiting the scope of the public sector than myself, there are some issues nevertheless which demand a public role. Abortion, which I and others view as the taking of human life, is one of those issues.

Third, one can describe as theological, if they are inclined, most exercises in public policy. No doubt there are cults flourishing around the world who would view most of this Nation's criminal code as a violation of one or another of their respective tenets.

The law generally is an expression of public morality and, presumably, it is grounded to a significant extent in the sense of private morality possessed by all of its citizens. I fail to see the menace there, and I fail to see the grand first amendment principles involved. Every claim of respect for human life can be characterized as theological by someone or another.

Fourth, the case against abortion can be articulated entirely apart from reference to theological principles. Indeed, one of the most forceful witnesses who has appeared before this subcommittee in opposition to abortion has described himself as an atheist. He has observed that, "Even if God does not exist, the fetus does."

Finally, let me note that church organizations and religious groups are constantly active in this country in matters of public affairs. They were active in lobbying and agitating for the reconstruction amendments. They have been active in exalting and deploring American exercises in military involvement. They have been active in countless issues of public policy during this Congress and the previous Congress and the Congress before that.

With respect to the abortion issue again, I would note that the primary benefit of antiabortion measures will not go to these church leaders. They will go to the unborn of all religions.

I look forward to the outstanding assemblage of witnesses we have with us today. We appreciate each one of you taking the time in being with us today on this important matter, whatever your perspective, and we will give equal respect to all sides of this particular issue.

I will expect people within this hearing room to give equal respect to all sides on this issue. We will tolerate no disturbances. We have had some embarrassing disturbances in the past. Let us show respect for all witnesses regardless of whether or not we agree or disagree with them.

At this point, a statement by Senator DeConcini will be made a part of the record.

[The prepared statement of Senator DECONCINI follows:]

STATEMENT OF HON. DENNIS DECONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman, I would like to take this opportunity to thank you for your concern and speed in dealing with the grave issue of abortion. Abortion is a matter which I feel strongly about and I feel that it is time that we come to grips with this situation. I have long unequivocally supported the Pro-Life position and will continue to do so in the future.

Abortion has grown in epidemic proportions in our country such that it may no longer be ignored. Last year alone, almost 1.4 million abortions were performed in the United States. This figure represents 40 percent of all births in our country. In other words, for every 10 live births in our Nation there are 4 abortions. These abortions represent human beings who were never given the opportunity to experience the miracle of life. These unborn children are never given the opportunity to enter our society where, if they are unwanted, there are countless childless couples who would give all that they have for a child to adopt and raise as their own.

The unborn children of our country must be protected in some way. It is a startling fact that, in the case of abortion, current law leaves us with the principle that the life of the unborn members of our society may be terminated solely according to the value judgment or convenience of one private individual. According to the standards present today, that individual is the single individual with the greatest self-interest. . . . Who is presently looking out for the self-interest of the unborn? . . . No one . . . and this is thoroughly incorrect.

The destruction of human life associated with abortion is appalling, and it must be stopped. Each year we kill twice as many unborn babies as the total number of battlefield casualties in our 200-year history. In all the wars that our country has ever fought, we have lost less than 700,000 lives. Each year, we allow 1,400,000 unborn babies to be killed, and most of them legally. More frightening yet, the number of abortions performed in the United States is increasing by 8 to 10 percent each year.

I do not believe that our society can continue to condone the abhorrent activity of abortion. The unborn children of this world are entitled to the same right to live and participate in our society as you and I. The unborn child has life, and due to that, life should be protected by the same basic guarantees that protect every other member of our society.

The subcommittee is dealing with several amendments to the U.S. Constitution, one of which I am a cosponsor, which are designed to deal with the problem of abortion in America. Throughout the previous hearings and throughout the subsequent hearings, this subcommittee has been and will continue to take a keen interest in the testimony presented. The various pieces of testimony serve as a roadmap, by which we may determine the best manner of protecting the unborn children of America.

Senator HATCH. We are happy to have Senator Leahy with us here today. Senator, do you have any comments you would care to share with us?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I have just a couple brief comments, Mr. Chairman. I am pleased to be here. I think it is an extremely important issue. I would commend the chairman at the outset for the efforts he has made to bring in all views and, within the areas of religious views, a cross section certainly of those views within our country. I think the chairman has been eminently fair in doing that.

At some point this morning, I will have to leave to go to the Appropriations Committee where we are drafting an appropriations bill. The one we are going to is the health and human services appropriation. It strikes me this area, plus another one I have to go to today, a committee conference on the farm bill, are just as much human life questions as anything we are doing here.

The farm bill will go into those questions concerning our feeding programs where major cuts have been proposed in the WIC program, the women and infant children program, and those kinds of programs in which we give food aid to pregnant women, to postpartum women, and to their children. I happen to think that these are areas that help to encourage women to have children. Yet they are areas of some of the greatest proposed cuts.

We will go into the human and health services appropriations concerning mental health and counseling services where again cuts are being made. Yet an argument can be made that these are prolife amendments to keep the money where needed.

I think back to my own experience as a prosecutor for years before I came here. I know some of the pressures that are really antilife pressures build up because of economic conditions, because of the lack of mental health training, because of lack of counseling, and because of the lack of those programs that give hope to people. Once hope is gone, there is not much to encourage life at any age.

I mention this simply because I think all of us agree that this whole question of abortion will not be decided in just this committee room or in just what we do here. It also decreases abortion when we have a society which encourages people to keep children, and where there is the kind of hope in society that makes the idea of having a child far superior than the idea of aborting the child.

There is no law that we can pass in this Congress that can ever stop abortion by itself. However, a lot of steps that we can take can make life desirable enough for our citizens so that it is far more desirable than the question of abortion.

As for amending the Constitution, all national ills are not susceptible to a constitutional cure, whether it is this or any other one. Amendments to the Constitution have generally reflected the outcome of issues resolved by the American people, sometimes after generations of debate and deep divisions of opinion.

I think we have to ask ourselves whether indeed there is a full consensus on the issue of abortion in America today. We have to ask that because constitutional amendments memorialize consensus. They do not create it. We must be absolutely sure that if we do amend our Constitution, something that should be done only in the rarest of circumstances, we ask whether we are memorializing or are we creating an enforced consensus.

However, let us not forget as we sit here—I know the chairman does not and I know our distinguished witnesses today do not—that the question of human life, of right to life, goes beyond just the question of abortion. It goes to the quality of life that an infant will have once born.

It goes to the type of society that has interest in how that child will be brought up, how the child will be fed, and how the child will be instructed. It goes to such questions as what type of air they will breath and what type of land they will live in and what type of hope they will have for the future.

Then it goes to the ultimate human life question that faces all of us on this planet whether we live in the United States or anywhere else. That is the fact that, if we do not alter and alter substantially the enormous buildup of nuclear arms in this country, nuclear war in this century becomes a probability, not a possibility. That is the ultimate human life issue.

All of this fits into the matter of human life. All of this is important, but I would hope that nobody in or out of this committee room, or in and out of the committee rooms where they are handling any of these other issues, think that each one of them is the sole human life issue. They are all part of it. They are all extremely important.

I have broken my normal rule, Mr. Chairman, of never speaking for more than a couple of minutes. I apologize. I will now yield the floor.

Senator HATCH. I have been with you a long time and you break that rule quite often. I think that is just fine. Your statement has been excellent this morning.

We are very pleased to have with us representing the National Conference of Catholic Bishops, Cardinal Terence Cooke, the Archbishop of New York, and Archbishop John Roach of Minneapolis/St. Paul, the chairman of the conference.

Gentlemen, we are very grateful to have you with us today, as we are all of our witnesses. At this point, we will turn the time over to you.

STATEMENT OF JOHN R. ROACH, ARCHBISHOP OF ST. PAUL/MINNEAPOLIS

Archbishop ROACH. Thank you very much, Mr. Chairman and Senator Leahy.

I am Archbishop John R. Roach of St. Paul/Minneapolis, Minn. I appear before this subcommittee today in my capacity as president of the National Conference of Catholic Bishops and the U.S. Catholic Conference.

With me is Terence Cardinal Cooke of New York, chairman of the Committee for Pro-Life Activities of the Bishops' Conference.

We are very grateful to you for this opportunity to speak to a matter of urgent concern to us and to many, many Americans, the reality of permissive legalized abortion in the United States and the pressing need for a constitutional remedy for this national scandal.

Twice before, the Catholic bishops of the United States have testified before committees of Congress on this matter. I ask permission, Mr. Chairman, to submit for the record our testimony on those occasions as well as our longer written statement to this subcommittee which reviews recent developments and updates the record on several matters.

I commend and I thank you for your decision to hold these hearings. Certainly the time is at hand—and, indeed, long overdue—for congressional action to correct the situation which has existed since the Supreme Court's abortion decisions of 1973. We are hopeful that these hearings will mark a major step toward early enactment and ratification of a constitutional amendment to remedy the Court's tragic and repeated error in this matter.

I realize that I have used strong language in referring to this situation: "national scandal" and "tragic error." However, I do not use those terms casually or for rhetorical effect. The rate of legalized permissive abortion in the United States is now approximately 1.5 million a year, 30,000 a week, over 4,100 a day. Destruction of human life on that scale boggles the mind, and the fact that it occurs under the mantle of law calls into question our status as a civilized nation. In cold fact, 1.5 million abortions a year can be understood, though never justified, only as symptoms of a kind of disease of the national spirit, eroding respect for life and hardening hearts against the most elementary claims of compassion.

I think it is valid to question the right of a religious leader to say that we are speaking here of human life. That could be argued to be a question for science to settle. I readily concede that, for science has long since settled it and done so in favor of the unborn. The scientific data fully support the commonsense claim that each human individual comes into existence at conception, and all subsequent states of development are simply that—phases of growth and development in the life cycle of an individual already in existence.

It is true that some scientific and medical professionals misinterpret what is at issue here, but I submit it is they who attempt to introduce subjective ideology and myth into the debate. Having concluded, on the basis of their private value systems, that life before birth is either valueless or has less value than the social benefits of legal abortion, some reason backward and seek to reject the evidence for the humanity of the unborn, without being able to disprove or even seriously to question it. This is what it means to substitute subjective beliefs for scientific facts.

Plainly, the implications of the abortion decisions reach far beyond the abortion issue and impinge upon the legal status and rights of human beings who are handicapped or dependent on others, or who in any way fall below the standard of what some court or legislature may consider meaningful life. They affect the very nature and purpose of law in relation to human rights. Therefore, the debate is not between science and religion, nor between one view of morality and pluralism, nor between competing interpretations of scientific data. Ultimately, it is between the conviction that all human beings are inherently equal in rights and dignity and the idea that the inherent dignity of all members of the human race is in fact irrelevant from the viewpoint of law.

It would be a happy thing if the Supreme Court, acknowledging that the bad arguments propping up its decisions have had disastrous consequences, would reverse itself. Unfortunately, there is no reason to think it will in the foreseeable future. Hence the need, which we have urged from the beginning, for a constitutional remedy.

We have considered amendments proposed during this Congress in light of the same concerns which prompted the bishops to testify before this body in 1974. Now, as then, we wish Congress to give its support to an amendment which effectively reverses the Supreme Court's abortion decisions, allows for effective and universal protection of unborn children against abortion, and has good prospects for ratification. In light of these criteria, we support Senator Hatch's proposal, embodied in Senate Joint Resolution 110.

There should be no misinterpretation about our own position on the abortion issue. We are committed to full legal recognition of the right to life of the unborn child, and will not rest in our efforts until society respects the inherent worth and dignity of every member of the human race. When a constitutional amendment is ratified and hearings are held on a national abortion law, we shall again request permission to testify in order to urge Congress to enact laws to protect the unborn child to the maximum degree possible.

We realize that other groups and individuals will put forward other views on this matter. However, our understanding of national attitudes and our commitment to the democratic process convince us that this strategy for returning the abortion controversy to the legislative arena has the great merit of being an achievable solution to the present situation of abortion on demand. We cannot in conscience tolerate the continued destruction of unborn human lives at the rate of 1.5 million a year on the hypothetical grounds that some day another, theoretically ideal constitutional solution might be found.

Mr. Chairman, Cardinal Cooke will present further reflections on these questions. In conclusion, I thank you again for the opportunity to testify on behalf of Senate Joint Resolution 110. Acknowledging that other approaches have their merits, we nevertheless stand prepared—should this committee give its endorsement to Senate Joint Resolution 110—to use all our efforts to urge support among our people and adoption by the appropriate legislative bodies.

I thank you again.

Senator HATCH. Thank you, Archbishop Roach.

Cardinal Cooke?

STATEMENT OF CARDINAL TERENCE COOKE, ARCHBISHOP OF NEW YORK

Cardinal COOKE. Mr. Chairman, Senator Leahy, friends, I am Cardinal Terence Cooke, Archbishop of New York. I offer this testimony as chairman of the Committee for Pro-Life Activities of the National Conference of Catholic Bishops.

I also welcome the opportunity to appear before this subcommittee in order to affirm once more that abortion is detrimental to our Nation, and to urge the enactment of a constitutional amendment rectifying that situation.

The promotion of abortion—which we have witnessed since the Supreme Court decisions of 1973—has grave effects on the lives of individual human beings, on families, and on society itself. It has rendered defenseless before the law millions of the unborn and has created a system of selective justice where some members of society decide who will live and who will die.

I am further grateful for the opportunity to appear before you today in fulfillment of our right to speak on matters of public policy, precisely as a religious leader concerned with the moral and spiritual welfare of our society.

While noting the complexity of the abortion issue and agreeing that it has moral and religious dimensions, I am convinced that legal protection for the unborn child must be based on a respect for human dignity and fundamental human rights commonly held by people of good will regardless of their religious affiliation.

This conviction is not restricted to one particular religious denomination or to one particular theory concerning natural law, but it is at the very root of American law. It requires that if the laws of our Government are to be considered valid, they must recognize that human rights are grounded in human dignity and cannot be freely bestowed and removed by government. Instead, human rights call out to be recognized because they exist prior to any particular government. Laws which violate or ignore these rights do not truly remove them, but instead render themselves invalid.

I am convinced that each day that permissive abortion on demand continues to reflect a situation of lawlessness in our country, the concept of the acceptability of violence is reinforced, the respect for the dignity of each human being is diminished, and the moral fiber of the Nation is further unraveled.

Abortion is not a victimless procedure. Every time an abortion is performed, the developing life and future of a human being is violently destroyed. There is no more permanent or decisive form of child abuse than the aborting of the unborn. Yet we live in a society which has attempted to make abortion socially acceptable by fostering an abortion mentality.

Some people in our country have even asserted that abortion is a God-given right, an affirmative good, and have gone to great lengths to promote this attitude toward the destruction of unborn human life. Others have insisted that taking away the opportunity of abortion is an invasion of the privacy which should mark the relationship between a woman and her physician. This ignores totally the fact that there is someone else to be considered. Yes, abortion involves a woman and her physician, but it also affects an unborn child as an innocent third party.

Every abortion also has consequences for the future of the society in which it takes place, for it involves moral, psychological, and emotional factors which play an important role in making up the character of that society.

All of us are concerned about the growing evidence of violence in our Nation. I am convinced that a society is doomed to violence when it allows direct attacks on the most fundamental of all human rights, the right to life itself. The potential for destructiveness in such actions reaches to the very roots of our system and turns its most basic principles upside down. The right to life is replaced by the right to destroy. The very concept of inherent rights is replaced by the concept of privileges bestowed by the State upon those it considers worthy of recognition.

Ready access to abortion has failed to solve society's problems as some of its proponents claimed it would. It has become instead a legal and social disaster. Its consequences will be felt for many years to come. We must reverse the current policy if we are to promote the common good of all who live in our society. Without such a reversal of policy, we fear that our society's commitment to the common good can only erode further.

The society in which we live has always placed an emphasis on family life. The family, as the U.N. Declaration on Human Rights says, is "the natural and fundamental unit of society, entitled to protection by society and the state." The family is the place where life originates and where human relationships are first experienced, where values and beliefs are found and formed and passed on from one generation to the next.

We find ourselves now in a situation where the widespread practice of permissive abortion brings about the rejection of the concept of protecting family life through the ordinary means of society and the state. In addition to denying the sanctity of human life and allowing its ultimate destruction, abortion involves a denial of family values and parental responsibilities. It constitutes a threat to all family relationships and so contributes to destabilizing and weakening society itself.

In recent years, especially since the Supreme Court decisions of 1973, our Government to a large extent has failed to recognize and support the family as a basic institution with its own roles and prerogatives. The Supreme Court and other Federal courts have gone beyond the promotion of permissive abortion with decisions that have undermined various family relationships between husbands and wives, parents and children. At the same time, notions used as a rationale in the abortion decisions have been extended into other areas, such as the care of the terminally ill, and used to override the role traditionally assigned to the family as a mediating agent between the individual and the state.

Increasingly our Government has come to look upon abortion simply as a matter of private, individual choice, as a mechanism to limit population growth, or as a way to deal with poverty or unplanned pregnancy. In doing so, Government intervenes in the internal dynamics of the family and substitutes its policies and technical solutions for the compassion, mutual assistance, support, and human love on which family life is based.

These developments are inherent in the logic of promoting abortion. They underscore the need for corrective action.

In calling for a constitutional remedy, we have no intention of asking the Government to take over our own task of teaching moral principles and forming consciences. However, the law does have a teaching function, which is exercised by encouraging or forbidding specific actions according to their assessed impact on the common good.

In evaluating abortion, legislators and jurists inevitably make judgments as to the moral principles which will be reflected in the law. In a real sense, therefore, the question now before Congress is not whether it will legislate morality, but whether the morality reflected in the law shall respect human life, or legitimate its destruction, along with undermining family structures and values.

I submit that the time has come for our elected representatives, in the face of the arbitrary and destructive action by the courts, to resume and exercise their role to protect the common good of all, and to enact legislation which embodies moral values essential to the well being of society and which guarantees the most basic of all human rights, the right to life.

I join with Archbishop Roach in accepting the concept expressed in the proposed Hatch amendment, and I encourage it as a step in this process. This approach recognizes that the Constitution does not confer a right to abortion, and it grants to the Congress and the State legislatures the power to legislate against the destruction of unborn life.

Thank you very much.

Senator HATCH. Thank you, Cardinal.

Up to now, Archbishop Roach and Cardinal Cooke, your organizations have refrained from supporting a specific constitutional amendment, but today you have endorsed Senate Joint Resolution 110. Could you share with this committee your basic reasons for doing this?

Archbishop ROACH. Mr. Chairman, that is a correct picture of where we have been in the past. We have been obviously consistent in working for some kind of constitutional amendment. We have refrained from endorsing a specific amendment.

I would say there are probably a couple of factors which lead us to a change in that game plan. First of all, the number of abortions per year keep increasing. I think there is a kind of cumulative horror at this. I think that that gets to us.

Second, and very frankly, the fact that you, as chairman of this committee, author a bill makes us look at it very carefully. We have looked at it. We feel it has the essential ingredients of what we see as a remedy, and we reached a decision that it is time for us to take a public posture of support for the kind of remedy which we believe is politically feasible and which we are willing to back and support.

Senator HATCH. Cardinal Cooke, do you have anything else to add to that?

Cardinal COOKE. I am very much in agreement with what Archbishop Roach has said. I think that the suggested amendment would bring together the people of the United States in a consensus to solve the present tragic situation.

Senator HATCH. I direct this question to both of you. We will start with you, Cardinal Cooke. How would you respond to the argument that efforts to limit the practice of abortion in this country represent the imposition by one religious group of its notions of morality upon other groups?

Cardinal COOKE. I think we both spoke about that.

Senator HATCH. You have, yes.

Cardinal COOKE. In my testimony I made it clear that we speak as religious leaders and that we do have the right to speak on the moral and spiritual welfare of our society in the area of public policy. In no way would we say that in speaking out on this we are speaking out in such a way as to foist our view on everybody else.

I think people of all religious denominations would join very much in opposition to the state of permissive abortion, abortion on demand, in our country. It is not a question of imposing views. We are completely open to the democratic process and working with it.

Senator HATCH. In other words, through this amendment, you are willing to allow the democratic process operate on this very crucial issue.

Cardinal COOKE. We would like to see the democratic process take place. What has happened since 1973 is that it has been completely stalled. I think the best way to have it take place is by our representatives in Congress being given the opportunity to vote on this matter.

Archbishop ROACH. I have nothing in particular to add to that, except to indicate that obviously it is our view that abortion is not a problem which affects only individuals. It has a serious effect upon society. We see both church and state as having a real responsibility to address the common good of society. We would regard the taking of unborn life as being an impediment to the common good. As such, we have no alternative but to speak to this kind of issue.

I think what Cardinal Cooke has indicated is that we have enormous faith both in the democratic process and in the inherent kind of abhorrence which people feel toward abortion. We are willing to have that tested.

Cardinal COOKE. Senator, I think we are not talking about something that is restricted to one particular religious denomination, or even to any special approach to a theory of natural law. We are talking about something that we feel is very much rooted in American law, and it is rooted in the sanctity of human life and the inherent dignity of the individual, a fundamental human right. That is what we are talking about.

Senator HATCH. You both have discussed in your testimony at some length the idea that placing restrictions on abortion would be a major contribution to strengthening the family unit.

Cardinal COOKE. Yes.

Senator HATCH. You have elaborated quite well on this, but would you care to add anything else to what either of you have already said?

Cardinal COOKE. In addition to the comments I have made, it is covered even more thoroughly in the written report we have submitted to your committee.

Senator HATCH. Thank you.

Cardinal COOKE. There is no doubt that the family is in trouble today, serious trouble. Abortion causes that situation to deteriorate even further in terms of the relationships within the family, and by the very fact of the destruction of life it affects the relationships of the husband, wife, children, and other family members.

Archbishop ROACH. I would agree with that.

Senator HATCH. What long-term benefits from an educational standpoint can you envision from placing in the Constitution an amendment relating to the subject of abortion? Can you see a continuing education benefit, for instance, if this amendment is ratified?

Cardinal COOKE. I think the way the Constitution has been interpreted by the decisions of 1973 has made it necessary for us to go for the constitutional amendment. It will certainly reverse and correct.

Archbishop ROACH. As you know—better than I, certainly—law is an enormous teacher. That is true whether we are talking about abortion or about many of the things by which I was much impressed in Senator Leahy's opening statement.

LAW TEACHES

The posture that we take in law in our attitude toward a variety of life issues, of human rights issues, whatever they may, may be the most effective single teacher we have. I see this amendment and I see our change in the posture on abortion as being a massive educational effort.

I think churches have a specific responsibility to lead people to form consciences on moral issues. I firmly believe that is one of our major responsibilities. We will do that. I think we cannot just count on law to change our Nation's attitude and try to reach a consensus. It is our responsibility to help form that consensus, but law is a very heavy teacher. I think it is tremendously important just from that educational standpoint.

Senator HATCH. I notice that both of you are fully aware that this amendment makes no value judgments with regard to abortion other than to declare it not to be a right guaranteed under the Constitution. Should this amendment be passed by two-thirds vote in the Congress and be ratified by three-quarters of the States, this amendment would leave it up to the concurrent jurisdiction of the Congress and the States to make the ultimate determination concerning what type of abortion laws we have or do not have in this country.

I take it that both of you feel confident that, if this issue were submitted to the people's representatives across the country, the conclusions of the proabortion forces that they have a vast majority of people on their side would be called into doubt?

Archbishop ROACH. I firmly believe that.

Cardinal COOKE. I do, too.

Senator HATCH. So do I.

What you are willing to do is let the people decide. Is that not right?

Archbishop ROACH. Yes, sir.

Senator HATCH. If they win, I guess that is the way public policy is going to be. You have also indicated, however, that you will never quit fighting for these principles that you are articulating.

Cardinal COOKE. We will continue our struggle for the principles articulated. Yes: very much so. The very fact that these hearings are taking place makes everybody think. The very fact of these hearings gives hope for a brighter future, moving away from the present situation.

Senator HATCH. What bothers me about the abortion on demand proponents is their arguments with regard to this amendment. They very strongly attack this amendment as frustrating public opinion even though it is a democratic amendment which leaves the decision up to the people of this country.

I suspect that the reason they do this is because they know deep down that it will turn the issue so they will be on the defensive trying to defend abortion on demand and all of its consequences. Do you agree with that or disagree?

Archbishop ROACH. I think that is the genius of this amendment, Senator. It puts the issue back precisely where it belongs. Without getting into the language—because I am not an attorney—I think what you have indicated is exactly correct.

Cardinal COOKE. Senator, so that we understand each other, we will continue our struggle for the maximum protection for the unborn.

Senator HATCH. I understand. You have made that very clear. I share your intentions.

Cardinal COOKE. I would just like to keep that clear, too.

Senator HATCH. That is clear. You have made it clear. Nobody could doubt that for a minute. I respect you for it.

Does the conference believe that Senate Joint Resolution 110 effectively overturns *Roe* v. *Wade?*

Archbishop ROACH. Yes.

Senator HATCH. Thank you.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I understand your support of Senate Joint Resolution 110. There is another human life bill with which the full committee will have to deal at some point, the Helms-East bill or S. 158. Has the Bishops' Conference taken a view on that?

Archbishop ROACH. We have discussed the amendments which are available. As we just remarked, this is a process. We will keep struggling, I suppose, and praying for the maximum protection for human life.

It is our belief at this moment, with deep respect for both the initiators and supporters of other amendments, that the amendment we are discussing at this point is the amendment which we really ought to support.

We are not troubled by other amendments. We feel this is the amendment we want to support at this moment.

Senator LEAHY. Has the Bishops' Conference or the general counsel of the Bishops' Conference taken a view as to the constitutionality of S. 158?

Cardinal COOKE. Are you speaking about the amendment, Senator?

Senator LEAHY. I am talking about the Helms-East amendment.

Senator HATCH. He is talking about the human life bill.

Senator LEAHY. The human life bill, S. 158, which is sometimes called the Helms-East bill.

Cardinal COOKE. First, I think these hearings are on the amendment. Is that not right?

Senator HATCH. These hearings are on proposed amendment. That is right.

Cardinal COOKE. We have made it very clear all along where we stand. We want a constitutional amendment. We have not deviated from that.

Back in 1974, in the testimony which is part of the record, we said that. Then just a few months ago, we said again, Senator, that here is where we stand. We stay at this position.

After much consideration and study we have come to the conclusion that the only feasible way to reverse the decision of the Court and to provide some constitutional base for the legal protection of the unborn child is by amending the Constitution.

Moreover, this is a legal option consistent with the democratic process. It reflects the commitment to human rights that must be at the heart of all human law, international as well as in our own Nation. Because human life is such an eminent value, the effort to pass an amendment is a moral imperative of the highest order.

We have always stayed with the amendment. This, we feel, is the only way to go. That is our position.

Senator LEAHY. I understand that, Cardinal. What I am suggesting is that the full committee, when it meets, is going to have all of these in front of it. It is going to have the human life amendment, it is going to have Senator Hatch's proposed constitutional amendment, and we are going to have to probably spend days debating back and forth among all of us. What I am looking for is a little guidance.

I know that the Bishops' Conference has looked at the human life bill, the Helms-East bill. I understand your feelings regarding a constitutional amendment. However, so that we would know when we come into the discussions of that bill, which we have to because it will be on the agenda as will this, has the Bishops' Conference developed a view as to that bill? Have you made a determination whether you feel it is constitutional, unconstitutional, a good idea, or a bad idea?

Cardinal COOKE. I think that is the role of the Supreme Court really, is it not? As far as we are concerned, as a conference we have not deviated from stating clearly that we wish a constitutional amendment. We intend to stay with that.

These are problems that you, you and the members of the committee have, and we have confidence in you. I am sure you will work them out. We will pray for you.

Senator LEAHY. We appreciate the confidence you have in us. Sometimes it is good for us to hear that somebody outside the Congress has confidence in us. We sometimes question our own confidence in each other within the Congress. I must admit that there are occasions where sometimes our constituents waiver in their confidence.

I had been told at one point that the general counsel of the Bishops' Conference has concluded that the human life bill was unconstitutional. I just did not know whether that was so.

Senator HATCH. I understand that, even if he is of that opinion, the conference takes its own position.

Cardinal COOKE. That is right. That is what I was trying to say.

Archbishop ROACH. If I may say so, obviously this has been discussed. The conference has not taken a position on that question. The conference's position is precisely the one that we have expressed this morning.

Senator LEAHY. Let me ask a couple of questions here that would help me. I come not from a large State as the two of you represent, although, Bishop Roach, I do get out your way quite often because not only does my godmother live in St. Paul, but my sister went to St. Catherine's, and we have a lot of relatives and friends in that area.

Archbishop **Roach**. You are very fortunate.

Senator **Leahy**. It is a lovely area. It is the only place I know that gets as cold as Vermont in the wintertime.

Senator **Hatch**. I hope that he will call upon you on this issue when he comes.

Senator **Leahy**. I would hate to impose on the archbishop's time, but I would be delighted to talk with him if he had time when I was there.

I do get questions on this from Vermont. I get recommendations. As you can well imagine, Vermont, while small, is as pluralistic as any other State. The questions go from those who have apparently made up their mind on one side or the other to those who are actually looking for real answers.

I pulled out some of the questions from the letters and so on and tried to put them into questions here. It is my understanding from what you have said here that the Catholic Church would ultimately like to have a constitutional amendment declaring a fetus a person from the moment of conception. Am I correct in that?

Archbishop **Roach**. Yes; that would be an ultimate hope, correct.

Senator **Leahy**. Does canon law treat a fetus as a person from the moment of conception?

Archbishop **Roach**. Are you a canonist?

Cardinal **Cooke**. Well, I know the church has always consistently promoted the protection of human life from the moment of conception. I know that at times people in various places have taken other views, but they do not have an historical basis. The clear position of the church is that life is present from the moment of conception.

As the archbishop mentioned, medical and biological science certainly lends support to this position.

Senator **Leahy**. Therefore, the church's view is that a fetus is a person from the moment of conception?

Cardinal **Cooke**. In terms of the actual situations, it is a question of human life. I think that is made very clear.

Senator **Leahy**. Therefore, it would be a person from the moment of conception?

Cardinal **Cooke**. When you start speaking legally of what you describe as a "person", that is where there could be difficulties in discussion back and forth. However, we stand for respect for the human life in the womb, as a person. We stand for that.

Senator **Leahy**. I think of a person as one having a soul.

Cardinal **Cooke**. Yes.

Senator **Leahy**. You say that is from the moment of conception? You are using that as a term?

Cardinal **Cooke**. You are trying to get the discussion into philosophical and other areas, but more and more we are learning medically about these things. It is clear medically and scientifically what happens. They have pictures of virtually every stage. With all the new techniques, you can see this.

I think the issue is human life. The more people are aware of human life being present, the less desirous they are in the public debate of the destruction of human life. This is what has been going on in our country now for a number of years.

I think the job of the legislature and the Government is to protect human life, not to destroy it.

Senator LEAHY. I could not agree more on that. We are in absolute agreement on that. I want to make sure though that I understand. Oftentimes in drafting certainly major pieces of legislation, we do go to the philosophical understandings of our witnesses and others. We go to laws that have already been passed. We have had discussions on the floor and legislative histories of everything from canon law to the British common law and so forth.

For example, under canon law, is abortion treated as murder?

Cardinal COOKE. It is certainly treated as the destruction of life. It is treated as the killing of human life. Again, when you talk about murder, as you undoubtedly know as a lawyer, murder requires that a person be conscious and deliberate. It is a type of description that has to be made legally. I think you would be best able to define that.

Senator LEAHY. I understand. I am just wondering though. I would assume that canon law must be fairly clear on this. I am not a canon lawyer and I do not have a background in it. I just thought maybe you might help me on that and save me a few hours of research into the question. Does canon law treat abortion as murder if somebody knows they are performing an abortion?

Cardinal COOKE. It is treated in canon law as a heinous crime.

Archbishop ROACH. That is right. We have no problem, Senator, talking in terms of unborn life as a person, theologically. Our problem, and I suppose the reason we are almost labored in trying to avoid the use of that term, is because it immediately gets into a kind of legal complexity.

Canon law does treat abortion as a crime. Canon law does not treat the crime of murder. It is a crime. However, to use the term murder has all kinds of legal implications and penalties that we are trying to avoid. Maybe we cannot do it both ways.

However, I think we are trying to be fairly clear in using the words human life. But in response to your question, yes, canon law would treat abortion as a crime.

Cardinal COOKE. As a heinous crime and a killing and a destruction of human life. When you want to put the further phrase of murder in, you get into the question of——

Archbishop ROACH. It is a legal one.

Cardinal COOKE. It is legal and also involves the idea of persons knowing what they are doing and with full deliberation. Many times people do not know. Many times there are abortions performed where people are not even fully aware of what is happening.

Senator LEAHY. I understand.

Cardinal COOKE. That is why the education that you mentioned is so important.

Senator LEAHY. Let me ask you this.

Senator HATCH. Would the Senator yield for one moment? I think it might assist somewhat to note here that in no State prior to *Roe* v. *Wade* was abortion treated as murder. I would doubt seriously, regardless of what laws might be enacted in the future concerning abortion, that any State would take that position.

I take it that you do not want to get drawn into a legal splitting of hairs on this. You are concerned with the moral issue.

Cardinal COOKE. That is right.

Prior to the court decisions, it was a criminal act.

Senator HATCH. Yes; it would be a criminal act but not necessarily murder.

Senator LEAHY. I would find it probably the singular honor of my career in the Senate to have the Cardinal as one of the people in my office to help me in preparing answers to my mail, but that is never going to happen. Therefore, I am trying through these questions to determine some of the answers that we have to give.

Again, on this particular question, if the fetus is indeed a person from the moment of conception, which is part of the major debate we have here, I have personally prosecuted enough murder cases to know that one of the various elements of proof is that somebody did intentionally kill a person, a person alive. Unless being able to prove that, I was not able to prove the murder cases.

I have a number of other questions I will submit for the record because I know my time is up, but let me ask you this: If we determine that, and determine through laws that might follow Senate Joint Resolution 110 that the fetus is a person, would the intentional aborting of that person at whatever stage, days after conception, months after conception, be murder?

Archbishop ROACH. Senator, I understand what you are saying and I recognize that that question is raised, but I think it would be inappropriate for us to depart from the kind of moral stance we have taken. My impression is that you are leading us, perhaps appropriately, into a situation which is essentially yours. That is to define what murder is, even to suggest appropriate penalties.

I do not think that is our function. I think that our function is to continue to speak in terms of the taking of human life. It seems to me that it is someone else's—either the courts' or the Congress—function to define or to say what that taking of human life is as it applies to law. I do not believe that is our function.

Senator LEAHY. I respect that. I will leave it with this. Part of the debate will center around the question of when human life as human life begins. Is it the moment of conception, is it the moment of viability of the fetus, is the moment of birth? A lot of what we do in the end—I think we are all agreed on this—will revolve around the feelings of individual Members of the Senate on answering that question.

Actually, my questions to you were as related to that as anything else because the question of whether Senate Joint Resolution 110, or a form of it, will go through the Senate will be determined to a large extent on how each one of us has to answer what is a scientific, a legal, and a theological question all rolled into one: Is it human life at the moment of conception, is it at viability, is it at birth, or is it at some other point in between? That would have major ramifications on what we ultimately do.

I realize my time is up, but if either of you would like to add further views on the subject within that context, please write to me personally. I would consider it very much a privilege to have that. Also, if any of the other witnesses who are going to testify today would like to respond within that context, I would find it very interesting and would be most happy to make it part of the record with the chairman's permission.

Archbishop ROACH. Senator, I was about to suggest that it would be helpful for us to give you at least the theological component of the complexity of the answer. We will work on that and submit that to you in writing.

Senator LEAHY. Thank you.

Senator HATCH. Thank you.

We are very happy to have Senator DeConcini from Arizona with us.

Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you very much. I am not going to impose on the committee and the witnesses here for questions. I know their position. I have studied it for some many years. I thank both the cardinal and the archbishop for taking the time, and staff for the fine presentation here today.

Senator HATCH. Thank you, Senator DeConcini.

We are certainly pleased that you took time out of your busy schedules to be with us. We appreciated hearing your testimony here today. Thank you again.

Cardinal COOKE. We are very grateful to you. Thank you very much.

Archbishop ROACH. Thank you.

[The prepared statement of Archbishop Roach and Cardinal Cooke follows:]

PREPARED STATEMENT OF ARCHBISHOP JOHN R. ROACH AND CARDINAL TERENCE COOKE

INTRODUCTION

The National Conference of Catholic Bishops has testified before Congressional subcommittees on two previous occasions on the subject of abortion and the need for a Human Life Amendment: on March 7, 1974, before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary; and on March 24, 1976, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

Neither in 1974 nor in 1976 was any version of a Human Life Amendment reported out of committee and voted on by Congress. As a result, this issue has not yet been brought before the state legislatures for their own determination. It is our fervent hope that this subcommittee and this Congress will show their respect for the democratic process by making it possible for the elected representatives of the American people to consider such a constitutional amendment.

In our previous testimony we have commented on a great many aspects of the abortion debate.

In 1974, we presented a wealth of evidence on the humanity and dignity of the unborn child. We pointed to the American legal tradition which recognizes the inherent right to life of all human beings, and noted that until the Supreme Court stripped virtually all legal protection from the unborn child, the life of that child was seen as deserving of legal protection. We noted the virtually absolute character of the right to abortion created by the Court, which gave the unborn child no recourse or appeal under the law. The conclusion reached in that testimony was:

> After much consideration and study, we have come to the conclusion that the only feasible way to reverse the decision of the Court and to provide some constitutional base for the

> legal protection of the unborn child is by amending the Constitution. Moreover, this is a legal option consistent with the democratic process. It reflects the commitment to human rights that must be at the heart of all human law, international as well as national, and because human life is such an eminent value, the effort to pass an amendment is a moral imperative of the highest order.

On March 24 of this year, the NCCB Administrative Committee voted unanimously to reaffirm this 1974 statement.

In 1976, our testimony concentrated on reactions to the Supreme Court's abortion decisions and on the early effects those decisions had on law and society. By that time, many distinguished legal scholars, representing a wide variety of views on abortion itself, had criticized the 1973 decisions as having little or no basis in the Constitution or in American legal history. Preliminary statistics suggested that legalization did increase the number of abortions performed by making abortion more easily available and more socially acceptable. This situation produced its own threats to women's lives and health while failing to put an end to illegal abortions.

The abortion mentality was already helping to erode some physicians' respect for human life in other spheres, most noticeably in the treatment of handicapped newborns who could be classified as falling below someone's standard of "meaningful humanhood." At that time we condemned as patronizing and sometimes punitive the attitude that "abortion is good enough for the poor," as well as the general tendency to see the quick and violent "solution" of abortion as the answer to a variety of social ills which have their own appropriate and infinitely more humane solutions. We renewed our criticism of the abortion decisions themselves, observing that they had created a "new legalism...destructive of the human spirit." The Supreme Court had imposed this "new legalism" by replacing the facts about the beginnings of human life with new legal fictions and by failing even to recognize many of the individual and social values at stake in public policy decisions on abortion. By isolating the pregnant woman in her "right of privacy," the court had done a disservice both to her and to her child, cutting them off from the familial and societal bonds which can support and encourage life-affirming attitudes.

We responded to the claim that laws restricting abortion constitute an establishment of religion or a denial of religious freedom, pointing out that the idea of abortion as an affirmative good is a novelty created by the Supreme Court and not one maintained by any major religious denomination. While noting the complexity of the abortion issue and agreeing that it has moral and religious dimensions, we reasserted our conviction that legal protection for the unborn child can be based on a respect for human dignity and fundamental human rights commonly held by people of good will regardless of their religious affiliation.

Without repeating our 1974 and 1976 testimony in detail, we wish to take this opportunity to reaffirm our continued adamant opposition to the current public policy on abortion and our conviction that a constitutional amendment is necessary to correct this unjust and destructive policy. Over the past five years, there have been a number of developments which strengthen the case on behalf of an amendment. In addition, the arguments put forth to defend legalized abortion have changed in some ways, requiring new responses. These recent developments will be noted during the course of this testimony, which will address four important aspects of the abortion controversy:

First, the central issue of the human dignity of the unborn child, with special emphasis on the complementary roles which scientific evidence and ethical insight can play in appreciating this dignity.

Second, a review of Western and specifically American legal traditions on human rights and the protection of unborn human life, with comments on the ways in which the reasoning of the Supreme Court's abortion decisions distorted and weakened those traditions.

Third, the legal and social effects of *Roe v. Wade* upon American life.

Fourth, the issue of the relationship between law and morality as it applies to the abortion issue.

THE HUMAN DIGNITY OF THE UNBORN CHILD

In 1974 and 1976, we cited a wealth of scientific literature to show that individuated human life begins at conception--that is, that a unique human individual comes into existence when male sperm and female ovum successfully unite, and that all subsequent stages of development are simply phases in the continuous process of maturation into an adult human being. No new evidence has been found to contradict this simple fact, and a great deal of evidence has accummulated to confirm it. The testimony presented on this matter before the Senate Subcommittee on Separation of Powers on April 23 of this year presents a small sample of the evidence available. The Federal government itself officially acknowledges the biological facts on this point. A 1979 publication of the Department of Health and Human Services reports:

> Life is a constantly evolving process that begins with conception and continues until death. Movement through time necessitates change and therefore is synonymous with life itself; the opposite state is stasis and death....With the passage of time, the human organism grows from a single cell to a fully developed adult....Life begins when a male sperm unites with a female egg. The new life created by this union starts as a single cell....In relation to the total life span of the individual, the early developmental years are short and serve as the foundation for the remainder of one's life span. The needs of a child in the support of this growth and development begin before birth and continue throughout the growth years until maturity is reached.[1]

The development of new biological techniques has served to underscore the fact that a new human life begins at conception. Despite the lack of a moral and legal consensus on the advisability of human _in vitro_ fertilization experiments, there is consensus on one point: Baby Louise Brown, born in England in 1978, attracted so much publicity because _her life as an individual_ began in a laboratory rather than in her mother's fallopian tubes. There is little point in claiming that this new life is a part of the mother's body, when it is technically possible to transfer the developing embryo into another woman's body and may soon be possible to bring a child to maturity using an "artificial womb." It is clear that from the moment of fertilization, there exists a new individual who requires nothing but a hospitable environment in which to direct its own growth and development.

Perhaps even more interesting than the strictly scientific evidence on the life of the unborn child, however, is the newfound status of the unborn child in medical practice. In 1974, when Dr. Bernard Nathanson first publicly admitted his "increasing certainty" that he had "presided over 60,000 deaths" as director of the world's largest abortion clinic, he did not attribute his new attitude to newly discovered scientific evidence that life begins at conception, for he knew that such evidence had existed for more than a century. Rather, the unborn child's humanity had been brought home to him in a new way by his experience as the director of a new perinatology unit at St. Luke's Hospital Center in Manhattan. Here, Dr. Nathanson was able to study the child in the womb for extended periods of time, to chart his or her development, to locate and correct medical problems--in short, to treat the child as a patient, and thus to realize that the child in the womb is as much a member of the human community as is a newborn infant or a mature adult. Based on his medical experience and his own thoroughly secular medical ethic, Dr. Nathanson has now concluded that legal protection should be restored to the unborn child.[2]

Dr. Nathanson's medical experiences have now been duplicated many times over. The new specialties of fetology and perinatology have advanced at a tremendous rate. Amniocentesis, fetoscopy and high-resolution sonography allow us to observe the development of the unborn child and the onset of possible medical problems long before birth. The prescribing of drugs and nutritional programs for children still in the womb is becoming commonplace, and the specialty of prenatal surgery is coming into its own.[3]

Such recent medical developments add an important human dimension to what might otherwise seem like rather abstract scientific evidence on the beginnings of human life. As Dr. John C. Fletcher noted in an editorial in The Journal of the American Medical Association, physicians are now being confronted in new ways with the inescapable reality of the unborn child as a human patient in need of care and support.[4] Our developing prenatal technologies are stripping away the veil of ignorance which some would like to maintain with regard to the humanity of this child, forcing physicians and society as a whole to appreciate the continuity between life before and after birth. Unless our society wants to be blind to the point where it can ignore the increasingly obvious status of the unborn child as a member of the human family, it must come to grips with the fact that the abortion debate is not over "when life begins". Rather, the core of the issue concerns the intrinsic dignity and value of life already in existence. We are faced with a moment of decision which cannot be avoided: We must decide whether every human being in need of medical care will be approached with instinctive concern or with the detached eye of the technician who is equally ready to cure or to kill in accordance with the whim of family or society.

The temptation to evade this all-important decision is pressing. To face the decision honestly is to admit that acceptance of abortion is a violation of the physician's most sacred vow in all circumstances "to help or at least to do no harm." Some have therefore tried to claim that science has nothing to say about the point when a human being's life begins because such terms as "human life" and "human being" have only a religious or metaphysical rather than a scientific meaning. They attempt to dissolve the ethical dilemma of abortion by re-defining the word "human" in terms of various functional abilities which make human beings worthy of respect and protection. Having concluded, then, on the basis of their own value systems, that life before birth is either valueless or of less value than the social benefits of legal abortion, they reason backward from this conclusion to deny that pre-natal life is "fully human."[5]

This evasion is not a new phenomenon by any means, for it was described in 1970 by the journal California Medicine:

> The reverence of each and every human life has been a keystone of Western medicine, and is the ethic which has caused physicians to try to preserve, protect, repair, prolong, and enhance every human life.
>
> Since the old ethic has not yet been fully displaced, it has been necessary to separate the idea of abortion from the idea of killing which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception, and is continuous, whether intra- or extra-uterine, until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because, while a new ethic is being accepted, the old one has not yet been rejected.[6]

We take some consolation in the fact that the "new ethic" for medicine has apparently still not caught on completely, since "semantic gymnastics" are still necessary; but we can only regret the confusion created when such tactics are used to avoid facing the facts.

Such attempts to deny the humanity of the unborn betray a lack of understanding of the social and moral dilemma confronting our society. We do not claim that unborn children have all the physical and social abilities proper to adults, any more than we would claim that newborn children possess all such physical and social abilities. We do claim that each human individual comes into existence at conception, and that all subsequent stages of development in which such abilities are acquired are just that-- stages of growth and development in the life cycle of an individual already in existence. Each abortion destroys the life of an individual human being at an early stage in his or her development. Recognition of these facts does not automatically settle the moral and legal issue of abortion, but it does focus attention directly on the fundamental question involved: Will we treat human life as having inherent dignity and worth, or will we treat it in accordance with a sliding-scale of value in which the right to life is a privilege granted only to those with certain functional abilities?

As spiritual leaders and as representatives of an ethical tradition concerned with this question for centuries, we can give only one response to it. That response was succinctly summed up by the assembled Catholic bishops of the world at the Second Vatican Council, when they ranked abortion, murder and infanticide as "offenses against life itself" and declared that such offenses "debase the perpetrators more than the victims and militate against the honor of the creator."[7] Our witness on this point is rooted in a commitment to the sanctity of life which reaches to every level of our convictions as Christians, as believers in God the Creator, and as human beings.

As Christians we look to the gospel of Jesus Christ as our norm for faith and action. In Jesus we see that God has a special concern for the most lowly and despised human beings, and we see that each human being has infinite worth as a brother or sister of Jesus who is called to eternal life with God. Jesus is presented to us in the gospels as the paradigm of human dignity who calls to our consciences with the challenge: "As you did it to one of the least of these my brethren, you did it to me" (Mt. 25:40). At the same time we are forced to admit that, in comparison with this perfect example of humanity, each of us is a very imperfect specimen indeed; and we therefore deny that we or any human being can sit in judgment upon another and proclaim him or her to be "not fully human." The New Testament parable of the Good Samaritan teaches us that no Christian can sit back and ask "Who is my neighbor?" in an attempt to define limits to his or her obligations with respect to others. Rather, each of us has, in the words of the Second Vatican Council, "an inescapable duty to make ourselves the neighbor of every man, no matter who he is."[8] This duty moves us not only to condemn abortion as the killing of our neighbor, but also to reach out to the pregnant woman with assistance and support both for her and for her child, offering life-giving alternatives to abortion and seeking the help of private agencies and of government in responding to this human need. Finally, the gospel calls us to a mission of forgiveness and reconciliation with regard to the woman who has had an abortion. Christ teaches us that the Father's mercy is always available and without limit. It is our duty to witness to this mercy toward all.

As heirs to the Judeo-Christian spiritual and ethical tradition which recognizes one Creator as Lord of all, we proclaim with Pope John Paul II that "all human life--from the moment of conception and through all subsequent stages--is sacred, because human life is created in the image and likeness of God."[9] God is not the Lord only of some lives or of some stages of life, but as the Author of life itself, he is intimately concerned with the life of every human being from its very beginning. The ethical tradition common to all Christians has always recognized this, condemning abortion at every stage despite occasional philosophical speculations concerning the time of "ensoulment."[10] Our Protestant brethren in particular have argued that speculations about "ensoulment" or "personhood" do not change the character of abortion as the destruction of a nascent human life called into existence by God.[11] We share the conviction that the deliberate destruction of innocent human life is the violation of God's commandment and the usurpation by man of divine authority over life and death. We believe that no human person has dominion over life and death, and therefore that no human individual or government has the right or the authority to dispense with unborn human life as it pleases.

Finally, as human beings committed to the common good of our society and the promotion of justice in the human community, we reject abortion as the killing of one who shares in our common humanity. Because the unborn child is undeniably a fellow human being, he or she deserves the same respect and the same protection as any other member of the human family. Simple human justice demands this much, as does the Golden Rule that calls on all human beings to treat others as they would have themselves treated. From a purely human viewpoint, therefore, the promotion of abortion is the prelude to the disintegration of all human dignity. It is the promotion of a selective justice, in which only the powerful can survive.

At every level of our convictions--as Christians, as religious leaders, and as concerned human beings--we believe the Supreme Court's abortion decisions constitute an egregious offense against human dignity. We do not suggest that every aspect of our religious convictions on this point can or should be represented in the law. But we defend our right to speak on matters of public policy precisely as religious leaders concerned with the moral and spiritual welfare of our society. We maintain that no human authority can arrogate to itself the power to classify some human lives as devoid of value, because no human authority gives human life its value. Any law which directly violates the divine law and the inherent rights of human beings, as the Supreme Court's decisions have done in this case, is itself unworthy of human respect.

WESTERN TRADITIONS ON HUMAN RIGHTS AND THE UNBORN CHILD

Having stated our conviction that the protection of the unborn child is a demand which our common humanity makes upon us, we also wish to emphasize that this conviction is in complete harmony with our commitment as American citizens to the defense of fundamental human rights. On this point, it is important to remember both the United States' traditional commitment to inherent human rights in general and its legislative record with respect to the protection of unborn human life.

At the root of Western jurisprudence, and especially of American law, is the conviction that governments must act according to certain commonly held moral principles and respect certain inherent rights if their laws are to be considered valid. This conviction is not restricted to one particular religious denomination, or to one particular theory concerning "natural law," but is

Western civilization's alternative to arbitrary, unjust, or totalitarian government. It was in recognition of government's responsibilities to a higher law that the founders of our nation claimed the right to revolt against what they considered an unjust system of colonial law. This recognition is also what justifies America's criticism of violations of human rights by certain foreign governments. Without adherence to the idea of a higher law, all such condemnation of injustice is meaningless, because there is no independent standard by which the most abhorrent practices and policies of a legally constituted authority can be considered as either just or unjust. If human rights are grounded in human dignity, then they cannot be freely bestowed and removed by government. Instead, they call out to be recognized because they exist prior to any particular government. Laws which violate or ignore these rights therefore do not truly remove them, but instead render themselves invalid.

The articulation of such rights has been the intent of some of our most revered national and international documents. The right to life is proclaimed as the most fundamental of all rights, and is recognized as existing equally in all human beings regardless of their condition. Our Declaration of Independence recognizes the right to life as inherent and unalienable from the first moment of each human being's existence when it proclaims that "all men are created equal" with respect to this right. The fifth amendment to our Constitution states that no person shall be deprived of life or liberty without due process of law. The 13th and 14th amendments attempt to strengthen the protection of human life and to assure that no class of human beings will ever again be deprived of legal protection in the United States. The United Nations' International Covenant on Civil and Political Rights provides that "every human being has the inherent right to life," and implicitly recognizes the rights of the unborn child by rejecting the use of the death penalty upon pregnant women. The UN's Declaration of the Rights of the Child is more explicit, stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Here the mental and physical immaturity of the unborn, so often used as arguments in favor of abortion in the current American debate, are seen precisely as reasons for providing especially strong protection to the unborn because of their helplessness and greater need for the care of others. The American Convention on Human Rights, proposed by the Organization of American States in 1969 provided: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."[12]

The presumption in favor of legal protection for the unborn child created by this human rights tradition is a strong one. Since the unborn child is now recognized more clearly than ever before as a member of the human race in science and medicine, such a tradition calls on legislators to protect the right to life of the unborn child as they protect the rights of other human beings. Indeed, the only sure means for avoiding such a conclusion is to deny that membership in the human race is sufficient reason in and of itself for being considered worthy of legal protection, and thus ultimately to deny that the idea of inherent human rights is relevant to the law. This denial should be familiar to those who recall the history of the degrading institution of slavery in America and the constitutional remedies which were necessary in order to put an end to it. The same denial can be found more recently in Nazi Germany's ideal of the absolute sovereignty of the state over the individual, and in the concept of "life devoid of value" by which it gave official sanction to a program for eliminating those considered medically or socially undesirable.[13]

Beginning in 1972, this denial has also played a role in federal court decisions dealing with abortion in the United States. In that year the highest court in the state of New York admitted that the unborn were "human" and "unquestionably alive", but ruled that there was no obligation to protect them because "it is not true that the legal order corresponds to the natural order." In dissent, Judge Adrian Burke focussed directly upon this questionable disjunction between fact and law, citing the Declaration of Independence to argue that human beings are created with inherent rights. These rights, claimed Judge Burke, could not simply be over-ruled by the state in the name of whatever happens to pass for enlightened social policy at any particular time.[14] But in January of 1973 the U.S. Supreme Court accepted the approach suggested by the majority opinion in this case, handing down the first in a series of rulings in which the concept of the inherent dignity of all human beings has been denied its proper role in the law.

Many have failed to notice this feature of the 1973 abortion decisions, because they think that the Supreme Court merely found itself unable to determine which of several views on the beginnings of human life is correct. In fact, the Court said that it "need not resolve the difficult question of when life begins," and implied that it could reasonably ignore the claims of the Texas state legislature that life begins at conception, because the question of whether someone was actually a living member of the human race was not determinative of legal status as a person.[15] This position was made more explicit by a federal judge in Rhode Island later in 1973, when he cited the Supreme Court's decisions as the basis for his ruling that the existence of human life at conception is "irrelevant" to the question of public policy on abortion.[16] The result of such decisions has been the creation of a new area of law in which the natural and legal orders are separated with a thoroughness hitherto unknown in the United States, with the possible exception of early American law dealing with slavery. This is the "new legalism" which we discussed in our 1976 testimony. While claiming to promote the freedom of physicians to practice good medicine, the Supreme Court substituted legal fictions such as "meaningful life" in place of the medical facts about abortion and unborn life.

In its 1973 ruling in Roe v. Wade, the Supreme Court attempted to show that this approach to the unborn child has some basis in American legal history. American legislators, it claimed, granted little or no protection to the unborn child prior to the 19th century, and they never considered themselves as obliged to acknowledge a particular set of biological facts concerning the beginnings of life. But after eight years of research and reflection, American legal scholars and historians are still finding previously undiscovered ways in which the court's historical argument on this score is faulty.[17]

In part, the court's historical statements in Roe v. Wade can now be seen as relying on incomplete information. For instance, its claim that there were no civil statutes against abortion until the 19th century ignored laws of the 15th through 18th centuries regulating midwifery, in which abortions performed for any reason were prohibited.[18] More often, the Court's historical arguments involved an apparent misunderstanding of the way in which the law in each historical period has interacted with contemporaneous scientific knowledge and medical realities. Thus it mentioned that abortion was considered a crime only after "quickening" for some centuries, but it failed to appreciate that this subjective sensation on the part of the pregnant woman was given undue importance because of the primitive state of medical technology at that time.[19] The Court discussed medieval speculations concerning "delayed animation," grossly misrepresented them as having been Catholic "dogma" until the 19th century, failed to note that the Church's moral teaching always condemned abortion at every stage, and seemed oblivious of the fact that the philosophical speculations in question were based partly on Aristotelian biological ideas now totally obsolete.[20] Similarly, the Court noted the role of the American Medical Association in enacting new abortion laws in the 19th century, but simply juxtaposed its statements with the AMA's pro-abortion statements of the 1960s instead of looking carefully at the reasons behind those statements.[21] In 1859, when the AMA urged American legislatures to enact much stricter laws against abortion, it based its stance specifically on scientific evidence that human life begins at conception. In 1871, the AMA could quote with approval from Archbold's Criminal Practice and Pleadings:

> It was generally supposed that the foetus becomes animated at the period of quickening; but this idea is exploded. Physiology considers the foetus as much a living being immediately after conception as at any other time before delivery, and its future progress but as the development and increase of those constituent principles which it then received. It considers quickening as a mere adventitious event, and looks upon life as entirely consistent with the most profound foetal repose and consequent inaction. Long before quickening takes place, motion, the pulsation of the heart, and other signs of vitality, have been distinctly perceived, and, according to approved authority, the foetus enjoys life long before the sensation of quickening is felt by the mother. Indeed, no other doctrine appears to be consonant with reason or physiology but that which admits the embryo to possess vitality from the very moment of conception.[22]

This position has never been contradicted by more recent AMA statements; instead, its statement of fact has been subordinated to a subjective view of social progress which has little to do with the AMA's scientific competence. A recognition of developing medical knowledge is also behind the Catholic Church's decision in the 19th century to treat all abortions from conception on as equally serious crimes against human life in the context of canon law.[23]

In other words, the history of Western law on abortion had demonstrated a clear trend toward greater and greater protection for the unborn child, based on the perceived need for such legislation and on the developing medical knowledge at a given point in time concerning life's beginnings. The Supreme Court's documentation in Roe v. Wade juxtaposed differing laws on the matter from different historical periods and argued that these differences create an irreducible pluralism which the Court cannot resolve--as though it were forced to give equal attention, for example, to modern medical knowledge and ancient Stoic philosophy.[24]

Roe v. Wade's treatment of constitutional "personhood" is another example of its inadequate reflection on this entire issue. The Court simply went through the Constitution with a concordance, and concluded that most uses of the term "person" therein (with regard to voting, eligibility for presidential office, etc.) have only "post-natal application."[25] Almost all of the examples noted by the Court, in fact, apply only to adults. Yet the 14th Amendment proclaims that all persons who are either born or naturalized in the U.S. are citizens of the U.S. No court has used this wording to argue that new immigrants who are not yet naturalized are "non-persons" who can be killed with impunity--rather, it is assumed that immigrants are "persons" with an inherent right to life long before assuming the special rights and responsibilities of American citizens. The Supreme Court interpreted this clause in the opposite sense in the case of those not yet born, as though the absence of full-fledged citizenship automatically meant the absence of any unalienable human rights.

This interpretation is imposed upon the 14th amendment from without, ignoring evidence that the amendment was intended to prevent any class of human beings from being denied the rights of persons. It is clear from the legislative history of the 14th amendment that the word "person" was not intended to distinguish between members of the human race who had rights and those who did not--on the contrary, words such as "man," "human being" and "member of the human race" were all used in Congressional debate by the framers of this amendment as common-sense synonyms for the term "person."[26] The status of the unborn child in relation to laws on abortion was not explicitly discussed during this debate; but when the AMA urged new abortion laws in 1859 and 1871 to protect the unborn child, from conception on, in all but the most extreme cases, the same state and federal legislators who ratified the 14th amendment responded promptly in recognition of their solemn responsibility to protect human life.[27] The protection of unborn life was seen as being in harmony with the basic purpose of the 14th amendment, which was, in the words of one of its Senate supporters, to "establish...equality before the law, and...give to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[28] It is this principle of the innate equality of all members of the human race which the Supreme Court denied in the case of the unborn child, reversing the obvious trend toward protection of all human life found in American law prior to the "liberalization" of some state abortion laws in the late 1960s.

The implications of Roe v. Wade's principles for the legal status of human beings who are handicapped or dependent on others, or those who in any way fall below the standard of what some court or legislature may consider "meaningful life," reach far beyond the abortion issue itself. To appreciate these implications is to realize that the abortion debate is not between science and religion, or between moralism and pluralism, or between two different interpretations of scientific data. The debate is between the conviction that all human beings are inherently equal in rights and dignity, and the idea that the inherent dignity of membership in the human race should be considered irrelevant to the law. Some who agree with the Supreme Court's abortion decisions argue that legal protection should be accorded only to those who can articulate and justify their needs in the public forum; others propose a sliding-scale of rights corresponding to the possession of certain mental or physical abilities; still others eschew such considerations, arguing simply that legal abortion is necessary for the efficient pursuit of social goods and liberties and that this is sufficient reason for its acceptance. But these positions all have two things in common: They require us to reject the idea that all human beings have inherent value and inherent rights by reason of a commonly shared humanity, and they can easily be applied to the killing of other classes of human beings in addition to the unborn.

We have recognized for years that the arguments by which the Supreme Court devalued unborn life have the potential for undermining the idea of inherent human rights with regard to those already born. In its 1974 Declaration on Abortion, the Roman Catholic Church's Sacred Congregation for the Doctrine of the Faith stated that an unequivocal defense of the right to life of human beings must be grounded in the conviction that this right exists prior to any state's recognition of it, indeed that it must exist as soon as life itself comes into existence. To argue that the right to life rests instead on official legal recognition by the state, or that it exists only upon arrival at some particular stage or condition of life which the state is willing to regard as socially valuable or "meaningful," is to deny that there is such a thing as an inherent right to life at all.[29] The logical conclusion of the principles used by the Supreme Court to legalize abortion is that our own fundamental rights are held only as privileges bestowed upon us by the state. Thus when Pope John Paul II said last year that there is a "patent contradiction" in the attempt to reconcile abortion with the furthering of human dignity, his words held special significance for the situation in the United States, in which the very principles used to justify abortion involve a denial of our traditional commitment to the natural rights of mankind. With Pope John Paul we hold that "the right to life is the most fundamental right of the human being, a personal right that obliges from the very beginning," and that the attempt to deny this right with respect to the unborn child is an attack upon the fundamental rights of all of us.[30]

THE LEGAL AND SOCIAL EFFECTS OF ROE V. WADE

When Roe v. Wade and Doe v. Bolton were handed down by the Supreme Court in 1973, the public policy they created with regard to abortion was hailed by some Americans as an example of progressive social policy. Abortion advocates predicted that a variety of social benefits would soon follow. Safe and legal abortion would make unsafe "back alley" abortions a thing of the past; infant and maternal mortality rates would plummet; every child who was allowed to be born would be a "wanted" child, and so the abuse and neglect of children would become less of a problem; teenage childbearing and illegitimate children would become less of a burden upon society; etc.

Eight years later, we see no sign that the brave new world predicted in 1973 has materialized. Nor is there any reason to expect that a few more years of the same policy will eventually bear the promised fruit. Some of the more obvious failures of the current policy are as follows.

1. Initial predictions that the annual number of abortions would level out within a few years have proved overly optimistic. The estimated number of abortions performed last year is 1.5 million, and groups such as Planned Parenthood still point to a great unmet abortion "need" in many parts of the country.[31] At this point it seems clear that the "need" or "demand" for abortion is very flexible, growing every year as the current legal situation allows the "supply" to be openly and aggressively marketed to American women. As permissive attitudes toward abortion take hold, increasingly frivolous reasons are considered sufficient justification for abortion. Some genetic counselors who perform amniocentesis for the purpose of detecting genetic defects prenatally have complained about the growing number of women who wish to use amniocentesis simply to determine the sex of an unborn child, so that an abortion can be obtained if the child is not of the "right" sex.[32]

2. Despite the annual increase in the number of legal abortions, women continue to die every year from illegal abortions--that is, from abortions performed by non-physicians. In addition, the huge number of legal abortions adds its own annual casualties to the maternal mortality statistics. It may be that the full story of this tragedy has not yet been told, since some findings suggest that the number of maternal deaths from legal abortion is under-reported.[33] Although the number of abortion-related maternal deaths has decreased since 1973, the rate of decrease is not significantly different from the annual rate at which it has dropped since 1942, due to general advances in obstetrical medicine.[34] In 1978, the noted obstetrician Denis Cavanaugh remarked that "there has been no major impact on the number of women dying in the United States since liberalized abortion was introduced," and indeed that "there has been less improvement in maternal mortality in the 1973-

to-1975 period than in any other period since 1965. This suggests that approximately one million fetuses are being sacrificed each year with no evidence that it is contributing significantly to the reduction of maternal deaths in this country."[35] Since 1975, the annual number of abortion-related maternal deaths has levelled off, with the exception of 1977, when there was an increase in abortion-related maternal deaths; some legal abortions still result in the mother's death, and illegal abortions continue to be performed.[36] From the outset we have rejected the very premise on which this argument in favor of legalized abortion was based: Even if legalization did result indirectly in some preservation of life, it would be morally reprehensible to authorize the direct destruction of life in order to achieve this goal.[37] But it is now clear that this policy fails even when seen in its own callous and pragmatic terms. At this point the only way to reduce significantl the number of maternal deaths may be to restrict the actual number of abortions as much as possible, while offering comprehensive programs of care and support to women with problem pregnancies.

3. The claim that legalized abortion reduces the infant mortality rate rests on questionable reasoning. If one kills a child before birth, then obviously he or she will never appear in the official infant mortality statistics, but this can hardly be declared a social benefit. In any case, states which have shown remarkable reductions in infant mortality over the past few years have generally attributed their success to the development of bette medical care for pregnant women and their children and not to abortion.[38] Some cities which have the highest abortion rates in the country, such as the District of Columbia, also have infant mortality rates which are a national scandal.[39] There may well be a cause-and-effect relationship at work here. The most reliable recent studies indicate that women who have had two or more abortions have a much higher chance that other women of having premature births in future pregnancies. In places like the District of Columbia, where a large percentage of the abortions are obtained by women who have already had at least one previous abortion, the

premature birth rate which is a major cause of high infant mortality may be aggravated by the high abortion rate.[40]

4. The slogan of "every child a wanted child" seems empty in the face of a national epidemic of child abuse and neglect. Some psychologists have suggested that here, too, there may be a cause-and-effect relationship at work. Abortion may help to break down the protective instinct of mother for child which begins to form early in pregnancy. Once weakened, it tends to affect the behavior of the mother toward the other children.[41] Whatever the truth may be with respect to this particular claim, it is clear that the ideology represented by "every child a wanted child" is destructive rather than supportive of the family as a haven for the acceptance and nurturing of life.[42] When a child is seen primarily as the projection of parents' self-serving desires and needs rather than as a unique individual with intrinsic worth, the stage is set for parental disappointment and even uncontrollable anger whenever this child does not quite measure up to parents' plans or expectations. No clear link has been shown between an initially unplanned or "unwanted" pregnancy and the later "unwantedness" of the child after birth; in fact, almost every pregnant woman has ambivalent feelings about her pregnancy at one stage or another, and this is generally recognized as a perfectly normal event of pregnancy. Many of the children who end up being abused or neglected after birth are initially "wanted" and planned children who later have fallen short of their parents' standards of perfection.[43]

5. At one time it was thought by abortion advocates that legalized abortion would enable physicians to practice medicine with greater freedom from external legal restrictions, and that this would help the medical profession to devote itself more single-mindedly to the care of human beings already born. Instead, the erosion of respect for life which is promoted by a policy of abortion on demand has spread to areas of medical practice dealing with the handicapped and the terminally ill. The Hippocratic oath is as opposed to infanticide and euthanasia as it is to abortion; but this oath is now seen as "an inadequate guide" for physicians,

according to a recent weekly magazine, because "modern doctors, many of whom swore to uphold its principles when they graduated from medical school, now violate it every day."[44] Physicians' professional and ethical opposition to practices such as infanticide for handicapped newborns and "assisted suicide" for the terminally ill thus becomes increasingly difficult to maintain.[45] A profound shift in the professional ethics of the physician can therefore be detected, in which the Hippocratic axiom "To help or at least to do no harm" is in danger of being replaced by the physician's role as technician, using his expertise either to kill or to cure as is demanded of him. As some physicians cease to consider themselves as involved in a sacred calling devoted to the nurturing of life, others have warned that such a trend may help to undermine public trust and respect for the medical profession as a whole. According to an editorial by Dr. Seymour Glick in a recent issue of The New England Journal of Medicine, the most fundamental reason for modern medicine's growing crisis of respectability is its failure to stand up "for the sanctity of life and for the dignity of human beings" in an increasingly secularized society. "Our societies must come to grips with this problem," Dr. Glick concludes, "because the problem transcends medicine; it threatens the very fabric of Western societal structure and its future."[46]

6. Attempts to stem the tide of what is sometimes called the teenage pregnancy "epidemic" have been going on for many years. In 1963, Planned Parenthood pamphlets warned teenagers that abortion "kills the life of a baby after it has begun" and recommended contraception as a way of insuring that one need never face the prospect of abortion.[47]

When this approach did not have the desired effect, Planned Parenthood and other groups turned to abortion as a back-up to "contraceptive failure." The "epidemic" has continued, to the extent that Planned Parenthood, Inc. refers to it as "the problem that hasn't gone away."[48] Yet the response of Planned Parenthood and other groups has been to claim that more of the same approach will lower the teenage pregnancy rate, if only the government will help them to push contraception and abortion more aggressively and on a wider scale.[49] Some abortion advocates have called for mandatory abortion for teenage girls under a certain age as a way to solve this problem.[50] Yet this approach seems doomed to failure, even if it is allowed to become coercive, because it ignores the realities of teenage pregnancy and childbearing as human problems. Some teenage girls look to pregnancy, either consciously or unconsciously, as a welcome relief from a difficult or unloving home environment. Teenagers in general have little of the self-discipline required for consistent contraceptive practice, because of their romanticized attitudes toward the "spontaneity" of sex; and this lack of self-discipline is further encouraged by the offer of abortion as a quick and easy "back-up" solution.[51] Researchers are beginning to notice that many of the problems once seen as results of teenage childbearing, such as low economic and educational achievement, may actually be factors in the social situation which contributed to the likelihood of pregnancy.[52] In short, the use of abortion as a solution to problems such as teenage pregnancy seems certain to fail even in its own pragmatic terms because it is based on a myopic view of the problem. Alternative solutions which are more complex but more respectful of human life and human dignity offer more promise in helping to solve this difficult problem.

While failing to solve the social problems once cited as justifications for the legalization of abortion, the Supreme Court's abortion decisions have created new problems in a number of legal areas. As the principles of these decisions have begun to work their way into American jurisprudence, they have provided ample evidence to support the claim that Roe v. Wade and its progency constitute a threat to the rights and dignity of all Americans. Again, only some of the most obvious examples of this can be listed here.

1. The Supreme Court's dichotomy between human beings and "persons in the whole sense," and its innovations in referring to independent or "meaningful" life as the only life deserving of legal protection, have begun to affect court rulings dealing with

the rights of those already born. In a 1979 abortion case, the Supreme Court ruled that a child born alive during an abortion who may be capable of surviving with medical help has no legal right to that help, because the recognition of such a right would have a "chilling effect" on the woman's right to have a late-term abortion.[53] In 1980, a New York state court cited Roe v. Wade to claim that terminally ill comatose patients have "in the true sense, no life" for the state to protect. This court argued that "the State's interest in preservation of the life of the fetus would appear greater than any possible interest the State may have in maintaining continued life of a terminally ill comatose patient...(whose) claim to personhood is certainly no greater than that of a fetus."[54] Recent court cases concerned with the right of handicapped children to medical treatment and with the new concept of "wrongful life" suggest that the 1973 abortion decisions pose a threat to all human beings who are especially helpless and dependent on others.[55]

2. As we noted above, the practice of abortion and its concomitant ideology of the "wanted child" constitute a threat to the family as a life-nurturing institution. The destructive effects of abortion on the family have been multiplied by the way in which the family is explicitly treated in recent court rulings on abortion. In Planned Parenthood of Central Missouri v. Danforth, for instance, the Supreme Court ruled that a father's rights and responsibilities with respect to his unborn child are his only by delegation of the State, instead of being grounded in the natural relationships of parenthood and the family.[56] Even in rulings which have sustained relatively weak legislation dealing with parental consent for abortions performed on minors, the courts have insisted that a court, rather than parents, shall have the final say as to whether an abortion will be performed, and perhaps even the final say as to whether parents will be notified at all.[57] The federal courts have thereby attacked that institution which the United Nations has called "the natural and fundamental unit of society... entitled to protection by society and the state."[58] In rulings such

as these the family is seen primarily as a grouping of separate individuals, or as the delegated agent of the State. In treating family structures merely as restrictions upon the rights of private individuals, the Supreme Court has ignored the family's vital role in promoting these rights. For most of us, the family is that training-ground where we are first educated to the very idea of inherent human dignity and rights, because it gives us our first experience of being accepted and loved simply because we are and not because we have earned acceptance through our own achievements. By intruding upon familial prerogatives and substituting their own values for the values of the family unit, courts weaken the ability of parents to provide this kind of community for their children; and when the values of the courts are themselves questionable with regard to the principle of inherent human rights, the result can only be a weakening of society's overall commitment to human dignity.

3. Some court cases dealing with abortion have provided an opportunity for attacks on the rights of individuals and groups who disagree with the current public policy on abortion. Although "conscience clauses" protecting health care personnel and privately owned hospitals have been enacted by state and federal legislatures, these clauses have been difficult to enforce.[59] Even rulings which uphold the principle of the conscience clause have noted that the consciences of employees need not be respected if this could cause "undue hardship" to the employer wishing to provide elective abortions.[60] There have also been attempts to force church-affiliated institutions to violate the moral convictions of their sponsors by making them provide abortion services.[61]

4. In some cases courts have played an intrusive role by actually making life-and-death decisions on behalf of private individuals. This has been made possible by Roe v. Wade's ruling that the constitutional "right to privacy" can over-rule any interest the state may have in preserving life that is not "meaningful." For instance, the right of a patient to refuse unwanted medical treatment has traditionally been seen as a common-law

right to be exercised within the familial and doctor-patient relationship whenever possible. But some courts have begun to treat this area of law in terms of a constitutional right to privacy which is so personal and individual a right that it cannot be limited or exercised within those relationships, but must be adjudicated by the court itself. In cases where a patient is not competent to exercise this right on his or her own behalf, courts have attempted to make the decision by their own "substituted judgment."[62] These cases have provided an opportunity to treat all private decision-making processes in such situations as mere delegations of a power which properly belongs to the court itself.[63] This judicial trend has even been applied back to the abortion issue itself, allowing courts to order abortions for mentally retarded or incompetent women and to demand that state legislatures provide public funding for elective abortions.[64] The general idea at work in all these cases is that, since the right to privacy is a constitutional right to be defined by the state and federal courts, the courts have broad powers to facilitate the exercise of that right and even to exercise it on behalf of others. By a curious twist of reasoning, a "right to privacy" originally formulated as an alleged defense of individualism has become a very public entity indeed, and one which can be used to ignore the dignity of human individuals in the implementation of courts' value judgments on life and death. While pro-abortion groups continue to lobby against any constitutional amendment on abortion as a threat to individual freedom, we see a clear threat to freedom in this abuse of judicial power with regard to decisions concerning life and death.

When the decisions of the Supreme Court imposed an abortion policy on this country in 1973, many thought this marked the end of the public controversy over legalized abortion. The Court treated abortion simply as a medical procedure and as a matter of individual privacy, and by doing so seemed to have remove the issue from the public arena.

Eight years later, it is not possible realistically to hold such a view. While some maintain that abortion is now a private matter between a woman and her physician, the social and legal trends noted above indicate that the Supreme Court's decisions have had far-reaching effects on American society. This has happened, we believe, primarily because the court was tragically mistaken in thinking that abortion affects only a woman and her physician. Every abortion also involves the unborn child as an innocent third party. Every abortion involves the father of the child, and in many cases abortion has profound effects on friends, parents, and other members of the family. Every abortion also involves the future of the society in which it takes place, for it involves moral, psychological and emotional factors which play an important role in making up the character of that society. By ignoring the public dimension of the practice of abortion and failing to recognize it as the fundamental social problem that it is, we place ourselves among its passive victims. In the United States this public dimension has been magnified by the Supreme Court's classification of abortion as a virtually absolute constitutional right and by its direct attack on the most fundamental of all rights, the right to life itself. The potential for destructiveness inherent in such action is almost unimaginable, for it reaches to the very roots of our legal system and turns its most basic principles upside down. The right to life is replaced by the right to kill, and the very concept of inherent rights is replaced by the concept of privileges bestowed by the state upon those it considers worthy of recognition.

We do not pretend to have all the solutions to the problems which abortion has been purported to solve. Indeed, the idea that there was one quick and easy solution to these problems has been at the root of some very misguided support for our current public policy on abortion. But we do know that abortion, in addition to being a moral evil, has failed to solve society's problems, and has itself become a legal and social disaster, the consequences of which will be felt for many years to come. By reversing the current policy, we will clear the way to enable us to work together to promote the common good of all who live in our country. Without such a reversal, we fear that our society's commitment to that common good can only erode further.

THE ISSUE OF LAW AND MORALITY

The national debate on the relationship between law and morality has become closely associated with the debate on abortion in recent years. Some groups that support legalized abortion have claimed that any law protecting the unborn child would be an imposition of a particular morality on a pluralistic society; and some have even claimed that it would impose specifically Roman Catholic religious beliefs on this society, thereby violating the non-establishment clause of the First Amendment. We wish to conclude our testimony with some remarks on these charges.

Our response remains fundamentally the same as in 1974, when we gave the following testimony before the U.S. Senate Subcommittee on Constitutional Amendments:

> We wish to make it clear that we are not seeking to impose the Catholic moral teaching regarding abortion on the country. In our tradition, moral teaching bases its claim on faith in a transcendent God and the pursuit of virtue and moral perfection. In fact, moral teaching may frequently call for more than civil law can dictate, but a just civil law cannot be opposed to moral teaching based on God's law. We do not ask the law to take up our responsibility of teaching morality, i.e., that abortion is morally wrong. However, we do ask the government and the law to be faithful to its own principle--that the right to life is an inalienable right given to everyone by the Creator. . . .
>
> We appear here today in fulfillment of our considered responsibility to speak in behalf of human rights. The right to life--which finds resonance in the moral and legal tradition--is a principle we share with the society and the one that impels us to take an active role in the democratic process directed toward its clear and unequivocal articulation.[65]

Since our testimony in 1976, several developments have helped to underscore the exact nature of the Catholic Church's moral concern in this area and the extent to which the abortion issue reaches beyond the bounds of any particular religion's moral teaching.

First of all, the increasingly visible involvement of other religious groups in the public debate on abortion has vividly demonstrated that this is not just a "Catholic issue." The news media have directed their attention primarily to new conservative political groups led by evangelical Protestants who were previously silent on most public policy issues. In addition, however, the governing bodies of denominations such as the Lutheran Church--Missouri Synod and the Southern Baptist Convention have approved resolutions in support of a Human Life Amendment during the last two years, and other churches which had made statements in support of permissive abortion after 1973 have begun to qualify their stance.[66]

Second, the fact that a convincing case can be made against abortion on wholly secular grounds has become increasingly obvious. This case has been ably defended by many respected scholars in the realm of political philosophy and constitutional law.[67] The author of Aborting America, Dr. Bernard Nathanson, has articulated his opposition to abortion in terms consistent with his own non-religious humanistic convictions. All one needs in order to support laws against abortion, he notes, is a recognition of some simple biological facts and a commitment to the Golden Rule which has been taught in every civilized society.[68] Secular groups of every conceivable social and political background have enriched the public debate with the variety of their perspectives on this issue.[69]

Finally, the U.S. Supreme Court itself, in ruling upon the constitutionality of restrictions on the public funding of abortion, has reiterated the traditional judicial principle that a law with a "secular legislative purpose" does not violate the Establishment Clause of the First Amendment simply because it "happens to coincide or harmonize with the tenets of some or all religions." Noting that "laws prohibiting larceny" are not unconstitutional establishments of religion despite the fact that "the Judaeo-Christian religions oppose stealing," the Court concluded that a funding restriction on abortion is "as much a reflection of 'traditionalist' values toward abortion, as it is an embodiment of the views of any particular religion."[70] The Supreme Court's argument clearly can be applied to legislation restricting abortion in general. To its own statement on the matter we wish only to add that the word "traditionalist" is no more appropriate as a description of the Catholic Church's position on abortion than it is as a description of our position on stealing. As we have emphasized throughout this testimony, our position on abortion is perfectly consistent with modern scientific knowledge and the most progressive features of American policy on human rights in general. We do not support legal protection for the unborn child because it is "traditional" to do so, but because we totally reject the idea that social "progress" lies in a retreat from the legal and ethical principles which have given the United States its reputation as a defender of the weak against the strong.

Pro-abortion groups have also claimed that opposition to abortion is a minority view and that we are seeking to "impose" this view on the majority of the citizens of the United States. This charge is false on two counts. First of all, every major public opinion poll taken in the last eight years has shown that most Americans are opposed to legalized abortion on demand. About half of those polled would like to see abortion made illegal except for certain rare circumstances; the other half is about equally divided between those who favor abortion on demand and those who either oppose all abortion or would make an exception only to prevent the death of the mother.[71] Two-thirds of the people of our country think that abortion is morally wrong, and almost three-fourths seem to realize that the victim of even a first-trimester abortion is a living human being. Contrary to a rather popular stereotype, women are more opposed to legalized abortion than men are, and Americans who are poor or who are members of racial minorities are more opposed to abortion than the white and affluent.[72] The most recent analysis of public opinion on abortion by Judith Blake, who has researched this question since before the Supreme Court's 1973 decisions, indicates that popular support for the full extent of the Supreme Court's actions in this area is even more precarious than the above figures would seem to suggest. Her findings show that Americans who have "moderate" or ambivalent attitudes toward legalized abortion actually lean more toward the consistent anti-abortion position than toward the consistent pro-abortion position.[73] These figures do not even begin to address the point that the group whose rights are in question, that of unborn children, is totally without a voice of its own, and therefore deserves the special concern of legislators who are sworn to defend the rights of minorities against the power of the majority.

Secondly, there is no effort afoot to "impose" a law on our country from the outside, but only a drive to return this issue to the American people's elected representatives. The legalization of abortion on demand was "imposed" on this country in 1973 by seven Justices of the U.S. Supreme Court. In attempting to correct this unfair decision by constitutional amendment as provided for by our Constitution, we display our commitment to American democratic principles.

There are also some who admit that the majority view is against abortion on demand, but who defend its legalization on the basis of American "pluralism." Because no one view of abortion will ever claim the minds and hearts of all Americans, they argue, we must continue to leave the abortion decision up to each individual woman. There are several important flaws in this argument as well.

1. This "pro-choice" argument would invalidate almost all civil rights legislation if it were applied consistently. In fact, the same argument was used to defend slavery in the 19th century. Slave-owners claimed that individuals or states that wished not to engage in the practice of slavery need not do so, but that they should respect the conscientious decisions of others in this controversial matter. President Abraham Lincoln's response was to point out that the law of the U.S., if it accepted such a situation, would in fact be taking the pro-slavery side by acting as though there were nothing wrong with slavery. The same response must be made today to the "pro-choice" rationale for legalized abortion.[74] To

withdraw all legal protection from the unborn child in the name of "pluralism" is to say, in practice, that this child is not deserving of any public attention and his or her life is to be left to the whim of the mother. It means forgetting that we are dealing not with a purely "private" decision but with one which determines the fate of a defenseless and innocent party. As we have argued elsewhere in this testimony, the current legal situation with regard to abortion also has a number of devastating effects on government and society which call for a public response.

2. The "pro-choice" argument, in one sense, does not go far enough in its defense of pluralism. If pluralism means anything in American society, it means that we must defend the rights and freedoms of every class of human beings, regardless of age, race, sex, or condition. A law which allows the killing of any class of human beings is therefore fundamentally anti-pluralistic and "anti-choice," for it allows those human beings to be deprived of any possibility of making their own choices and expressing their own opinions in the future. A pluralism which respects only those who are currently powerful and articulate enough to put their own beliefs into practice to the detriment of others is not, in our opinion, a genuine or complete pluralism.

3. The argument also ignores another important factor in what we have come to know as American pluralism. This factor was fully recognized by that great defender of religious freedom, John Courtney Murray, when he wrote his classic work entitled We Hold These Truths:

> One idea, rooted in the American tradition, has seemed to me to be central, and therefore it has been recurrent. Every proposition, if it is to be argued, supposes an epistemology of some sort. The epistemology of the American Proposition was, I think, made clear by the Declaration of Independence in the famous phrase: 'We hold these truths to be self-evident....'
>
> ...For the pragmatist there are, properly speaking, no truths; there are only results. But the American Proposition rests on the more traditional conviction that there are truths; that they can be known; that they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.[75]

Without this commitment to the grounding of law in an objective order of inherent rights, there is no pluralistic America; instead, there is a plurality of Americas, each committed to its own peculiar viewpoint concerning human rights. We see this destructive form of pluralism at work in the arguments of those who consider the beginning of human life as merely a matter of private opinion. Once one rejects the idea that human rights should be based on simple existence as a member of the human race, one is faced with an irreducible and chaotic pluralism of arbitrary opinions as to the beginnings of "personhood," "meaningful life," or "fully human" life. In this climate, as we have seen, the "personhood" of human beings already born becomes a matter of debate as well, since their membership in the human race is not sufficient reason for being granted the rights or privileges or legal "persons."[76] This will be a special threat to human beings, such as handicapped infants or terminally ill patients, whose right to life is already being compromised by our legal system. We cannot allow this trend toward the elimination of the weak and defenseless to be pushed forward under the banner of American "pluralism" or "freedom of choice," any more than we would allow a re-institution of slavery under this banner. Some human choices are fundamentally destructive of the rights and dignity of other human beings, and therefore should be forbidden by law.

In calling for legal protection for the unborn child, we have no intention of asking the government to take over our own task of teaching moral principles and forming consciences. But the law does have a teaching function, exercised through legislation which forbids or discourages specific actions deemed to be destructive of the common good. In deciding whether abortion should be considered as among such actions, legislators inevitably make judgments as to the moral principles which will be reflected in the law. To some extent, the question before our legislatures is not whether they will "legislate morality"--it is whether the morality reflected in the law will be one which respects all human life or one which legitimates the destruction of particularly inconvenient and dependent human lives. In this controversy, to refuse to legislate is to allow the Supreme Court by its decisions to legislate the latter form of morality.

CONCLUSION

During this testimony we have touched upon many elements in the complex issue of legalized abortion. We have reaffirmed the relevance of fundamental moral principles to the debate on this issue, while pointing out the undeniable basis which our moral position has in modern biological and medical fact. We have explained the way in which our position is in harmony with the most respected principles of international and American law, as well as the ways in which the Supreme Court's abortion decisions rest upon an unjust denial of those principles. We have delineated what we see as some of the most devastating social and legal consequences of these decisions, emphasizing the point that their reversal should be an important and immediate priority for all those who are committed to promoting the good of our society. Finally, we have discussed the controversial question of law and morality as it bears on this particular issue, and responded to charges that our commitment to legal protection for the unborn child is inconsistent with a commitment to American freedom and pluralism. Our final remarks will deal with the specific legislative response which we think should be made to the situation we have described.

Our own comprehensive response to the Supreme Court's abortion decisions can be found in the Pastoral Plan for Pro-Life Activities, approved by the National Conference of Catholic Bishops on November 20, 1975, which we presented as part of our testimony before the House Subcommittee on Civil and Constitutional Rights in 1976. This response is three-pronged, including efforts in the spheres of education and pastoral care as well as in that of public policy. Within the area of legislation and public policy, we proposed a pro-life legislative program with the following elements:

a) Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.

b) **Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.**

c) Continual research into and refinment and precise interpretation of Roe and Doe and subsequent court decisions.

d) Support for legislation that provides alternatives to abortion.

Although we have been active in all these areas, we have restated a number of times over the past eight years that our highest legislative priority is the passage of a constitutional amendment that will reverse the Supreme Court's abortion decisions and restore legal protection to the unborn. Today we again reaffirm our commitment to such an amendment.

We have generally refrained from endorsing a specific amendment before the Congress, however. Instead, we have suggested certain guidelines that we believe should be taken into account in formulating an amendment which gives a constitutional base for the protection of unborn human life. These guidelines state that a constitutional amendment should do four things:

1) Establish that the unborn child is a person under the law in terms of the Constitution from conception on.
2) The Constitution should express a commitment to the preservation of life to the maximum degree possible. The protection resulting therefrom should be universal.
3) The proposed amendment should give the states the power to enact enabling legislation, and to provide for ancillary matters such as record-keeping, etc.
4) The right to life is described in the Declaration of Independence as "unalienable" and as a right with which all men are endowed by the Creator. The amendment should restore the basic constitutional protection for this human right to the unborn child.

Now, as in 1976, considerable controversy has raged concerning the relative merits of various proposals for an amendment. In our 1976 testimony we recognized that not every proposal was equally consonant with all of our suggested guidelines; while arguing against a pure "states' rights" amendment as an ineffective measure for giving uniform protection to the unborn in the various states, we also recognized that some proposals granting legislative authority to Congress and the states to protect unborn human life were a significant improvement on the "states' rights" approach. Similarly, on September 22 of this year we expressed great interest in the new "human life federalism amendment" recently proposed by Senator Hatch of Utah, which expressly overturns the right to abortion created by the Supreme Court in 1973 and gives concurrent power to Congress and the states to restrict and prohibit abortion.

As moral leaders we claim no special competence at legislative draftsmanship, and so we do not claim the expertise to comment at length on the advisability and effectiveness of specific formulations. Our own guidelines have always been offered as contributions to a dialogue, in which the members of Congress were considered as the appropriate agents for the actual drafting of an amendment to be presented to the state legislatures. We take note of the fact that some recent testimony before this subcommittee indicates a possibility that the establishment of constitutional "personhood" may not be necessary at the present time for restoring effective legal protection to unborn children, and indeed that it could fail through judicial interpretation to provide effective protection. We expect that the members of the subcommittee will take expert testimony of this sort into account, and also that they will consider the political possibilities for ratification of the various proposals which confront them. Our own fundamental commitment, as stated in our 1975 Pastoral Plan, is to an amendment which will actually provide the maximum degree of protection for unborn human life that is possible.

Our appearance here today is an expression of our commitment to the American democratic process. We believe that this process was short-circuited in 1973, when the decisions of the Supreme Court overturned the abortion laws of every state in the Union in its single-minded drive to promote its own policy on abortion. We urge our elected representatives in Congress to redress this injustice as soon as possible by restoring to our legal system the power to protect human life at every stage of its existence.

NOTES

[1] The Status of Children, Youth, and Families 1979, U.S. Department of Health and Human Services, DHHS Publication No. (OHDS) 80-30274, pp. 29-30.

[2] Bernard N. Nathanson, M.D., with Richard N. Ostling, Aborting America (Doubleday 1979). Especially see Chapters 16, 20 and 26.

[3] Among the recent reports on such progress: "Successful Operation is Performed on Fetus", The Washington Star, July 27, 1981; "The Tiniest Patients: Surgery Before Birth", San Francisco Examiner, May 26 and 27, 1981; "Life of Baby is Apparently Saved by Doses of Vitamin Before Birth", The New York Times, May 15, 1981; R.W. Smithells et al., "Possible Prevention of Neural-Tube Defects by Periconceptional Vitamin Supplementation", The Lancet, February 16, 1980, pp. 339-340; Jason C. Birnholz, M.D., and Frederic D. Frigoletto, M.D., "Antenatal Treatment of Hydrocephalus", The New England Journal of Medicine, April 23, 1981, pp. 1021-23.

[4] John C. Fletcher, Ph.D., "The Fetus as Patient: Ethical Issues", The Journal of the American Medical Association, August 14, 1981, pp. 772-73.

[5] This line of argument was proposed by Dr. Leon Rosenberg of Yale University in his April 24 testimony before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. His approach has been embraced by Dr. George Ryan of the American College of Obstetricians and Gynecologists, whose remarks on the matter were given wide public circulation by syndicated "Ann Landers" columns for September 7 and 8 of this year.

[6] Editorial: "A New Ethic for Law and Society", California Medicine, September 1970, p. 68.

[7] Gaudium et Spes (Pastoral Constitution on the Church in the Modern World), n. 27.

[8] Gaudium et Spes, n. 27.

[9] Pope John Paul II, Homily at the Washington Mall, October 7, 1979, in Origins: NC Documentary Service, October 18, 1979.

[10] Sacred Congregation for the Doctrine of the Faith, Declaration on Abortion (U.S. Catholic Conference 1975), n. 6 and 7 (pp. 3-4).

[11] See the references to Calvin, Thielicke, Barth, Bonhoeffer, etc. in John T. Noonan, Jr., A Private Choice: Abortion in America in the Seventies (The Free Press 1979), pp. 59-61.

[12] See Dennis J. Horan et al., "The Legal Case for the Unborn Child", in Thomas W. Hilgers and Dennis J. Horan (editors), Abortion and Social Justice (Sheed and Ward 1972), pp. 133-34.

[13] See Noonan, A Private Choice, pp. 13-14, on the dichotomy between human beings and persons. On the concept of "life devoid of value" and the Nazi euthanasia program: Robert A. Graham, S.J., "The 'Right to Kill' in the Third Reich: Prelude to Genocide", The Catholic Historical Review, January 1976, pp. 56-76; William Brennan, Medical Holocausts, Volume I: Exterminative Medicine in Nazi Germany and Contemporary America (Nordland Publishing International 1980), Chapter 3; Leo Alexander, M.D., "Medical Science Under Dictatorship", The New England Journal of Medicine, July 14, 1979, pp. 39-47.

[14] See Noonan, A Private Choice, pp. 16-17.

[15] Roe v. Wade, 410 U.S. 113 at 159 (1973).

[16] Doe v. Israel, 358 F. Supp. 1197 (D.R.I., 1973). See Noonan, A Private Choice, pp. 17-18.

[17] In our 1976 testimony we cited criticisms of the abortion decisions by John Hart Ely, Alexander Bickel, Robert Byrn, and Archibald Cox. In his new book, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1981), Professor Ely has re-stated his judgment that even a fairly "activist" viewpoint on judicial review fails to provide any warrant in the Constitution for Roe v. Wade. Liberal columnist Michael Kinsley recently voiced a growing consensus when he referred to the abortion decisions as "the one really indefensible case of judicial overreaching" in recent years (The New Republic, October 18, 1980, p. 15). On the Supreme Court's historical arguments, see: Joseph P. Witherspoon, "Impact of the Abortion Decisions Upon the Father's Role", The Jurist 1975, pp. 41-47; idem., Testimony before the Senate Subcommittee on Separation of Powers, June 10, 1981; Victor G. Rosenblum, Testimony before the Senate Subcommittee on Separation of Powers, June 1, 1981. Professor Rosenblum's testimony has been reprinted by Americans United for Life as Number 11 of AUL Studies in Law and Medicine.

Recognition of the fact that the abortion decisions had no firm grounding in legal history began with the dissenting opinions of Justices on the court itself. Referring to the majority opinion as "an exercise of raw judicial power", Justice White declared that "I find nothing in the language or history of the Constitution to support the Court's judgment." Justice Rehnquist joined in this dissent and added his own, in which he noted that the Court's imposing of specific limits on the states for each trimester of pregnancy "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." See Roe v. Wade at 174; Doe v. Bolton, 410 U.S. 179 at 221-22 (1973).

[18] Roe v. Wade at 136. See Dennis J. Horan and Thomas J. Marzen, "Abortion and Midwifery: A Footnote in Legal History", in Hilgers, Horan and Mall (editors), New Perspectives on Human Abortion (University Publications of America 1981), pp. 199-204.

[19] Roe v. Wade at 138.

[20] Id. at 160-61. Philosophical speculations concerning "delayed ensoulment" have never been part of Catholic dogma. For a brief historical survey of the Church's position, see John T. Noonan, Jr., "An Almost Absolute Value in History", in Noonan (editor), The Morality of Abortion: Legal and Historical Perspectives (Harvard University Press 1970), pp. 1-59. The most complete study on the history of Catholic thought on this subject up to 1950 can be found in John Connery, S.J., Abortion: The Development of the Roman Catholic Perspective (Loyola University Press 1977). Also see Declaration on Abortion, n. 7 (pp. 3-4).

[21] *Roe v. Wade* at 141-42.

[22] D.A. O'Donnell and W.L. Atlee, "Report on Criminal Abortion", *Transactions of the American Medical Association* 22 (1871), p. 250. A review of the AMA abortion statements of 1859 and 1871 can be found in Brennan, *Medical Holocausts*, pp. 25-34.

[23] The "treatment" in question, it should be noted, concerns only ecclesiastical penalties in canon law. The moral teaching of the Church, as we have already noted above, has condemned abortion at every stage as a form of grave wrongdoing from the earliest years of the Christian era. The fiction that the Church has changed its moral judgment of early abortions arises, in part, from a failure to understand the distinction between moral doctrine and canon law.

[24] *Roe v. Wade* at 160.

[25] *Id.* at 157.

[26] See Witherspoon materials cited in note 17.

[27] See: Witherspoon, "Impact of the Abortion Decisions", pp. 42-45; James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (Oxford University Press 1978). Mohr notes on p. 200: "The anti-abortion policies sustained in the United States through the first two-thirds of the twentieth century had their formal legislative origins, for the most part, in the wave of tough laws passed in the wake of the doctors' crusade and the public response their campaign evoked."

[28] Speech of Senator Jacob Howard of Michigan, *Congressional Globe*, 39th Congress 1st Session (May 23, 1866), p. 2766. Cited in Witherspoon, "Impact of the Abortion Decisions", p. 47.

[29] See *Declaration on Abortion*, n. 10-14 (pp. 5-7).

[30] Pope John Paul II, Homily in Piazza Del Campo, Siena, September 14, 1980, cited in *L'Osservatore Romano* (English language edition), September 22, 1980.

[31] In 1978, researchers affiliated with the Alan Guttmacher Institute estimated that 1.3 million abortions had been performed in 1977 but that 550,000 women "in need" of abortions had been unable to obtain them ("Abortion in the United States, 1976-1977", *Family Planning Perspectives*, September/October 1978, p. 271). But early this year, the same researchers reported that "although 1.5 million women obtained abortions in 1979, an estimated 641,000 in need were unable to do so, largely because of problems of geographical and financial inaccessibility" ("Abortion in the United States, 1978-1979", *Family Planning Perspectives*, January/February 1981, p. 6). According to *The Washington Post* for October 21, 1981, the current issue of *Family Planning Perspectives* reports that the women in "need" of an abortion would number about 450,000 even if every woman in the U.S. used the most effective but most dangerous contraceptive devices.

[32] See Lynne McTaggart, "The Breakthrough that Backfired", *New York Sunday News Magazine*, February 8, 1981.

[33] See Hadley Arkes, *The Philosopher in the City: The Moral Dimensions of Urban Politics* (Princeton University Press 1981), p. 437. Professor Arkes observes that when investigative reporters from the *Chicago Sun Times* began to uncover abuses at several legal abortion clinics in Chicago, "the investigators brought in reports of twelve deaths that were attributable to four abortion clinics in their sample. Those deaths, which were uncovered in only four clinics, amounted to nearly half of the deaths that were reported

officially for abortion in the nation as a whole. And if, as we suspect, the experience in Chicago can find a modest replication in New York, Detroit, Los Angeles, and other cities, the total deaths due to legal abortion may now exceed the number of deaths that were thought to occur each year as a result of illegal abortions."

[34] See *Documentation on Abortion and the Right to Life*, Volume II (Testimony of U.S. Catholic Conference before the House Subcommittee on Civil and Constitutional Rights, March 24, 1976) (U.S. Catholic Conference 1976), p. 10.

[35] Denis Cavanaugh, letter in *American Journal of Obstetrics and Gynecology*, February 1, 1978.

[36] "Abortion-Related Mortality--United States, 1977", *Morbidity and Mortality Weekly Report* (official report from the Center for Disease Control), July 6, 1979, pp. 301-4.

[37] See *Declaration on Abortion*, n. 19-20 (pp. 8-9).

[38] "Several States Showing Significant Decreases in Infant Mortality", *Ob. Gyn. News*, January 15, 1981. The remarkable advances reported here for the states of South Dakota, Florida and Alabama are attributed to better pre-natal medical and nutritional care, educational programs for pregnant women, and the development of regionalized care networks.

[39] The District of Columbia has a higher abortion rate than any state in the Union, estimated at 173.4 per thousand women aged 15-44 in 1978. This is more than six times the national average. See "Abortion in the United States, 1978-1979", *op. cit.*, pp. 10-11. The mayor of the District of Columbia has called its high infant mortality rate its "Number One health problem." See "City Infant Mortality Rate Rises", *The Washington Post*, June 17, 1981.

[40] See Levin et al., "Association of Induced Abortion With Subsequent Pregnancy Loss", *The Journal of the American Medical Association*, June 27, 1980, pp. 2495-99. Thirty-four percent of the women who obtained abortions in the District of Columbia in 1978 had obtained one or more previous abortions. This is the highest repeat abortion rate in the country, the national average being 29%. *Abortion Surveillance: Annual Summary 1978* (Center for Disease Control, U.S. Department of Health and Human Services 1979), p. 4.

[41] Philip G. Ney, M.D., "Infant Abortion and Child Abuse: Cause and Effect", in David Mall and Walter F. Watts, M.D. (editors), *The Psychological Aspects of Abortion* (University Publications of America 1979), pp. 25-38.

[42] See "The Impact of Abortion" (Intervention made by Cardinal Terence Cooke of New York at the 1980 Synod of Bishops in Rome), *Origins: NC Documentary Service*, October 16, 1980, pp. 283-85.

[43] Our most eminent national authority on the problem of child abuse had already emphasized this eight years ago, and predicted that the aborting of the "unwanted child" would fail to solve the problem. See Vincent J. Fontana, M.D., *Somewhere a Child is Crying* (MacMillan 1973), pp. 239-43.

[44] Matt Clark et al., "When Doctors Play God", *Newsweek*, August 31, 1981, p. 48.

[45] In our 1976 testimony we noted the scandal caused by reports that handicapped newborns had been deprived of life-saving surgery at some hospitals simply because they were mentally retarded. Now newspapers report that physicians at some intensive-care nurseries have actually been giving lethal drug overdoses to such newborns.

See Diane Brozek, "Let My Baby Die", The Pittsburgh Press, June 29, 1981. The candor with which physicians are willing to discuss the advisability of voluntary euthanasia or "assisted suicide" seems to be increasing. See: Dan Cryer, "Suicide and Euthanasia: Christiaan Barnard tackles controversial subjects", The Boston Globe, April 16, 1981; Editorial, "Overdose--Will psychiatrist please see?", The Lancet, January 24, 1981.

[46] Seymour M. Glick, "Humanistic Medicine in a Modern Age", The New England Journal of Medicine, April 23, 1981, pp. 1036-38.

[47] Plan Your Children for Health and Happiness, Planned Parenthood Federation of America pamphlet, 1963.

[48] Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away (New York 1981).

[49] See the articles on government funding of family planning services in the May/June 1981 issue of Family Planning Perspectives, and articles on government funding of abortion in the May/June 1980 issue, as well as the conclusions of Teenage Pregnancy: The Problem That Hasn't Gone Away.

[50] At the fourth annual meeting of the National Abortion Federation, held May 28-30, 1980 at the Hyatt Regency Hotel in Washington, D.C., a talk given by Jane Hodgson included the rhetorical question: "Does freedom of choice really apply to the very young? Should we sit quietly by and allow our 12-year-olds, and our 11-year-olds, possibly 10-year-olds, to make a choice which is far more harmful to her, to society, and to the ensuing generation? Shouldn't we...mandate aginst continuing pregnancy in the very young, say, those less than 14 years?". Her proposal was later endorsed by another speaker, Lonnie Meyers, who claimed that "it's time we had the guts to say that 14 is too young to have a baby." See Andrew Scholberg, "The Abortionists and Planned Parenthood: Familiar Bedfellows", International Review of Natural Family Planning, Winter 1980, p. 299.

[51] See: Sister Paula Vandegaer,S.S.S., Teenagers and Sexuality (NCCB Committee for Pro-Life Activities 1981); "Abortion and Teenage Pregnancy", in Respect Life! (NCCB Committee for Pro-Life Activities 1977/78), pp. 16-21.

[52] See: "Teens, Parents, Officials Don't Agree on Impact of Teen Motherhood", Family Planning Perspectives, March/April 1981, pp. 81-82; Jeanne Marecek and Eugenie Flaherty, "Correlates of Teenagers' Contraceptive Use" (Study presented at the American Psychological Association convention in Montreal, September 1980). The Marecek/Flaherty study was announced in Ob. Gyn. News for January 1, 1981.

[53] Colautti v. Franklin, 439 U.S. 379 (1979). The court's finding puzzled many observers, who thought that Roe v. Wade had placed severe restrictions on abortions performed after the point of "viability"; but even in 1973, the court had ruled that a post-viability abortion could be performed for "health" reasons, and had interpreted "health" so broadly that temporary financial or emotional distress were sufficiently serious justifications for an abortion in the final stages of pregnancy. In their Philadelphia Inquirer article "Abortion: The Dreaded Complication" (August 2, 1981), Liz Jeffries and Rick Edmonds report that the problem of dealing with a child born alive during an abortion now arises hundreds of times a year in the U.S.

[54] In re Eichner, AD 2d, 637E, March 28, 1980 (Supreme Court: Appellate Division Second Department) at 43.

[55] "Wrongful life" suits are predicated on the idea that a handicapped child's very existence is a "wrong" for which monetary damages can be assessed. In its 1980 ruling in *Curlender v. Bio-Science Laboratories* the California Supreme Court suggested that a handicapped child should be able to sue her own parents for not having aborted her. In the same state, however, the courts denied the right of Phillip Becker, a child with Down's syndrome, to have surgery which could save his life but which is opposed by his parents. The parents had argued that they do not wish Phillip to outlive them because they are afraid of the quality of life of which he would be capable. The Supreme Court has refused to hear an appeal from this decision (*Bothman v. Warren B.*, No. 79-698; denial of cert. March 31, 1980). Another family has tried to gain temporary custody of Phillip in order to allow him the medical care he needs, but his condition may already have advanced too far for the surgery to be of help. See: George F. Will, "A Trip Toward Death", *Newsweek*, August 31, 1981, p. 72; Peter J. Riga, "Phillip Becker: Another Milestone", *America*, July 12, 1980, pp. 8-9.

[56] 428 U.S. 52 at 69 (1976).

[57] The most important cases dealing with this question are *Bellotti v. Baird*, 443 U.S. 622 (1979), and *H. L. v. Matheson*, 101 S. Ct. 1164 (1981). See the analysis by Noonan, *A Private Choice*, pp. 90-95.

[58] United Nations Declaration of Human Rights, cited by Cardinal Terence Cooke in "The Impact of Abortion", p. 284.

[59] See the analysis by Noonan, *A Private Choice*, pp. 83-86. This problem was mentioned by the Sacred Congregation for the Doctrine of the Faith in 1974, when it declared inadmissible a situation in which doctors or nurses should have to choose between the law of God and their professional situation: *Declaration on Abortion*, n. 22 (p. 9).

[60] This principle has recently been affirmed in *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. Ct. App. 1981). Here it was implied that the need to re-arrange schedules substantially in order to respect a nurse's refusal to cooperate in abortions might have been considered as "undue hardship". The lower court had ruled against the nurse without seeing evidence of any hardships of this kind.

[61] The National Conference of Catholic Bishops has filed suit against federal guidelines which could force certain employers, including the U. S. Catholic Conference, to provide abortion benefits through employees' health insurance plans and fringe benefit programs: *NCCB v. Bell*, U.S. District Court for the District of Columbia (Filed 1980). For comments on the threat to First Amendment rights involved in such guidelines, see George F. Will, "'Trivializing' Abortion", *The Washington Post*, August 19, 1979.

[62] Paul Ramsey has discussed this aspect of the *Eichner* case in his article "Two-Step Fantastic: The Continuing Case of Brother Fox", *Theological Studies*, March 1981, pp. 122-34. Other cases of this sort include: *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977); *In re Earl Spring*, No. F-2030, Mass., May 13, 1980. In its ruling in *In re Grady* (February 18, 1981), the New Jersey Supreme Court cited the famed Karen Quinlan case to uphold a right to sterilization as an exercise of the constitutional right to privacy. The court suggested that this right can override the State's interest in preserving a patient's life, and that only the courts can exercise such a right on behalf of a mentally incompetent parient.

[63] In the Spring case, the lower courts (probate and appeals) had ordered that Spring's attending physician, along with his wife and son, should make the decision as to whether life-prolonging treatment would be continued. The state supreme court overruled these decisions, claiming that "we disapprove shifting of the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction." The court argued that it would be forsaking its own responsibilities if it tried "to delegate its resolution to some private person or group."

[64] Both Saikewicz and Spring were cited as precedents by the Massachusetts Supreme Court on February 17, 1981, when it ruled that the state of Massachusetts is required to subsidize elective abortions with public funds (Moe v. Secretary of Administration and Finance). Interpreted through these cases, the state constitution was said to provide more stringent requirements for actively supporting the pregnant woman's right to an abortion than are found in the U.S. Constitution. Similar chains of reasoning have been used by courts in California and Pennsylvania to mandate public funding of abortion in those states.

Court involvement in ordering abortions for mentally incompetent patients seems to be increasing. Justice Warren Burger recently refused to block an abortion ordered by the court-appointed guardian of a woman in a semi-catatonic state, despite the fact that no evidence had been presented on a medical need for the abortion. The woman in question had been fully competent earlier in her pregnancy, and had not sought an abortion (see "Justice Refuses to Bar Abortion for Sick Woman", NC News Service, March 19, 1981). In California, a court-appointed conservator almost succeeded in ordering an abortion for an unwilling 38-year-old mental patient, although all three of her sisters were adamantly opposed to the abortion and were all willing to adopt the child even if born with congenital defects. Superior Court Judge Bob Krug denied the petition for an abortion on the basis of medical risks involved in performing a second-trimester abortion, without denying that the conservator had the right to petition the court for an abortion against the wishes of the patient and her family (see Mary Sanchez, "Petition to do Abortion on Mental Patient Denied", NC News Service, March 26, 1981).

[65] Documentation on the Right to Life and Abortion, Volume I (Testimony of U. S. Catholic Conference before the Senate Subcommittee on Constitutional Amendments, March 7, 1974) (U.S. Catholic Conference 1974), pp. 2-3.

[66] At its 1979 national convention, the Lutheran Church-Missouri Synod approved a resolution which condemns abortion, urges its members to help secure legal protection for the defenseless unborn child, and supports efforts to enact a Human Life Amendment to the U. S. Constitution. The American Lutheran Church, which issued a statement in support of legalized abortion in 1974, approved a Statement of Judgment and Conviction at its 1980 national convention which rejects "the practice in which abortion is used for personally convenient or selfish reasons", recognizes that "an induced abortion ends a unique human life", and "deplores the alarming increase of induced abortions since the 1973 Supreme Court decisions." See the newsletter of Lutherans for Life, issues for December 1980 and February 1981. The Southern Baptist Convention, the nation's largest Protestant body with 13.4 million members, approved a condemnation of abortion at its 1980 annual meeting which includes a call for a Human Life Amendment banning abortion "except to save the life of the mother" (NC News Service, June 13, 1980).

[67] In addition to the works cited elsewhere in this testimony by Noonan, Witherspoon, Rosenblum, etc., see: Joseph M. Boyle, "That the Fetus Should be Considered a Legal Person", The American

Journal of Jurisprudence 1979, pp. 59-71; chapters on legal, social and philosophical aspects of abortion in Hilgers, Horan and Mall (editors), New Perspectives on Human Abortion.

[68] Nathanson, Aborting America, chapter 23.

[69] Groups such as Democrats for Life, Libertarians for Life, Feminists for Life, and Pro-Lifers for Survival (a group opposed to abortion and nuclear arms) have helped to belie the stereotype that opposition to abortion is only a "conservative" phenomenon. See Mary Meehan's brief survey of some of these groups in "The Other Right to Lifers", America, January 18, 1980.

[70] McRae v. Harris, 100 S. Ct. 2671 at 2689 (1980).

[71] This has been the consistent finding of four Gallup polls taken over the last six years. See "Views on Abortion Show Little Change", The Washington Post, August 27, 1980.

[72] The most recent ABC News/Washington Post poll on abortion (Survey #34, aired June 8, 1981) shows 50% of men and only 42% of women favoring the goals of the "pro-choice" movement; 36% of women favored unrestricted abortion, compared with 45% of men. Nearly a a third of the people strongly opposing legalized abortion make under $12,000 a year, with only 10% making $30,000 or more, and nearly one-quarter are black, whereas more than a quarter of those favoring legalized abortion make $30,000 a year or more. Similar results were obtained by the Connecticut Mutual Life Insurance Company when it conducted a survey on American Values in the '80s: 65% of all Americans considered abortion as morally wrong, but opposition was stronger among women, racial minorities and the poor. The ABC News/Washington Post poll showed 71% support for the idea that "a fetus becomes a human being" either at conception or at some point in the first trimester; only 11% of those polled thought that one "becomes a human being" at birth.

[73] Judith Blake and Jorge H. Del Pinal, "Negativism, Equivocation, and Wobbly Assent: Public 'Support' for the Prochoice Platform on Abortion", Demography, August 1981, pp. 309-320.

[74] See John T. Noonan, Jr., Abortion in Our Culture (NCCB Committee for Pro-Life Activities 1980).

[75] John Courtney Murray, We Hold These Truths (Sheed and Ward 1960), pp. viii-ix.

[76] This has already been suggested by the testimony given by Dr. Leon Rosenberg before the Senate Subcommittee on Separation of Powers earlier this year (see note 5). "Some say that life begins at conception", noted Dr. Rosenberg, "but others say that life begins when brain function appears, or when the heart beats, or when a recognizable human form exists in miniature, or when the fetus can survive outside the uterus, or when brain development is completed at two years of age." Any of these would be equally valid points for beginning to protect life, he claimed. Presumably, under the last-mentioned of these standards, some mentally retarded human beings would never become "persons" at all.

NATIONAL CONFERENCE OF CATHOLIC BISHOPS
BISHOPS' COMMITTEE FOR PRO-LIFE ACTIVITIES
1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005 • 202/659-6673

The Honorable Orin G. Hatch
125 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

Enclosed is a response to questions raised by Senator Patrick Leahy (D-VT) during the November 5 hearings on S. J. Res. 110 last year. I thought this might be of interest to members of the Judiciary Committee as historical background in the current abortion debate.

If there is any other way in which this office can be of help in clarifying the Church's stand on the sanctity of all human life, please feel free to contact me.

Sincerely,

Edward M. Bryce

Rev. Edward M. Bryce
Director

EMB:rp
Encl:

THE DEVELOPMENT OF CANON LAW ON ABORTION

During testimony presented before the Senate on November 5, 1981 by Cardinal Terence Cooke and Archbishop John Roach on behalf of the National Conference of Catholic Bishops, Senator Patrick Leahy (D-VT) posed two questions relating to the history of the Catholic Church's position on abortion:

1. Has canon law always considered the fetus as a "person" from conception?

2. Has canon law always considered abortion as homicide?

Archbishop Roach has offered to have a written treatment of these questions prepared for the Senator's benefit. The following is intended to fill this need.

Before treating these questions in detail, it might be useful to state some general facts about the Catholic Church's moral teaching on abortion and the relationship between morality and canon law.

The Church's moral teaching has never treated abortion at any stage as anything but a grave sin. This has been true independently of speculations about the exact time of animation or "ensoulment." A Declaration on Abortion promulgated in 1974 by the Sacred Congregation for the Doctrine of the Faith included the following note:

> This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement. For some it dates from the first instant, for others it could not at least precede nidation. It is not within the competence of science to decide between these views, because the existence of an immortal soul is not a question in its field. It is a philosophical problem from which our moral affirmation remains independent for two reasons: (1) supposing a belated animation, there is still nothing less than a human life, preparing for and calling for a soul in which the nature received from parents is completed; (2) on the other hand it suffices that this presence of the soul be probable (and one can never prove the contrary) in order that the taking of life involve accepting the risk of killing a man, not only waiting for, but already in possession of his soul.
>
> (Declaration on Abortion, note 19)

Canon law is informed by moral teaching and is designed, in part, to reinforce that teaching by setting ecclesiastical penalties for various offenses. Special attention is given to offenses which present a particularly strong threat to the good of the Church or which are insufficiently restricted or condemned in the surrounding society. For example, duelling carried severe penalties in ecclesiastical law during historical periods when this violent practice was prevalent and considered acceptable in some classes of Western society as a means for resolving disputes. Such factors help to explain why early Church law addressed the question of abortion separately from the question of the killing of adults and gave it special significance: Because abortion was accepted in some segments of the surrounding pagan society and was not restricted by law to the extent demanded by the gravity of the offense, it called for special attention on the part of ecclesiastical authorities. As in any system of law, penalties were set with attention to the nature of the party injured, but also to the likelihood of deterrence and the likelihood of mitigating circumstances or duress on the part of the offender.

This background information helps to explain why the above questions are difficult to answer briefly. At present, for example, the canonical penalty for "murder" is less severe than the penalty of excommunication attached to participation in an abortion. There is a lesser need for special canonical penalties for murder, since the morality and civil law of the surrounding society already place the most severe condemnation and penalties on the murder of those already born. Similarly, canon law has no term which corresponds precisely to the American constitutional term "person." In one sense, someone is not a "person" in the Church (i.e., does not fall under the jurisdiction of canon law) unless he or she has been baptized. But canon law presumes that every human being, baptized or not, is a "person" with full human dignity and rights, and it punishes violations of these rights regardless of the victim's age or condition. The modern attempt to redefine some members of the human species as "non-persons" lacking human rights finds no support in canon law. It may be worth noting that the unborn child, when aborted or miscarried at any stage of pregnancy, is considered a fit subject for baptism if it has any chance of still being alive.

As to the historical development of canon law on these questions:

As Catholic theology has interacted with the scientific and philosophical ideas prevalent in each period of its history, it has gone through a process of development on the question of the most likely time of "ensoulment"--i.e., the question of when a being conceived of human parents is gifted with an immortal soul, and is therefore a human "person" in the philosophical sense of that word. Canon law has sometimes reflected changing philosophical opinion by distinguishing or refusing to distinguish between abortions performed at different stages of fetal development. Four steps can be discerned in this historical process.

(1) EARLY CHURCH. The Church of the first three centuries universally condemned abortion, and individual writers often used the word "homicide" to refer to the act. Speculations concerning different stages of fetal development had no effect on the condemnation of abortion as a grave sin, despite very limited knowledge of the earliest stages of pregnancy. Tertullian's witness on this point is typical:

> For us, since homicide is forbidden, it is not even permitted while the blood is being formed into a man to dissolve the conceptus in the uterus. For to prevent its being born is an acceleration of homicide, and there is no difference whether one snuffs out a life already born or disturbs one that is in the process of being born.
>
> (*Apologeticum*, IX.8)

In the fourth century, when the Church began expanding into a largely pagan society, the need was perceived for more formalized legislation to be promulgated by regional and ecumenical councils. Some of the earliest councils dealt only with the case of a woman who had an abortion after engaging in extramarital sexual relations;

this was considered the only circumstance in which any significant number of abortions occurred within the Christian community, and so the only circumstance in which special penalties were used to reinforce the accepted moral teaching. Here also, the word "homicide" was often used to refer to abortion, and the first conciliar legislation on abortion (Council of Elvira, 305 AD) refused communion to the woman having the abortion for the rest of her life. Later legislation usually softened this penalty, changing it to a period of penance for ten years; but the Council of Trullo (691 AD) also gave abortion the same penalty as murder.

During this early period, some theologians entertained speculations concerning the possibility of "delayed ensoulment"--that is, the possibility of an immortal soul not being infused in the unborn child until some point after the onset of pregnancy. This theory was based primarily on two sources: the biological theories of Aristotle, especially as found in his _On the Generation of Animals_, Book 2, and the Greek (Septuagint) translation of Exodus 21:22-23 in the Old Testament. The Christian theologians of this time generally did not know Hebrew, and therefore trusted in this Greek version as an accurate translation; they were not aware that the Jewish compilers of the Septuagint, who were also familiar with Aristotle, had interpolated the distinction between a "formed" and "unformed" fetus into the text. These speculations did not generally affect canon law at this stage, and they were explicitly rejected in the "Canonical Letter" of Basil the Great (374-5 AD) which refers to abortion at any stage as a form of murder. This document still constitutes the fundamental norm on abortion for the Greek Church.

(2) _THE MEDIEVAL CANONICAL COLLECTIONS_. During the 6th to 13th centuries, the major canonical activity was that of compiling and synthesizing earlier statements rather than that of promulgating new legislation. These compilations included theological statements by early Christian thinkers such as Jerome and Augustine, as well

as formal legislative statements; they therefore included hypotheses on the time of "ensoulment" which canonists had to synthesize with the conciliar legislation. The most famous of these canonists was Gratian, whose Decretum of 1140 suggested treating abortion as homicide after the likely time of "formation" or ensoulment" (about 40 days after conception) and as a somewhat lesser offense before this point. Even in the earliest stages, however, abortion continued to be considered gravely immoral. The canonical compromise, based on an almost complete lack of reliable knowledge about fetal development, did not affect this moral teaching.

During this period, an explosion of interest in Aristotle helped to insure that his theories on delayed ensoulment would be given serious consideration by Medieval theologians as well as by canonists. St. Thomas Aquinas, the greatest of the theologians making use of an Aristotelian philosophical framework, accepted the Aristotelian theory of ensoulment (including the notion that ensoulment probably took place at about 80 days for females, because the material available for development was inferior and required more time to be formed into a properly human configuration).

The Aristotelian hypothesis taken over by Aquinas and others was that the conceptus was originally endowed with a "vegetative" soul befitting its low level of physical organization, and that this was succeeded by a "sensitive" and finally by an "intellective" (immortal) soul as the available matter was "formed" to a degree of organization capable of receiving the new soul. This final event was estimated to occur at about the time that the fetus seemed to the naked eye to have a peculiarly human shape.

This theory involved total ignorance not only of the idea of a genetic code, but even of the existence of the ovum. It was thought that the mother (by means of her menstrual blood) supplied only unformed matter to the generative process, and so the succession of forms or "souls" was invoked to explain how the male senen was capable of turning into a new human individual. There was no recognition of the fact that a new and unique entity comes into existence from the union of sperm and ovum at conception, and so the very idea of "conception" or "fertilization" as we understand it was unknown to thinkers of this time.

(3) LEGISLATION OF THE 13th TO 16th CENTURIES. The Medieval distinction between the "unformed" and "formed" fetus, with the killing of the latter treated as murder, continued into the official canonical collection compiled at the direction of Pope Gregory IX in 1234. Local councils legislating on abortion during the next three hundred years established penalties for abortion including an automatic ban of excommunication which could be lifted only by a bishop or, sometimes, only by the pope. Pope Sixtus V promulgated legislation in 1588 which established the same penalty for abortion at any stage as for voluntary homicide; but the canonical distinction between the killing of a "formed" and "unformed" fetus was re-established by Pope Gregory XIV in 1591. Again, these developments had no effect on the Church's teaching that abortions performed at any stage are gravely wrong.

(4) MODERN LEGISLATION. In 1869 Pope Pius IX reordered the system of canon law, and again omitted the Medieval distinction between the "formed" and "unformed" fetus. Automatic excommunication was to be incurred by anyone who successfully procured an abortion at any stage, and the ban of excommunication could be lifted only by a bishop. The *Code of Canon Law* promulgated in 1917, which is still in effect, extended this penalty to all who performed or cooperated in the abortion. All treatment of abortion in canon law since this point has consistently reflected the conviction expressed with the authority of a general council by Vatican II: that "life must be protected with the utmost care from the moment of conception" and that "abortion and infanticide are abominable crimes" (*Pastoral Constitution on the Church in the Modern World* 51).

The chief reason for this rejection of the "formed/unformed" distinction was the development of modern scientific knowledge of the process of generation. Beginning in the 17th century, a series of scientific breakthroughs--the invention of the microscope, the discovery of the ovum and of the genetic code, and so on--discredited many of the biological theories which had given support to the theory of "delayed animation". The new knowledge about fetal development which prompted this updating of Church law simultaneously prompted a drive in countries like the United States to update secular abortion laws. In the second half of the nineteenth century, for instance, the American Medical Association engaged in a largely successful lobbying effort to have abortion treated as a serious crime in the United States at any stage of pregnancy. The chief reason cited for this campaign was that the old distinction between abortions performed before and after "quickening" was obsolete, because "no other doctrine appears consonant with reason or physiology but that which admits the embryo to possess vitality from the very moment of conception" (Transactions of the AMA 22 (1871), p.250).

The development of Church law on abortion has been aptly summed up by David Granfield as follows:

> The Church has always considered direct abortion to be morally wrong whatever the stage of fetal development. On the other hand, the Church, following the theory of delayed animation, has sometimes limited its penalties exclusively to those abortions which occurred after the estimated time of the soul's infusion. Clearly, these prohibitions of ecclesiastical law have depended on the conclusions of the then current biological and philosophical sciences. As science has changed on this point, so, to some extent, has ecclesiastical penal law. This change does not mean that the moral law is a function of science, but it does mean that the application of a moral law may change in confrontation with well-verified scientific evidence.
>
> (The Abortion Decision, p. 67)

To answer the two questions with which this analysis began:

1. If "person" is defined to mean a human being with an immortal soul, then the fetus has not always been considered by theologians as a "person" during the earliest days of pregnancy. This opinion

has never been Church dogma, but it did influence the treatment of the fetus in canon law, particularly during the 6th to 18th centuries. Theological opinion on this point has developed in keeping with the biological knowledge of each age.

2. Abortion has therefore not always been punished as the crime of "homicide" during the earliest stages of pregnancy in canon law. But early abortion has always been considered a gravely immoral act. Canon law of the 19th and 20th centuries treats all abortion as a form of homicide because modern biological knowledge has discredited the biological and philosophical theories which supported the Medieval idea of "delayed ensoulment."

For further information on the development of the Catholic Church's teaching on abortion:

Sacred Congregation for the Doctrine of the Faith, Declaration on Abortion (U.S. Catholic Conference 1975)

John Connery, S.J., Abortion: The Development of the Roman Catholic Perspective (Loyola University Press 1977)

Roger John Huser, The Crime of Abortion in Canon Law (Canon Law Studies, No. 162; Catholic University of America 1942)

James A. Coriden, "Church Law and Abortion", in The Jurist, Spring 1973, pp. 184-198

John T. Noonan, Jr., "An Almost Absolute Value in History", in Noonan (ed.), The Morality of Abortion: Legal and Historical Perspectives (Harvard University Press 1970), pp. 1-59

David Granfield, The Abortion Decision (Doubleday Image Books 1971)

Charles H. Whittier of the Congressional Research Service has also prepared a treatment of this issue, entitled "Catholic Teaching on Abortion: Its Origin and Later Development." Although this study is obviously the fruit of much scholarly labor, it contains a number of serious flaws as to both fact and interpretation. It should not be seen as a reliable guide to the history of the Church's position on abortion.

Prepared by: Committee for Pro-Life Activities
National Conference of Catholic Bishops

Senator **Hatch**. We will call our next two witnesses at this time: Dr. Adrian Rogers, pastor of the Bellevue Baptist Church in Memphis, Tenn., past president of the Southern Baptist Convention, and one of the most respected religious leaders in America; and Rabbi Seymour Siegel who teaches ethics at the Jewish Union Theological Seminary in New York. Rabbi Siegel has been a senior research fellow at the Kennedy Institute for Bioethics and is the author of numerous works on Jewish law. He is one of the editors of the "Encyclopedia Judaica."

We are honored to have you. Both of you are eminently respected all over this country and certainly respected by this committee.

Before we call on you first, Dr. Rogers. Let me clarify that nothing in Senate Joint Resolution 110 would require that abortion be treated by any State as a crime, much less that of the crime of murder or homicide. It would leave the States free to impose whatever criminal sanctions, or civil sanctions, or regulatory sanctions, or even no sanctions at all that they desire.

The penalties and the definition of the offense are totally left to the direction of the States. To clarify that issue, this amendment makes no moral judgments on abortion other than to say that abortion is not a legal right guaranteed under the Constitution. It will be left to the elected representatives to make the final public policy determinations in Congress and within the States.

I hope that that helps to clarify it.

Senator **Leahy**. Excuse me, if the chairman would yield for a moment on that, I would hope the chairman did not feel that I was in any way suggesting that it did. I was asking some of the possibilities under laws or again on the basic question of when human life begins because that in itself would have to leave any basis for any type of criminal laws involving murder.

Senator **Hatch**. I did not mean to imply that I thought that. I just wanted to make sure that was clear.

Dr. Rogers.

STATEMENT OF DR. ADRIAN ROGERS, PASTOR, BELLEVUE BAPTIST CHURCH, MEMPHIS, TENN., AND FORMER PRESIDENT, SOUTHERN BAPTIST CONVENTION

Dr. **Rogers**. Mr. Chairman and distinguished Senators, I am grateful to be here. To show my gratefulness, I will be brief because what I think I have to say is rather concise.

I am here today to express my deep and abiding concern, and the concern I believe of evangelical Christians everywhere, over the tragic abortion situation that now exists in America.

I am speaking as the pastor of the 13,000-member Bellevue Baptist Church in Memphis, Tenn., and also as the immediate past president of the Southern Baptist Convention, which is the largest Protestant denomination in America and in the world.

I am not here to lobby for any specific legislation or any particular wording in any amendment that may be proposed. I want to say, however, that I do not oppose your amendment. I would like to study it and know more about it.

You gentlemen, however, are the experts in that area, but since abortion is literally a life and death issue, one should not have to lobby, in my estimation, as in other issues that come before the Congress. This issue of abortion is unlike any other that you Senators have faced.

The burden should not be upon us as evangelicals to justify why you should pass appropriate legislation to stop the killing of preborn human beings. The burden is rather on the Congress that in 8 years has failed to reverse the national tragedy and disgrace of *Roe* v. *Wade*.

Therefore, I am here to humbly express the heartache, the remorse, and the foreboding that is in the hearts and minds of millions who consider the taking of innocent lives through abortion a crime against those lives, against God the creator of those lives, and against a society where those abortions are being tolerated.

I want to say that these convictions are more than my own personal convictions. I want to give you what I believe to be the heart of my testimony today, the official resolution of the Southern Baptist Convention passed in St. Louis, Mo., in June 1980.

As president of our Southern Baptist Convention, I was presiding when this resolution was adopted. May I say parenthetically but with emphasis that it was overwhelmingly adopted. I say that because sometimes in our Baptist lives some misrepresent what we as a constituency vote in our official resolutions when we meet together. I want to give you now that resolution.

> Resolution Number 10 on Abortion: Whereas, Southern Baptists have historically affirmed the biblical teaching of the sanctity of all human life, and
>
> Whereas, all medical evidence indicates that abortion ends the life of a developing human being, and
>
> Whereas, our national laws permit a policy commonly referred to as "abortion on demand,"
>
> Be it therefore *Resolved*, That the Southern Baptist Convention reaffirm the view of the Scriptures of the sacredness and dignity of human life, born and unborn, and
>
> Be it further *Resolved*, That opposition be expressed toward all policies that allow "abortion on demand," and
>
> Be it further *Resolved*, That we abhor the use of tax money or public, tax-supported medical facilities for selfish, nontherapeutic abortion, and
>
> Be it finally *Resolved*, That we favor appropriate legislation and/or a constitutional amendment prohibiting abortion except to save the life of the mother.

I want to say that this amendment that was passed in 1980 has not been amended, rescinded, altered, or changed in any way by the Southern Baptist Convention in its subsequent meeting in Los Angeles.

The position of evangelicals, as I understand it, is not whether or not you share our religious beliefs, but you should be quick to acknowledge that the basic requirements of moral decency require the rejection of abortion. Our laws simply must respect and protect all human rights if we are long to exist as a nation.

I want to say again that you are the experts in legislation. I will leave the how to with you. I will not presume to tell you what is technically the most effective way to implement these principles.

However, I plead with you to do so in haste. One day we will all give an account of our actions concerning the tragedy of abortion on demand.

I want to say again that I am not opposing this amendment. As a matter of fact, I tend to favor it. I would like to study it more, but I do want to say that I am for anything that you distinguished men can do to help stem the tide of the tragedy of the killing of the unborn.

I would like to share a verse of scripture taken from the Book of Proverbs, chapter 24, verses 11 and 12:

> If thou forbear to deliver them that are drawn unto death, and those that are ready to be slain; If thou sayest, Behold, we knew it not; doth not he that pondereth the heart consider it? and he that keepeth thy soul, doth he not know it? and shall not he render to every man according to his works?

I want to say also as an observation, Mr. Chairman and other gentlemen, that I believe there is a growing awareness of the abortion situation. I believe the reason there has not been a greater hue and cry against abortion is that many have been behind a veil of darkness. More and more public discussion, more and more information is coming out, and I am seeing the consciences of people being galvanized as never before.

If I am any judge of the human arena and the consensus of opinion, I believe there is coming a groundswell of opinion against abortion on demand like perhaps we have not seen before.

Therefore, I am optimistic, guardedly optimistic, but I think it is not without significance that Southern Baptists, the largest evangelical denomination in America, and my colleagues from the Roman Catholic community both feel so strongly as we feel in this particular area and arena.

We do not want to impose our religious view. We do not want to be disenfranchised. It is inconceivable to us that God ordained the government and then told his people to stay out of it. I personally believe that whatever makes a man a good Christian makes him a good citizen at the same time.

Therefore, I am grateful to have these few moments. I want to say also, Mr. Chairman, that I want to express my thankfulness to you for your courageous stand in this area. Thank you.

Senator HATCH. Thank you so much, Dr. Rogers.

Rabbi Siegel?

STATEMENT OF RABBI SEYMOUR SIEGEL, JEWISH THEOLOGICAL SEMINARY OF AMERICA

Rabbi SIEGEL. Senator Hatch, distinguished Senators, ladies and gentlemen, I am here to express my hope and support for legislative remedies to reverse the alarming trend in our country to tolerate and even encourage abortions.

I am pleased, honored as well, to speak at this hearing concerning the point of view of an ancient yet vibrant tradition on this very vital and important question.

I represent, or at least speak for—there are others who can speak as well—for a faith community which is the oldest one at least in the western part of the world, and which has from its very beginnings adamantly, enthusiastically, and sacrificially been pro-life. It is a faith community which has known death imposed upon it by enemies and persecutors in horrible and unprecedented ways. In spite of, perhaps because of, the close and tragic engagements which the Jewish people have had with death, we are, or at least should be, pro-life.

The God of Israel, who is of course the God of Christiandom and the whole world, is called in Hebrew literature the God of Life. The Torah, which is the collective name for the religious and spiritual teachings of Judaism is called the Torah of Life, and, in the most sacred days of the Jewish calendar, the most fervent prayers are recited to be inscribed in the Book of Life. I would say that if I were to characterize the Jewish view of things, and of course not only exclusively the Jewish view of things, we teach a bias for life.

The questions that agitate us are not the application of this principle to healthy, attractive, young, lively, vibrant individuals. The questions which do agitate us as a society have to do with the application of the principle of life to what the great Protestant ethicist and theologian Paul Ramsey of Princeton University called "the edges of life." That is to say not at the highpoints of existence, but when life is weak, protectionless, cannot speak for itself, and usually that means at its very beginning and at its very end.

The Talmudic literature, which is for Jews the authentic interpretation of scripture and the source of doctrine and law, sees the fetus as possessing a human dimension. It speaks of fetuses, for example, in the womb of the mother even participating, poetically of course, in praising God and in engaging in discussions with the twin which may share the womb with its mother.

The Zohar, which is the classic book of Jewish mysticism, in praising the Israelites in Egypt for preserving their moral integrity and their spiritual responses, comments that one of the great attributes of the people of Israel at that time was that they did not, in spite of provcation, destroy fetuses, which are in the words of this great classic "the handiwork of the living God."

FETUS AS PURSUER

The abortion dilemma which faces persons in concrete situations is not a question of pro-life or pro-choice as it is frequently stated, but it is a dilemma in which there is an adversary relationship, or, to use a Hebrew term, a "rodef" in which the fetus sometimes endangers the mother.

There are occasions, fortunately rare, in which the fetus is a threat to the mother who is carrying it. In such an instance, in such a rare and fortunately not too frequently experienced situation, the doctrine of self-defense can be invoked and the aggressor, who in this case unfortunately is the fetus, can be eliminated in defense of the victim of that aggression.

That means that terminating the life, or killing it to put it more correctly, of the fetus is only justified at the most severe and painful kind of situation in which there is a choice literally between the life of the fetus and the very life of the mother. Otherwise, in other instances, which means the vast majority of times and events, killing of a fetus is forbidden by ethics, morality, Jewish law, faith, and teaching.

The Talmud invokes or cites the verse in Genesis 9: 6 in which it says: "He who sheds the blood of a person adam b'adam"—which means in Hebrew a person or being within a person—"shall be punished." The Talmud interprets that to mean the person within a person to be the fetus in the womb of its mother. Therefore, the killing of fetuses is a serious, heinous crime.

There is some difference of opinion within the long and complicated traditions of Jewish law and ethics, but since there is no hierarchical system in our faith in which ex cathedra statements on faith and morals can be made, differences of opinion are of course both recorded and in some instances given weight even though they may be opposed.

There are some rabbinic authorities who would be much more liberal than I, as many of you no doubt know and have heard from, and as you will hear here later on in the day. However, it is my very, very strong and heartfelt opinion and viewpoint, which I believe expresses the normative viewpoint of Judaism, that when there is a difference of opinion, when there is any doubt about any dilemma and some are on the side of life and some are on the side of death, it is right to be on the side of life rather than to be on the side of death.

Notwithstanding the fact that the people on the other side who are proabortion or who are tolerant of abortion are individuals of learning, culture, even piety, and vision, we must invoke our bias for life not only when everyone agrees that there is life but, perhaps even more importantly, when there is a difference of opinion. For bias means just that, that we always weigh our decisions so that life will result rather than its opposite.

Therefore, I would say, simply stated, that the Jewish law and ethics do not permit abortion except to save the life of the mother. The viewpoint of traditional Judaism is that fetuses possess a human dimension and that it is human life on the way. I think that the history of the Jewish people and its career in time makes a pro-life stance especially important for us, as it is for other faith communities in this great country and in the world.

WE MUST BE FOR ALL LIFE

Just to add a comment or two, we are pro all life, not only fetal life but all life: those who are on the edges of life, those who are dying, those who have not yet seen the light of day and have not emerged from the womb, and also children after they have been born.

I would add that we do not fulfill our responsibilities on behalf of the fetuses who are waiting and growing to be born unless we also assume responsibility for what happens to them after they are born. I think that was a point made by Senator Leahy and others.

This means, as Mother Theresa has said in this room at a meeting that took place this summer, that we have to promote a program of adoption of children who are unwanted by their parents, and make it possible to provide these children with homes, with people who care for them, with love, care, and affection, something also part of being part of the human race.

I think we must be pro-life in providing education, resources, help in all kinds of ways for mothers who choose to have their children. If we do not do that, then I believe that our protestations are not as sincere and effective as they ought to be and that they are flawed.

I would also say just very briefly a few words about one or two other points which are usually brought up in discussions about this issue in which I believe the Jewish teachings, sharing with all high religions, would have something important to say.

LEGISLATING MORALITY

People say that it is wrong to legislate morality and that morality is a private matter. The fact is that if you think about it, especially in this room with distinguished legislators here, with any seriousness or rationality, the only thing we do legislate is morality. For all legislation is an institutionalization, a concretization of our moral ideas and outlook.

Even the laws of contract, the traffic laws, the bank laws, the laws which govern the stockmarket, Wall Street, and our foreign policy are expressions of our moral and ethical commitments set down in concrete ways of paragraphs and codes and in content of legislation proposed at the various levels of government. When the majority rules, they impose their view of course on the minority. That is part of our democratic society.

How could anyone believe that an issue as serious as whether we opt for life or death, which is in the last analysis the most important decision that anyone can make, could not be the subject of legislation? What else but that should be legislated for a society?

FREEDOM OF CHOICE

Secondly, freedom of choice, or prochoice as it is frequently called, which has a very attractive ring to it, is against, I think, the basic principles of all religions. I can certainly say it is against the Jewish religion and I am sure it is true of Christianity in its two major expressions. An individual does not have complete and total autonomy over his own person.

If you do not believe me, have a thought experiment and imagine if I were now to take out a knife or a hatchet and start chopping off my fingers one by one on the ground that I feel like it or that I am choosing to do it. I would hope that all of you would rise up as one to stop my doing it, or at least to call the police.

Especially if we believe, as I am sure do most of us who are believers in our own faith, traditions, and communities—certainly that is true in Judaism—that life is given to us as a gift, and that includes our persons and our bodies, we do not have a complete and total autonomous right to dispose of our persons or that which is within our persons as we wish to, although we have large areas of choice available to us.

However, when it comes to ultimate and serious matters, we are under a higher law than our choice and our own predelictions and our own biases and tendencies. I think this is such an obvious point that it does not even bear to say it, but I have learned that the things that have to be said are the things that seem to be most obvious.

COMMUNITY AFFECT

These then are the main fundamental principles underlying the whole enterprise of civilization and community. We are also part of a community. I think if the Jewish faith and any other faiths have anything to say about these things it involves the fact that as individuals we are not atoms in which our own decisions affect only ourselves, even though we have no relatives or friends to speak of.

We are a community. What one person in a community does—when he takes life and kills it—affects the whole community. Therefore, prochoice involves not only choosing for yourself but choosing the consequences for the group in which you live, the nation in which you are a citizen, and the world in which you have your being.

In the Talmud there is a parable which I think is paralleled in other ancient literatures about three men who are sitting in a boat. As the boat is floating in a body of water, one man takes out some intrument and starts drilling a hole under his own seat. Say the others to him, "What are you doing?" He says, "What do you care what I am doing? This is my place and what I am doing is my own business, not yours."

Of course the fallacy of this reasoning is obvious. We cannot, we must not, and we should not take with equanimity the notion that we can exist in a community in which life is cheapened and in which death is institutionalized with the consent of, or at least with the indifference of the Government.

In conclusion, I would say that the tradition of which I have the honor to speak for as one spokesman, which is after all the basis and the foundation of the great religions of Christianity and Islam, shares with them and others, too, a bias for life, a bias which must be invoked where life is threatened most, namely at its edges, and that when there is any doubt, when there is any controversy, when there are differences of opinion, we should always opt on the side of life.

We should recognize that we are part of a larger whole, that no man is an island unto himself, that choices of course are given to us, and that is part of our human estate. However, these choices must be made in light of our destiny and grandeur as we come into the world, in the words of William Wordsworth, "trailing clouds of glory," and that we have a responsibility as individuals and as citizens, especially as those who worship the God of creation, to forge and form our community so that in its official expressions in law and its more informal although perhaps more effective expressions in the life styles which are promoted and the world views which are taught it promotes that which is the most precious of all God's gifts, the gift of life.

I suppose to sum it all up, we are all committed, whatever our belief or no belief, to the thundering words of Deuteronomy: "u'vecharta v'chayim; and you shall choose life."

Thank you very much.

Senator HATCH. Thank you so much, Rabbi Siegel.

Senator Grassley has to leave in about 5 minutes so we are going to turn to his questions first.

Senator GRASSLEY. Thank you for your testimony.

I want to ask you to comment on something. I will lead off my invitation to you by saying that one of the criticisms that is often given, maybe not so much in public as it is in one-on-one discussion of the subject between pro-life and prochoice people, is: Is it not really an effort to impose one person's religion through Government upon the total of society?

I think the inference is basically that maybe because of the Catholic Church's strong stand on abortion we are trying to place upon society the Catholics' point of view of this to the disregard of any other religion.

I think the fact that we have had different religions and different denominations speak in favor of this, as well as having people of different religions speak against it, is an emphasis that it is more broadly based than one denomination.

I think that sometimes we detract from the overall subject when we emphasize a religious point of view on abortion. My question and invitation to you for comment is that maybe we have overdone that. Maybe what we ought to emphasize is respect for life as our goal, and that really whether you are a Christian, Jew, Catholic, or even an atheist, you can have the same view toward respect for life. If we would put more emphasis upon respect for life as our goal and invite those who are connected with organized religion as well as those who are not to promote that concept, would we not be much further ahead?

Then can we not legitimately just forget about the religious point of view of that? It can be a supplement to it, but can it not be forgotten and still be as strong in our beliefs that abortion is wrong?

Dr. **Rogers**. I agree with you wholeheartedly. I see that happening. None of us is going to abdicate our own personal religious convictions, nor should we be asked to, but I do see a consensus of people from all stripes and colors and denominations seeing this as a larger issue than a parochial issue on religion.

From a scientific, even more so than even a philosophical much less a religious point of view, we are coming to a consensus that there is no denying that the fetus, commonly called, is a preborn human being and would deserve as much protection inside the house called the mother as that child would deserve protection in the nursery after it is born.

I think the point that you have made is a strong point. I feel, Senator, that this is precisely what is taking place. That is one of the reasons that I am becoming more and more optimistic that it is not seen as narrow Catholic issue.

For example, I am sure that all of us would agree with the commandment that says, "Thou shall not kill." Because we have laws against murder, we would not say that is a religious issue therefore because Christians, Catholics, and Jews agree that we should not kill. One of the Ten Commandments happens to say the same. That point of coincidence certainly does not abrogate that principle.

Senator **Grassley**. Rabbi Siegel?

Rabbi **Siegel**. Before you came in, I think Senator Hatch touched on the first part of your comments in his opening statement, namely what I consider to be a red or other kind of colored herring in saying that these kinds of legislative efforts tend to or want to impose the point of view of one part of the community upon the rest of the community.

It is a red herring because anyone who promotes any legislation vigorously wants to promote his point of view so that it will be accepted in the Congress or wherever else, become the law of the land, and therefore the law for everyone whether they agreed to it or not at the beginning. That is the nature of all political advocacy, namely that you want your view to become the universal view.

The only problem is how you do it. If you do it by coup d'etat or by bribing somebody or other things, then of course that is immoral, illegal, unconstitutional, and reprehensible.

If you are doing it in a democratic way, by agitation, by publicity, by hearings, by testimony, then that is exactly what you are supposed to do and what you have to do whether it is a religious point or nonreligious point or whatever else it is. Therefore, I cannot see that argument having any status at all if you think about it rationally and even pragmatically.

As far as the other points, I agree with you and my colleague here that it is unfortunate that it has been identified with one group. Speaking to them, they think that it is unfortunate, too. They will agree with you. They would like to see this as a generally interreligious and even beyond the religious groups.

As a matter of fact, at the convention of the pro-life coalition which was held in Omaha just a few months ago, the most impressive speakers were people who were not affiliated with religion at all. One was a physician who himself had run the largest abortion clinic in the world in New York City, Dr. Nathanson, who changed his mind after awhile and is now a very strong advocate of limiting, if not eliminating, abortions.

Of course the religious element is part of our national political structure ever since we said "that we hold these truths to be self-evident that all men are endowed by their Creator," which of course is a religious statement.

Senator **Grassley**. Thank you.

Senator **Hatch**. Thank you, Senator Grassley.

Let me ask both of you, has there been any significant evolution one way or the other in the attitudes of your churches or your particular religious doctrines with respect to abortion over the years or over the centuries as the case may be?

Shall we start with you, Rabbi Siegel?

Rabbi **Siegel**. After my testimony, you will be privileged to hear from one of my distinguished colleagues, who on the basis of my own experience will probably represent a point of view opposed to mine. So that the Jewish world hardly is united on any issue except one or two, one of which you had experience with just a week or two ago.

There is a difference of opinion within the Jewish community. What is interesting to me is that the most traditionalist parts of the Jewish community, called the Orthodox, and the Conservative groups, are much more leaning against abortions, and the more theologically liberal parts of the Jewish community are leaning for abortion.

Being part of the traditionalist group, I would say that the reason they are of that opinion is they are closer to the traditional sources and teachings of our religious community.

Senator HATCH. Dr. Rogers.

Dr. ROGERS. Yes, I believe there has been somewhat of an evolution, if I can use the word loosely, in our Baptist constituency. I think we are johnny-come-lately's. Yet as I sense the temperature of our people, there is a growing awareness and correspondingly almost a horror that accompanies this. I think we have let our Catholic friends fight a battle and thought perhaps that was their battle.

I see now a rising tide. That is not to say that in times past Southern Baptists, or Baptists in general, were pro-abortion. I do not think we ever have been. I pray to God we never shall be. However, I think now our conscience is being galvanized. I think it was something that we tended to think was not our battle.

To that degree, I can see not only in the hearts and lives of Baptists, but also in the hearts and lives of evangelical Christians as I go in and out among other communions this growing awareness. Should you call that an evolution of thought, yes, indeed.

Senator HATCH. How do we make appropriate distinctions between matters of public and private morality? I know that is a question you could spend a semester discussing, but if you could do it in just a few minutes, I would appreciate it.

I will start with you, Dr. Rogers, and then Rabbi Siegel.

Dr. ROGERS. In my estimation, what happens to be a matter of public or private morality would be, is this some point of religious doctrine or something that is specifically Catholic, Jewish, or Baptist, or is there a commonality of decency as per the respect for life itself, which so far as I know our Judeo-Christian ethic, the very principles for which our Nation was built, these principles are shared by all of us from the point of commonality.

To be sure, someone must make a value judgment as to where that point is. There is a break point somewhere. I believe that there is a growing consensus and commonality of belief that this is a larger issue than a parochial issue, a denominational issue, a religious issue, although we share those convictions.

If a person had a formula to say which is and which is not, I would be happy to learn it, but I believe as intelligent human beings and as those who must give an account one day to their Creator, we must make that judgment. I believe that intelligent and well-minded people should and could and, I pray God, will make the right judgment.

Senator HATCH. Rabbi?

Rabbi SIEGEL. I have just a brief comment. The distinction between private and public, which is an important one in these halls, is sometimes misunderstood. Something which is an immoral act which is done in private does not cease to be immoral just because it is done in private.

What we have assumed as a community is that there is a limit, usually at the door, where the Government or some public institution can gather evidence. Usually, I think we would make a distinction between acts which affect the public atmosphere, the public peace, and the public health. I believe that promotion of abortion, or at least its toleration which is tantamount to the same thing, does endanger both public peace and the atmosphere in the public as well as public health seen in its totality.

Senator HATCH. I want to personally thank both of you for taking this time out of your busy schedules to be with us. I think this particular session today has been good. It is going to become more interesting as we continue. Let me just ask one other question of you, Rabbi Siegel. Are there any major differences in perspective on the abortion issue in the Jewish faith among the Reformed, the Conservative, and the Orthodox synagogues?

Rabbi SIEGEL. Yes, there is. As I think I said, the Orthodox group tends to be against abortions, somewhat along the line that I mentioned. The liberal group, the Reformed group, I think even officially has affiliated itself or allied itself with the pro-abortion groups, or at least anti-anti-abortion groups. The Conservative group, of which I am a member and which is the largest of the three numerically, has divided opinions on that. I represent that part which is, as you heard in my testimony, supportive of your efforts and the efforts of your colleagues in this area.

Senator HATCH. Thank you so much.

Dr. Rogers, one last question for you: Cardinal Cooke indicated, as did Archbishop Roach, that they believe that abortion on demand—some have testified 35 to 50 million a year throughout the world—has contributed to the deterioration of the family unit in our society. What would be your personal viewpoint and perhaps the viewpoint of your denomination with regard to that?

Dr. ROGERS. I agree with that wholeheartedly without equivocation. I believe that would be the consensus of our fellowship.

Senator HATCH. Thank you so much. We appreciate your being here.

Senator HATCH. We will now call our last panel. On this panel, we have Rabbi Henry Siegman, who is the executive director of the American Jewish Congress. He is also chairman of the Interreligious Committee of General Secretaries, a major interfaith organization, and a member of the executive committee of the National Urban Coalition.

Prof. Charles Reynolds is chairman of the religious studies department at the University of Tennessee. He is founder of the "Journal of Religious Ethics."

Bishop George Hunt is the bishop of the Episcopalian Diocese of Providence, R.I.

We appreciate the efforts all three of you have made to be here to enlighten the committee on your respective points of view so that hopefully we can face this very difficult issue in an intelligent way.

Let us begin with you, Rabbi Siegman. Then we will go to Mr. Reynolds, and then to Bishop Hunt.

STATEMENT OF RABBI HENRY SIEGMAN, EXECUTIVE DIRECTOR, AMERICAN JEWISH CONGRESS

Rabbi SIEGMAN. Thank you, Mr. Chairman.

I should like to thank you for this opportunity to appear before this committee and to express my views on the subject.

I am particularly pleased to do so because the American Jewish Congress has enjoyed very close and warm cooperation with the chairman of this committee on a variety of issues, a cooperation that we cherish, and in many cases in support of views that the Senator has been advocating. Unfortunately, this is not one such occasion.

Senator HATCH. I wanted to thank you before you made the last statement. I remember well your outstanding efforts on electoral college reform. Your organization is, I think, one of the most effective I have ever worked with.

Rabbi SIEGMAN. Thank you, Senator.

Senator HATCH. I respect you people very much, as you know, and will respect your viewpoint here today even though we disagree.

Rabbi SIEGMAN. Thank you.

I should like to say at the outset, in response to the views that were expressed earlier this morning, that I associate myself completely with the chairman's opening remarks with respect to our first amendment freedoms. Prolife positions do not raise church-State issues and enjoy the same first amendment protections as do prochoice positions. Suggestions that the vigorous advocacy of prolife positions involves nefarious imposition of one set of views on the rest of society betrays an incomplete and, we believe, incorrect understanding of how our democratic process works.

I should add, however, that it does not follow that everything that can be done should be done. That is a question not of law but of values and policy. That is the question I should like to speak to.

The committee may be surprised by the total divergence of views that I will present and the views it heard just moments ago from a very distinguished and learned colleague, Rabbi Seymour Siegel. That really should not be surprising. There is an old Jewish saying that where you have two Jews, you will likely find three opinions.

I believe that the views that I present to you this morning are shared by the vast majority of the organized Jewish religious community, specifically the reform movement and the conservative movement, which is considered the largest of the three branches, and, indeed, even by a certain segment of the orthodox community.

I do not wish to engage Rabbi Siegel in personal polemics. He is a formidable opponent, and this is not the time for it. However, I believe there are two points that should be made right at the outset.

Rabbi Siegel indicated that where there is any doubt whatever between life and the taking of life, Jewish tradition always and unequivocally comes down in favor of life, never on the side of taking life. I should like to suggest to my colleague and to the committee that this begs the question. The real question is: Judaism comes down in favor of whose life? Contrary to what Rabbi Siegel suggested to you, Jewish tradition comes down unequivocally in favor of the mother's life.

This brings me to the prepared statement that I should now like to present to you.

One intended result of the proposals before this committee, certainly of Senate Joint Resolutions 110, 17, and 18, is to permit each of the 50 States to enact its own laws on the subject of abortion.

THE DEMOCRATIC ARGUMENT

A major argument advanced in support of these amendments is that, by returning the issue to the people, we are allowing democracy to have its way. Given the reality of profound differences within our society on the question of abortion, so this argument goes, the attempt by one branch of Government which is not directly responsive to the public; namely, the judiciary, to impose a view that grievously offends the moral and religious sensibilities of a large segment of our society is not congenial, or should not be congenial, to our democratic ethic.

By permitting each State individually to deal with the issue, we enable the popular will to be expressed. Those who oppose the proposed amendments to the Constitution are therefore seen as dangerously distrustful of the workings of our democratic system.

This populist argument is clearly an attractive one, but, in my view, deceptively so. In a free society in which fundamental differences exist with respect to basic values, legislation which does not require persons on either side to violate their conscience should clearly be preferable to legislation that does.

Constitutional amendments that would make it possible for Congress or the States to pass legislation that may deeply offend the moral convictions of a large segment of our society can hardly be seen as contributions to this democratic process.

No one is compelled by the Supreme Court's decision in *Roe* v. *Wade* to have an abortion. The reverse is not the case. If these proposed amendments were to become law, those who believe as a matter of sincere moral and religious conviction that a pregnancy should be terminated could be compelled to act in direct violation of their sense of morality and of the sanctity of human life. No democratic principle is therefore served by overriding the Supreme Court's decisions and allowing Congress and the States to legislate restrictions on the freedom to choose abortions.

THE MORTAL ARGUMENT

Our primary objection to the proposed amendments, Mr. Chairman, is substantive rather than procedural, for all of them are based, we believe, on a serious misunderstanding of what motivates the religious traditions that oppose restrictions on a woman's right to choose an abortion.

It is generally assumed, and it was implicit in much that we heard this morning, that the conflict is between a restrictive and a permissive approach. This, I submit, is a distortion of the truth, for the conflict is in fact between two moral approaches, each equally grounded in religious conviction and in the desire to enhance the sacredness and dignity of life.

Before elaborating this point, permit me to say a few words about Jewish tradition. Despite a wide range of opinion among contemporary rabbinic authorities on the subject of abortion—you have been exposed this morning to that range—classical Jewish sources yield certain principles which are universally accepted in Jewish tradition.

First, the fetus is not a person in Jewish tradition until the moment of birth. The normative view of Jewish law with respect to the fetus is that expressed by Rashi, the preeminent commentary on the Talmud, in Tractate Sanhedrin: "Whatever has not come forth into the light of the world"—that is to say the mother's birth canal—"is not a human life."

Two, if the fetus up to the moment of birth, and indeed even during the very process of birth, threatens the life of the mother, the life of the mother takes precedence. Furthermore, abortion in such cases is not a matter of choice. It is a religious obligation. Indeed, and this may surprise you, those who stand in the way of saving the mother's life in that circumstance are seen in Jewish tradition as accessories to murder.

Three, even the most lenient approach to abortion in Jewish tradition considers termination of the life of the fetus morally objectionable if it is done for less than serious cause. What constitutes such serious cause divides Orthodox Jewish opinion, as you have heard, while Conservative and Reform Judaism hold a lenient view.

Finally, the last point of consensus is that, if an abortion is performed even in situations where Orthodox tradition would not sanction it, such an abortion does not incur criminal punishment in a Jewish court.

Given this uncontested Jewish position that one may not carry a fetus to term if it endangers the life of the mother, legislation which would prevent abortion even in those circumstances raises serious constitutional problems for it would clearly and directly infringe on the religious freedom of Jews.

Conceivably, the proposals before this committee do not raise this issue. However, the proposals before this committee do raise serious problems in cases where the mother's life is not immediately threatened, for even in Orthodox tradition, which is the most restrictive of the three, the principle of protecting the mother's life was understood to include the mother's health, including her mental health.

Orthodox rabbinic decisions permit abortion in the cases of rape, cases where the birth would cause extended suffering to the mother, and to prevent malformed infants on the ground of preventing emotional distress to the mother. Clearly, this school within Orthodox Jewish tradition would have been unthinkable if the Halacha, Jewish religious law, considered the fetus a person and abortion homicide.

To ascribe universality to the position of certain religious traditions that human life begins at conception is, I would suggest to you, to misread history. The Catholic Church itself did not consistently hold to this view.

Its present position is determined not by "universal" criteria but by theological considerations unique to the Catholic Church, the concept of ensoulment and the need for baptism as a prerequisite for salvation. These are concepts that command deep respect, but they are alien to Jewish religious belief and to the beliefs of many other Christian denominations.

I respectfully submit to the members of this distinguished committee that they should ask themselves an important and obvious question: Is it conceivable that spokesmen for religious traditions which oppose the proposed constitutional amendments are insensitive to the moral seriousness of terminating potential life? Is it possible that people who stake their lives on the proposition that men and women are the bearers of the divine image, that they are created in the likeness of God, would advocate a view that diminishes, however indirectly, reverence for life? Why would the bearers of an ancient tradition that proclaimed to the world long before the rise of Islam and even long before the rise of Christianity that life is the most precious of God's gifts, why would such a life-regarding and life-revering tradition be less than militant and passionate in its defense of all forms of life, including that of the unborn? Surely that is a reasonable question, and it deserves an answer.

The answer, I suggest to you, is that this very commitment to life and its sacredness is precisely what led major religious traditions, and particularly Jewish religious tradition, to the position they hold on abortion. These traditions hold that life can be diminished, demeaned, and desecrated far more by callousness and insensitivity to the born than to the unborn, however precious their promise.

The proposed amendments, if well intentioned, are ill advised, in my view, for what we have here are divergent approaches to the most basic of human and religious values. In the name of promoting life, the proposed amendments are in fact in danger of offending deeply the life-affirming impulse of a large segment of our society whose sensitivity to this issue, I assure you, is as acute and as intense as that of those who come to it from different theological premises.

As indicated, these amendments take sides, or would allow Congress and the States to take sides, not between a moral and an amoral approach, but between two conflicting moral approaches that are equally grounded in profound religious conviction and in the desire to enhance the sacredness and dignity of life.

It seems to me wrong for the Congress of the United States or for the States to say to the faithful adherents of a large number of religious traditions that their deeply held religious views with respect to the sanctity of life are misguided and wrong. I am sure that is not your intention, but that is the inescapable consequence of the proposals before you.

Antichoice theologians, including the distinguished witnesses you had before you this morning, have argued that the issue is not only the narrow and, to some, admittedly theological question of when life begins. Rather, their concern is that unrestricted abortion results in the vilification of all life, the born no less than the unborn.

To give moral sanction to abortion, they argue, is to condemn not only the fetus but all persons to the level of expendable things. As the Catholic writer David Granfield explains:

> Morally, the fight against abortion is not primarily to protect the human dignity of the unborn, but it is above all to safeguard that dignity in all men.

That is a point eloquently made by the bishops you heard this morning.

It is, I must say, an impressive argument. Indeed, Jews and Catholics do not differ over the need to safeguard the human dignity of all persons. We do differ as to how that goal is best achieved in the area of abortion.

Judaism and many Christian denominations believe that the human dignity of all men requires that the mother's well-being must take precedence over that of the fetus. Legislation that denies the mother that choice is objectionable not because it places limitations on some abstract notion of unrestrained freedom, but precisely because it may inflict serious and irreparable damage to the human dignity of the mother who is carrying the fetus.

Judaism, like Catholicism, affirms that nascent life has great value. However, it is often not the only value at stake. When genuine conflicts of value exist—and in the face of the kind of desperation that drives women to risk their lives and mutilate their bodies rather than carry the fetus to term, no man—and I say "man" deliberately—has the moral right to say that such profound conflicts of values do not exist—individuals turn to their own faith and religious traditions for guidance, as they should. It is bad policy for Government to preempt that religious process with legislation that leaves the individual morally trapped and without a choice.

In conclusion, Mr. Chairman, I have not presented the Jewish view on abortion in order to suggest that it find expression in the Constitution or in legislation. Given the differences that exist among religious communities on the subject, legislation expressing the Jewish view would be as inappropriate as legislation expressing the Catholic view.

Rather, my point is that, in view of the great diversity in theological belief, the proper role of Government in a free society is to allow the different religious traditions to inculcate their beliefs with respect to the appropriateness of abortion, and to leave that final decision, a very painful and critical decision, to the woman, answering to God and to conscience.

Thank you.

[The prepared statement of Rabbi Siegman follows:]

PREPARED STATEMENT OF RABBI HENRY SIEGMAN

INTRODUCTION

I welcome this opportunity to testify on behalf of the American Jewish Congress in opposition to several proposals to amend the Constitution now being considered by this Committee.

S. J. Res. 110, introduced by Senator Hatch, would eliminate a woman's right to an abortion, a right which is presently secured by the Constitution. S. J. Res. 110 would, instead, permit Congress and the states to restrict or prohibit abortions. Under the terms of this resolution and through the operation of the Supremacy Clause, where Congressional and state law diverge or conflict, the more restrictive law would control.

S. J. Resolutions 17 and 18 would also eliminate the Constitutional protection accorded the abortion decision. Both resolutions would do this by defining the word "person" in the Fifth and Fourteenth Amendments, "with respect to the right to life," to include the unborn. Both resolutions state that no unborn person shall be deprived of life by any person (except that laws permitting abortion to prevent the death of a mother would be permissible). Both would grant Congress and the states the power to enforce the amendment by appropriate legislation.

Finally, S. J. Res. 19 would vest in each human being "from the moment of fertilization" the "paramount" right to life. The meaning of the provision is unclear. At the very least, it is designed to stop abortions. Presumably, it would also permit the states or the Congress to outlaw the use of contraceptives -- like the IUD -- which may operate to prevent implantation of the fertilized egg. What it would mean for abortions necessary to preserve the life of the mother is unclear, for under the terms of S. J. Res. 19, both the life of the mother and the life of the fetus would be "paramount."

Because today's hearings were convened to consider the ethical and moral questions surrounding abortion, I will leave to others the task of exploring the significant problems of construction and interpretation inherent in the language of each of these proposals. Their implications are far from clear, and like all Constitutional provisions, they would assume content largely through the process of adjudication.

THE DEMOCRATIC ARGUMENT

One intended result, at least of S. J. Resolutions 110, 17 and 18, is, however, plain. These Constitutional amendments would permit each of the fifty states to enact its own laws on the subject of abortion.

A major argument advanced in support of these amendments is that, by returning the issue to the people, as it were, we are allowing democracy to have its way. Given the reality of profound differences within our system on the question of abortion, the argument goes, the attempt by one branch of government which is not directly responsive to the public to impose a view that grievously offends the moral and religious sensibilities of a large segment of our society is not congenial to our democratic ethic. By permitting each state individually to deal with the issue we enable the popular will to be expressed. Those who oppose the proposed amendments to the Constitution are therefore seen as dangerously distrustful of the workings of our democratic system.

The "populist" argument is an attractive one, but, in our view, deceptively so. In a free society in which fundamental differences exist with respect to basic values, legislation that does not require persons on either side to violate their conscience should clearly be preferable to legislation that does. Constitutional amendments that would make it possible for Congress or the states to pass legislation that may deeply offend the moral convictions of a large segment of our society can hardly be touted as contributions to American democracy.

No one's conscience is violated as a result of the Supreme Court's decision in Roe v. Wade. No one is compelled by that decision to have an abortion, even in the most extreme of circumstances. The reverse is not the case. If these proposed amendments were to become law, those who believe as a matter of sincere moral and religious conviction that a pregnancy should be terminated could be compelled to act in direct violation of their sense of morality and of the sanctity of human life. No democratic principle is therefore served by overriding the Supreme Court's decisions and allowing Congress and the states to legislate restrictions on abortion.

JEWISH TRADITION

Our primary objection to the proposed amendments is substantive rather than procedural, for all of them are based on a serious misunderstanding of what motivates the religious traditions that oppose restrictions on a woman's right to have an abortion. It is generally assumed that the conflict is between a "restrictive" and a "permissive" approach. This is a distortion of the truth, for the conflict is in fact between two moral approaches, each equally grounded in religious conviction and in the desire to enhance the sacredness and dignity of life.

Before elaborating this point, allow me to say a few words about Jewish tradition. Despite a wide range of opinion among contemporary rabbinic authorities on the subject of abortion, classical Jewish sources yield certain principles which are broadly accepted.

1. The fetus is not a "person" in Jewish tradition until the moment of birth. The normative view of Jewish law with respect to the fetus is that expressed by Rashi in the Talmud, Tractate Sanhedrin 72b: "Whatever has not come forth into the light of the world (i.e. the mother's birth canal) is not a human life."

2. If the fetus up to the moment of birth, and even during the very process of birth, threatens the life of the mother, the life of the mother takes precedence. Furthermore, abortion in such cases is not a matter of choice; it is a religious obligation. Indeed, those who stand in the way of saving the mother's life by preventing the abortion are accessories to murder.

3. Even the most lenient approach to abortion considers termination of the life of the fetus morally objectionable if it is done for less than serious cause. What constitutes such serious cause divides Orthodox Jewish opinion, while Conservative and Reform Judaism hold a lenient view.

4. The final point of consensus is that, if an abortion is performed even in situations where Orthodox tradition would not sanction it, such an abortion does not incur criminal punishment in a Jewish court.

Given the uncontested Jewish position that one may not carry a fetus to term if it endangers the life of the mother, legislation which would prevent abortion even in those circumstances raises serious Constitutional problems, for it would infringe on the religious freedom of Jews. But the proposals before this Committee raise serious problems even in cases where the mother's life is not immediately threatened for, even in Orthodox tradition, which is the most restrictive of the three branches of Judaism, the principle of protecting the mother's life was understood to include the mother's health, including her mental wellbeing.

Orthodox rabbinic decisions permit abortion in cases of rape, in cases where the birth would cause extended suffering (i.e. physical pain) to the mother, and to prevent malformed infants (thalydomide babies) on the ground of preventing emotional distress to the mother. Clearly, this "school" within the Orthodox Jewish tradition would have been unthinkable if the Halacha (Jewish religious law) considered the fetus a person and abortion homicide.

This Orthodox Jewish position was summarized by the late Rabbi Benzion Uziel (d. 1954), a former Chief Rabbi of Israel:

> It is clear that abortion is not permitted without reason. That would be destructive ... of the possibility of life. But for a reason, even if it is a slim reason (ta'am kalush) such as to prevent her disgrace (nivul), we have precedent and authority to permit it.*

UNIVERSAL STANDARDS AND DENOMINATIONAL DOCTRINE

To ascribe universality to the position of certain religious traditions that human life begins at conception is to misread history. The Catholic Church itself did not consistently hold to this view. And its present position is determined not by "universal" criteria but by theological considerations unique to the Catholic Church -- the concept of ensoulment, and the need for baptism as a prerequisite for salvation. These are concepts that command respect, but they are alien to Jewish religious belief and to the beliefs of many other Christian denominations.

In McRae v. Califano, 491 F. Supp. 630, 714-15 (E.D. N.Y.), rev'd on other grounds, 100 S.Ct. 2671 (1980), Judge John Dooling rejected the argument that restrictions on abortions violate the establishment clause. Nevertheless, Judge Dooling observed that the "differences [in the views of the Catholic Church and of other religious groups with respect to abortion] are identifiably religious, and constitute an integral element of denominational religious difference." I submit to you that it is clearly bad policy for Congress or the states to establish in law a position that "constitutes an integral element of denominational difference," when contrary views are equally grounded in religious doctrine.

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* Mishpetei Uziel, Vol. III, H. M. No. 47.

REVERENCE FOR LIFE: THE BORN AND THE UNBORN

I respectfully submit to the members of this distinguished Committee that they must ask themselves an important and obvious question. Is it conceivable that spokesmen for religious traditions which oppose the proposed Constitutional amendments are insensitive to the moral seriousness of terminating potential life? Is it possible that people who stake their lives on the proposition that men and women are the bearers of the divine image -- that they are created in the likeness of God -- would advocate a view that diminishes, however indirectly, reverence for life? Why would the bearers of an ancient tradition that proclaimed to the world long before the rise of Islam and long before the rise of Christianity that life is the most precious of God's gifts, why would such a life-regarding and life-revering tradition be less than militant and passionate in its defense of all forms of life, including that of the unborn? Surely, that is a reasonable question, and it deserves an answer.

The answer is that this very commitment to life and its enhancement is precisely what led major religious traditions, and particularly Jewish religious tradition, to the position they hold on abortion. These traditions hold that life can be diminished, demeaned and desecrated far more by callousness and insensitivity to the born than to the unborn, however precious their promise for one is promise, the other reality. The proposed amendments, if well intentioned, are ill advised, for what we have here are divergent approaches to the most basic of human and religious values. In the name of promoting life, the proposed amendments are in fact in danger of offending deeply the life-affirming impulse of a large segment of our society whose sensitivity to this issue, I assure you, is as acute, as intense, as that of those who come at it from different theological premises.

As indicated, these amendments take sides, or would allow Congress and the states to take sides, not between a moral and an amoral approach, but between two conflicting moral approaches that are equally grounded in profound religious conviction and in the desire to enhance the sacredness and dignity of life. It seems to me simply indefensible for the Congress of the United States to say to the faithful adherents of a large number of religious traditions that their deeply-held religious views with respect to the sanctity of life are misguided and wrong. I am sure that is not your intention, but that is the inescapable consequence of the proposals before you.

Anti-choice theologians have argued that the issue is not only the narrow and admittedly theological question of when life begins. Rather, their concern is that unrestricted abortion results in the vilification of all life -- the born no less than the unborn. To give moral sanction to abortion, they argue, is to condemn not only the fetus but all persons to the level of expendable "things." As the Catholic writer David Granfield explains, "Morally, the fight against abortion is not primarily to protect the human dignity of the unborn, but it is above all to safeguard that dignity in all men."

It is an impressive argument and, indeed, Jews and Catholics do not differ over the need to safeguard the human dignity of all persons. We do differ as to how that goal is best achieved in the area of abortion. Judaism and most Christian denominations believe that the human dignity of all men requires that the mother's wellbeing must take precedence over that of the fetus. Legislation that denies the mother that choice is objectionable, not because it places limitations on some abstract notion of unrestrained freedom, but because it may inflict serious and irreparable damage to the human dignity of the mother who is carrying the fetus.

Judaism, like Catholicism, affirms that nascent life has great value. But it is often not the only value at stake. When genuine conflicts of values exist -- and in the face of the kind of desperation that drives women to risk their lives and mutilate their bodies rather than carry the fetus to term, no man has the moral right to say that such conflicts of values do not exist -- individuals turn to their own faith and religious traditions for guidance, as they should. To preempt that religious process with legislation that leaves the individual morally trapped and without a choice betrays an arrogance which ill behooves our governmental institutions.

CONCLUSION

I have not presented the Jewish view on abortion in order to suggest that it find expression in the Constitution or in legislation. Given the differences that exist among religious communities on the subject, legislation expressing the Jewish view would be as inappropriate as legislation expressing the Catholic view. Rather, my point is that, in view of the great diversity in theological belief, the proper role of government in a free society is to allow the different religious traditions to inculcate their own beliefs with respect to the appropriateness of abortion, and to leave that final decision to the woman, answering to God and conscience.

Senator **Hatch**. Thank you, Rabbi Siegman.

Dr. Reynolds, we will turn to you at this point.

STATEMENT OF DR. CHARLES REYNOLDS, CHAIRMAN OF THE RELIGIOUS STUDIES DEPARTMENT, UNIVERSITY OF TENNESSEE

Dr. **Reynolds**. Chairman Hatch, my name is Charles Reynolds. I would like my statement to be made a part of the record and then to comment on it.

Senator **Hatch**. Without objection, your full written statement will be made a part of the record following the panel's presentation.

Dr. **Reynolds**. Thank you.

It is as a religious ethicist that I speak with you this morning. I do not come as a representative of any particular group. Before undertaking a statement on the public policy issues related to abortion, however, I want to make some general remarks and observations.

DIVERSITY OF VALUES

We Americans value human life in all its stages of development. We also value animal life, and we value plants and the Earth. We Americans value our political liberties. We also value our religions and our freedom to worship as our conscience directs, and we value one another as equal citizens. We Americans value peace. We also value individual and national self-determination, and we value our cooperative relationships with other people and other nations.

I want to emphasize the way a concern for peace can be overridden by the national interests. It has frequently been done in the past and will be done in the future. It is very easy for human beings in isolation from conflict—or the potential of a national conflict—to be pacifists and in favor of peace. It is always easy to give decent, kind, moral advice when one is not faced with a conflict of values oneself.

If you trace the history of pacificism in this Nation's history, Americans are pacifists when not confronted with the need or issue of preserving national self determination. I do not think this Congress would leave up to the States or leave up to the people in some disperse way the notion of what values can override the value of peace. We support the individual conscience, yes, but we do not allow national policy to be turned to the States on those kinds of issues.

Values such as self determination, personal well-being, freedom of conscience, and other widely held values can conflict with the life of the fetus, whether or not it is human. I want to make that point strongly because the humanity of the fetus is not the primary concern in this deliberation, just as the humanity of the Japanese, the Germans, and the Italians was not the issue during World War II. We did not debate whether they were human or not as a way of deciding whether war was a legitimate activity for the Nation.

Hence, while our Western religious and moral traditions have been pro-life rather than anti-life, when it is a matter of whose life is to be developed or denied, being pro-life does not resolve that issue. Given the diversity of values I mentioned above, it is not necessarily wrong for a democratic government to limit the free exercise of religion if that religion is undermining the principles of liberty that are the foundations of the democracy.

We believe in the free exercise of religion so long as religion does not undermine the liberties of the democratic society. It is not necessarily wrong to wage a war for peace, and it is not necessarily wrong to limit the development of a human life as an act of self-determination and personal well-being.

ABSOLUTE VALUES

The free exercise of religion is not an absolute value. Human life is not an absolute value. Yet we as a people tend to be idealistic and assume that all good things are compatible and capable of mutual realization, but some values are at times incompatible with other values. At those times, not all human values can be realized.

THE BIBLE AND ABORTION

Those of you considering whether or not to recommend the human life amendment to the Committee on the Judiciary should at least pause and ask yourselves why it is that nowhere in the Torah or the Christian scriptures is there any speculation on when human life begins, or any attempt to hand down a revealed truth on this matter.

The evangelical tradition of this country used to be that where the Bible speaks, we speak, and where the Bible is silent, we are silent. I would challenge you to challenge those from the evangelical tradition who are asking you to make a constitutional regulation on this matter to give the Biblical authority for their position, because it is not there.

That does not mean the Biblical tradition is not pro-life. It is pro-life. It observes a reverance for life. It is very concerned with developing life, but it does that not in the context or statement of any general abstract speculation or theory of what human life is, but by providing a supportive context for bringing new members into the human community so that the new members who are coming into the community are perceived as gifts of the Creator and are welcomed as gifts of the Creator.

SECULAR THEORY

The notion on the other hand that a child has a right to be born is a modern secular theory. It is a notion without scriptural warrant. It is a notion that signals a breakdown or radical transformation of religious communities in this society and indicates that the language of the communities of faith is no longer adequate for protecting the new members in the early stages of their development.

RELIGIOUS VALUES

Yet the state cannot do the work of the religious communities for them on this matter. A radical sense of the mystery or sanctity of human life, a sense that human life has a divine origin and likeness, a sense that human life is a gift and reflects the image of God in human beings, a sense that human life will flourish in religious communities, and a sense that parenting represents a special and distinctive calling, these are the convictions and sensitivites with which those are nourished who value fetal life at all its stages of development and welcome the born child alive into the world. No abstract law can nurture these convictions. Only religious communities about their proper business of ministering to one another and carrying out their distinctive activities in the world are likely to nurture and sustain again these convictions.

Constitutions and laws cannot and should not attempt to legislate moral substitutes—that is what we are talking about here—for religious values when the religious traditions that could be the carriers of those values refuse to take them seriously.

Indeed, we need to move to a point where we can base our public policy today on an understanding of the origins and backgrounds of two different value traditions that are currently shaping the American social system. One is indeed the tradition that is shaped by the Roman Catholic, Protestant, and Jewish religious communities.

In these religious traditions, there was not, prior to 1588—that is after the Reformation—any universally taught church position respecting the position of abortion. Up until then it was handled in different ways at different times in different parts of the church's history.

When Sixtus V in 1588 set forth an order that made all abortions, without discrimination as to time when the infant was aborted, what its age was, an immoral and sinful act, and made excommunication from the church a necessary penalty for anyone who engaged in abortion, that was the first church position that was taken and sanctioned on this matter.

It is interesting to note that the Roman Catholic Church turned that around in 1591 when Gregory XIV rescinded the order because it was not capable of being enforced. Then the position from 1591, which was the more moderate position, stayed in effect up until 1869. It was in 1869 that for the first time the Roman Catholic Church taught that abortion after conception is a sin. Even then they hedged it by saying it probably was 6 to 7 days following conception before it would be a serious sin.

What we have in this history is that the further the church has removed itself from engagement with the life of its people, the more the church—I am not talking about simply the Roman Catholic Church here—has become a beaucratic activity instead of a community of faith, the more widespread the concern has developed about abortion practices.

In my judgment, any religious body that wants to take a traditional stand on these matters should begin again with the rigorous discipline of its own membership, as Sixtus V did in 1588. It appears strange to me that religious bodies would ask the State to take actions that it is not able and willing to take with its own members. Are our churches and synagogues that out of step with their own membership that they will not enforce by acts of excommunication, a penalty, or withdrawal from the sacraments those they think are committing heinous sins?

During most of Jewish and Christian history the theory of when human life begins has had little to do, almost nothing to do, with the matter of the morality of abortion. The issue of abortion has been framed with reference to how to welcome—and prepare the context for welcoming—new lives into the membership of faith.

TWO VALUE TRADITIONS

There are religious and political value conflicts in our society today surrounding the abortion issue that do not in my judgment admit of constitutional resolution. In the current political and religious climate of the Nation, you are being asked to support the human fetus' right to be born alive or to support the noninterference of Government in women's freedom to choose according to their own conscience whether or not to have an abortion that is legal and safe.

These two values that you are being asked to sanction come from two different traditions. The freedom of conscience tradition underlies the bill of rights, and comes out of social contract theory. It is the kind of understanding of the role of Government in human society that was very dearly won.

However, that notion of the freedom of conscience was won following the wars of religion. The Thirty Years War ended with the peace of Westphalia. Germany's population went from 16 million to 6 million because Protestants and Catholics were fighting about how their values were going to be represented in the state.

Then in 17th century England, right up until the Act of Toleration was finally passed in 1689, bloodshed wreaked the countryside as one religious group after another religious group tried to instill in the Nation a specific policy on how that nation should operate its government.

The founders of our Nation who wrote the Declaration of Independence along with the Constitution had a recent memory of what was at stake in the separation of church and state. For them, the critical issue there was the freedom of the conscience.

I think that the people who are pro-abortion or who understand themselves as pro-choice are mistaken to put their chase in pro-choice kind of terms. The issue should be the freedom of conscience for the person who is acting very conscientiously on the basis of their own values when a conflict of values may be perceived to be present.

You have the freedom of conscience tradition that comes when religion failed to control the government the way it wanted to, either Protestants or Catholics in terms of England, Germany, and much of the Western World. Then you have the value of life tradition that has in fact been very carefully nourished throughout each of these religious traditions. Those collide as soon as one is faced with a particular situation of having to decide what am I going to do in this context, just as each of these religious traditions has been a tradition of peace.

JUST WAR CRITERIA

Christianity, both as Roman Catholic and Protestant, and Judaism, all value peace, but that does not mean that at most times in their history they had no ways by which they could make a decision about war. Those ways tended to be threefold. One was a pacifist position, which was we never compromise the value of human life, we never harm human life. Therefore, we will die before we will participate in actions whereby others will be killed.

The second was a crusade approach. I must say I think you are experiencing some of the crusade mentality on this whole approach to abortion. The crusade approach was that we are right, God is on our side, and we are going to change the infidels and force them by armaments, by whatever it takes, to accept our way of viewing the world.

Senator **Hatch**. Which side is doing the crusading? It seems like both sides are crusading.

Dr. **Reynolds**. This is certainly correct. The third side, and this is the one you have not been getting in any of the testimony I have seen, would be represented by the just war kind of tradition. That is the one that represents an acknowledgment that values can conflict, that it is not an easy matter to decide to go to war, but it is also not an easy matter to decide to be overwhelmed by someone else.

The just war tradition devised basically five criteria for determining whether a given war is just or not. I will not go through the details on them, but these are, first that it has to be declared by legitimate authority; second, it has to have a just cause; third, the good to be done has to be proportional to the evil that is to be wrought as well; fourth, it has to be fought with a just means; and, fifth, it has to have a probability of success. I say more about these in the text.

What the just war tradition would lead one to do in reflecting on the abortion issue is to recognize that the practice of abortion in

America raises a number of issues that permit one personally to be against abortion on religious and moral grounds—just as one might be against participating in war on moral and religious grounds—but to nevertheless judge that a public policy should be flexible and permit persons of various persuasions on the issue of abortion to act in ways that are true to their conscience and to their convictions.

THE COMMON GOOD

That is where I stand on this issue. I do not think a rigid public policy on abortion would be for the common good of the society. There are times when the concerned citizen needs to put the welfare of the Nation's common good above his or her own personal value stance, so long as one is not thereby coerced and does not coerce others to act in ways that are a violation of conscience.

CONSCIENTIOUS REFUSAL

Hence, I support the rigorous protection of the rights of those who do not in conscience approve of participating in abortion practices. In our concern to formulate a reasonable public policy on abortion, we should never forget that many of our fellow citizens consider abortion for any reason a serious and heinous sin.

ABORTION AS SIN

In the basic tradition of the church, especially prior to 1588, abortion was primarily dealt with as sin. That is why it was not dealt with in the natural law tradition, which was the church's way of establishing public policy for people who did not belong to the church.

PRESIDENTIAL COMMISSION

In closing, I would like to make one suggestion. That is, I would like for this committee to recall and for the Senate Judiciary Committee to recall the excellent work that was done on what was a very touchy, difficult, complex issue just a few years back that had to do with fetal research.

A Presidential commission was formed, scholars from a variety of persuasions were brought together, they met with the public, they worked together, and out of that they forged a national policy that was able to remove that issue as a serious public policy issue in the Nation. They did that by going through roughly the kind of procedures I mentioned in terms of just war kind of reflection on these matters.

There are ways and there are forums and there are contexts by which the churches can be brought to understand what their legitimate and appropriate and proper activity is on this kind of issue, and also by which the freedom of the conscience of the citizen can be protected.

I do not think any of the constitutional amendments now being considered address those issues, and those are the primary issues about how we are going to address abortion as a Nation. A Presidential commission should be established to develop national policy guidelines on abortion.

Thank you.

[The prepared statement of Dr. Reynolds follows:]

PREPARED STATEMENT OF CHARLES H. REYNOLDS

My name is Charles Reynolds, I am Professor and Head of The Department of Religious Studies at The University of Tennessee, Knoxville. My academic area of specialization is religious ethics. I have also taught courses on a regular basis in our medical ethics program, both at the graduate and the undergraduate levels. As Editor of The Journal of Religious Ethics from its inaugural issue in 1973 until this year, I have had the opportunity and the responsibility to review with care and rigor scholarly articles submitted to the academic journal for possible publication. It is as a religious ethicist that I speak with you this morning. I do not come as a representative of any particular constituency. My colleagues in religious ethics are deeply divided over the issues you are reviewing and receiving testimony on today. This is an issue that it is difficult to be rational and sane about without seeming to make others on all sides of the abortion debate who also think that they are rational and sane extremely upset and belligerant. Unfortunately, the important ethical, religious, and constitutional issues related to abortion practice seldom receive careful and caring analysis.

Before undertaking a statement on public policy issues related to abortion practice in our democratic society, with its deep ethical roots in the western religious traditions of Judaism and Christianity, I want to make some general remarks and observations. (1) We Americans value human life in all its stages of development. We also value animal life. And we value plants and the earth. (2) We Americans value our political liberties. We also value our religions and our freedom to worship as our conscience directs. And we value one another as equal citizens. (3) We Americans value peace. We also value individual and national self-determination. And we value our cooperative relationships with other people and other nations.

These values I have enumerated are only some of the broadly based values that are deeply shared by the American people. It is perhaps unfortunate that these deeply held values can conflict with one another or with similar values. Hence when we as a people waged war against Japan, Germany and Italy in the middle of this century, it was hardly because we failed to value peace or human life. Rather, we waged war because we valued national self-determination and perceived that value as threatened. To be sure, some American citizens argued that peace at any cost was more to be valued than the loss of life necessitated by defending national self-determination. But it was simply inaccurate when pacifists failed to perceive a conflict between multiple values and labeled Americans as war-mongers who did not value peace. Because in the real world deeply held values can and do conflict, we at times reluctantly decide that we must wage war at a cost to human life in all its stages of development in order to promote other values. Human life is deeply valued but is not a broadly shared absolute value for the American people.

I will review some religious grounds for opposing abortions in a few minutes, but for the moment I want to indicate that on moral grounds related to the deeply held values of the American people, one has not closed the case against abortion by establishing that the developing fetus is human from conception. As long as values such as self determination, personal well-being, freedom of conscience, and other widely held values can conflict with the life of a fetus, whether or not it is human, the case is not closed against abortion. To close the case, developing fetal life has to be considered an absolute value, just as pacifists make human life an absolute value as a way of opposing all participation in any war.

Although it is a logical possibility, taking human life at any stage of its development as an absolute is a minority position in the religious and moral traditions of the West. Hence while our western religious and moral traditions have been pro-life rather than anti-life, when it is a matter of whose life is to be developed or denied being pro-life does not resolve the issue.

Human life is not only a biological process, but includes some notion of self-determination and well-being as a dimension of the human. Matters are complicated as soon as we ask whose well-being is to take precedence in the tragic contexts in which decisions to give birth to the child or have an abortion are made.

Most women who have an abortion, whether the act is legal or illegal, do so after deciding for themselves that their well-being would not be served by carrying the fetus to term and having the child, even if the child could be put up for adoption. The decision has little to do with manifesting control over her body or with interpreting the fetus as a part of her body. Those rhetorical notions have nothing to do with the values at stake in a decision to choose to have an abortion. The value issues have to do primarily with whose well-being is to be furthered or given priority. Women who do not place priority on the fetus's well-being will frequently decide to have an abortion, even when the abortion is illegal. Just as women who place a priority on the fetus will carry to term and give birth to a child, even when abortion would be legal. Legality has little to do with the value issues. How the fetus is perceived, and whether or not it has a high value, has primarily to do with how one understands one's parental relationship to a prospective child, whether the child is to be kept or put up for adoption.

Given the diversity of values I mentioned above, it is not necessarily wrong for a democratic government to limit the free exercise of a religion if that religion is undermining the principles of liberty that are the foundations of the democracy; it is not necessarily wrong to wage war for peace; and it is not necessarily wrong to limit the development of a human life as an act of self-determination and personal well-being. The free exercise of religion is not an absolute value in a democracy. And human life is not an absolute value, in any stage of its development. As a people we tend to be idealistic and assume that all good things are compatible and capable of mutual realization. But some values are at times incompatible with other values. At those times, not all values can be realized.

Stanley Hauerwas, who teaches Theology at The University of Notre Dame, has recently written, "There is no theological means to determine when (human) life begins. Indeed, a Christian understanding of the morality of abortion should make such a question irrelevant." (A Community of Character, 1981:288) This is also true for Judaism. Those of you considering whether or not to recommend a human life ammendment to the Committee on the Judiciary, should at least pause and ask yourselves why it is that nowhere in the Torah or the Christian scriptures is there any speculation on when human life begins or any attempt to hand down a revealed truth on this matter. And why is it that Judaism and Christianity have had no difficulty in entertaining and permitting a variety of speculative theories on this topic by distinguished Rabbis and theologians without having the need of a doctrinal formulation?

The evangelical tradition in this country used to be, "Where the Bible speaks, we speak; and where the Bible is silent, we are silent." On the matter you are considering today, there is no scriptural authority. Each of these traditions, however, does have good doctrinal and ritual grounds for limiting the practice of abortion among its faithful. I do not know ~~for~~ of any instance in the writings of a Rabbi or a Christian theologian where abortion is recommended as a good practice. When it is permitted in any form, it is understood as an indirect action or action for which a tragic choice is recognized as permissible. But the prohibitions on abortion in the western religious traditions are far more numerous than the occasional statement that an abortion may be permissible.

I do not recall statements by Rabbis or theologians prior to the twentieth century where an abortion was judged permissible because it was thought to be in the best interest of the child. Life as born life is always thought to be in the best interest of the child because life outside the womb provides an opportunity to join a people in living out God's way in obedience to his calling. Viewed in this light, to parent a child is to participate in the creative activity of bringing forth a new member of the religious community. The birth is an occasion for religious joy and celebration. Parenting thus has a religious dimension or is a religious vocation. The child is a gift to the parents and to the religious community. To abort a child is to refuse a gift and to thwart God's creative activity.

The notion that a child has a right to be born is a modern, secular theory. It is a notion without scriptural warrant. It is a notion that signals a breakdown or radical transformation of religious communities in our society and indicates that the language of the communities of faith is no longer thought to be adequate for protecting the new members in their early stages of development.

From my perspective, what is tragic about the call for a human life ammendment is that the state is now being asked to protect developing human life because the religious communities have failed so completely in transmitting their values in the culture. But the state cannot do the work of the religious communities on this matter. Making abortion illegal will mean that more women will have serious complications from the abortions they will have, and will permit some people who disapprove of abortion to pretend that we are now a more moral people because abortion is less visible, but it will not keep most women from seeking and obtaining a desired abortion.

A radical sense of awe at the mystery or sanctity of human life, a sense that human life has a divine origin and likeness, a sense that human life is a gift and reflects the Imago Dei through an alien dignity, a sense that human life will flourish in religious community, and a sense that parenting represents a special and distinctive calling, these are the convictions and sensitivities with which those are nourished who value fetal life at all its stages of development and welcome the born child alive into the world. No abstract law about when human life does or does not begin can nurture these convictions. Only religious communities about their proper business of ministering to one another and carrying out their distinctive activities in the world are likely to nurture and sustain again these convictions. Constitutions and laws cannot and should not attempt to legislate moral substitutes for religious values when the religious traditions that could be the carriers of those values refuse to take them seriously.

Instead of receiving news of pregnancy as a sign of God's blessing and favor, many women today view their pregnancy as a curse, a contraceptive failure, and an impediment to their life plans. They believe that neither God nor the state has a legitimate interest in what they decide to do about their pregnancy. Some want the state to provide them the benefit right of a free abortion. But even more than the benefit right, they want the freedom of conscience and right of non-interference to make up their own mind, perhaps in consultation with friend or family, about whether or not to abort or have a child. Harris v. McRae upholds denying the benefit right. Roe v. Wade affirms the privacy right of non-interference prior to viability. Although Roe is contrary to the traditional religious values that relate to sexual ethics and the condemnation of most abortion practices in Judaism and Christianity (see David Feldman, Birth Control in Jewish Law, 1968, for a careful review of the complexities and exceptions in Judaism), the Blackmun opinion is not out of step with the basic values held on these matters by a majority of U.S. citizens today. Indeed, the right of freedom of conscience in these decisions, the notion that individuals have a right to self-determination in their life plans, including their sexual practices, and the right to be free from the government's interference are deeply held values by many American citizens, a large number of whom are active and in good standing in their churches and synagogues.

In my judgment, any religious body that wants to take a traditional stand on these matters should begin with the rigorous discipline of its own members. It appears strange to me that religious bodies would ask the state to take actions that it is not able and willing to take with its own members. Are our churches and synagogues that out of step with their own memberships? Not all are. For many Christian and Jewish organizations and religious bodies have endorsed an individual's right to freedom of conscience in abortion decisions. These positions are not based primarily on a notion of when human life begins, but on who should make the decision in a tragic situation.

During most of Jewish and Christian history, the theory of when human life begins has had little to do with the religious teachings on the morality of abortion. If the aim of human life is to participate in the religious community and to serve God and glorify him forever, it really does not matter whether or not human life begins with the emergence of the head at birth (as in Palestinian Judaism), or at forty to eighty days from conception, as in much of Christian history, or at conception, which is the modern Catholic theory. As John Calvin remarked about Menno's notion that in procreation the woman's role is receptive only since the father is the real origin of his child, "This is not a theological issue...accordingly, I shall not touch upon matters that belong to philosophy and medicine." (Institutes, 2:13,3) Because the theological issue was how the child would be received into the community of faith, it made little difference where the origin of human life was located on the spectrum from conception to birth. Indeed, that did not always even regulate the theory of when and how to baptize infants. For although Martin Luther seems to have located the beginning of human life at conception as a way of securing his notion of how original sin is transmitted, he nevertheless remarked, "There remains the question, whether it is right to baptize an infant not yet born, with only a hand or a foot presenting. Here I will decide nothing hastily, and confess my ignorance. I am not sure whether the reason given by some is sufficient, - that the soul resides in its entirety in every part of the body, for it is not the soul but the body that is externally baptized with water. Nor do I share the view of others, that he who is not yet born cannot be born again, even though it has considerable force. I leave these matters to the teaching of the Spirit, and meanwhile permit every one to abound in his own sense." (The Babylonian Captivity of the Church, 1520)

There is something refreshing in Calvin's way of recognizing that not all issues are theological issues and in Luther's recognition that in certain areas of dispute he would permit everyone to abound in his own sense. There are matters which the great theologians recognize to be beyond human resolution. On those matters, they recognize their limitations of office and discipline and permit others to address them.

There are religious and political value conflicts in our society today surrounding the abortion issue that probably do not admit of proper constitutional resolution. In the current political and religious climate of our nation, you are being asked to support the human fetus's right to be born alive or to support the non-interference of government in women's freedom to choose according to their own conscience whether or not to have an abortion that is legal and safe. The freedom of conscience that modern democratic societies support was not a freedom that was won easily. The Thirty Years War between Protestants and Catholics that ended with the Peace of Westphalia in 1648 reduced Germany's population alone from 16 million to 6 million. The seventeenth century struggles in England that produced the toleration act of 1689 also took their bloody toll. When this nation was founded, those who forged our Constitution and Bill of Rights were aware of this recent history, and they knew the dangers of a failure to build a wall of separation between church and state. Modern democratic states are both a product of the polity of the free Christian churches and an attempt to establish a neutral forum for regulating the free exercise of religion.

In closing I want to make use of some helpful criteria associated with just war theory to focus the critical public policy issues that need to be carefully addressed to any proposed constitutional ammendments or legislative acts designed to circumvent or overturn Roe v. Wade. Just war theory has been the alternative to passivist and crusade approaches to war in the Christian tradition. The passivist makes life an absolute value and refuses to participate in any violent acts, including war. The crusade approach is to declare a given war a holy war, to brand the opponents as infidels, and to deny any limits to the acts of aggression and violence that can be used to wage the war. The just war theory represents a search for criteria to be used both for initiating war and for prosecuting the war. Among the criteria I want to mention briefly in relation to your deliberations are: (1) declared by legitimate authority; (2) just cause; (3) proportionality of good achieved to evil wrought; (4) just means; and (5) probability of success.

Legtimate authority. Given the constitutional structure of our nation, and its separation of powers in the branches of government, it would be highly unfortunate for the Congress to fail to respect the legitimate authority of the Supreme Court, or other Federal Courts, with an action that has the appearance of the denial of the authority of the Supreme Court. Given the role of the Catholic Bishops in supporting a human life ammendment or act, such a move by the Congress would make for bad religious relations between many religious bodies in this country. Our nation does not need that additional source of divisiveness. The game should be played straight and by the traditional rules. If a Constitutional Ammendment is proposed and passed, the law on abortion and the rights of fetal life would change. If the Constitutional Ammendment did not pass, I would expect some additional shifts in the direction of circumscribing and narrowing Roe anyway in the years ahead.

Just Cause. Do the number of abortions performed legally today, compared with the number performed earlier when abortion was illegal, justify making a major issue over whether or not abortion is again primarily illegal? Do the injuries to women when abortion is illegal influence your judgments on this matter? How serious a harm is being done to American society by permitting legal abortions?

Proportionality. How do you weigh the value of women's freedom from the interference of government in regulating their decisions about abortion in relation to the value of the percentage of fetal lives that would be saved by restricting women's conscience and choice of abortion options? Would your actions fall heavier on the poor? What would that mean for the country?

Just means. Are fair procedures being used by those supporting this legislation in Congress and throughout the political process? If not, what can be done to instill a greater sense of fairness? If yes, how is the public being assured that fair processes are being followed?

Probability of Success. Are the resources of government being well used in addressing this issue, because a good has a reasonable probability of being achieved, or are important resources being wasted that should be applied elsewhere.

As you will readily observe, the passivist and crusade approaches have a simplicity the just war criteria do not permit. These criteria demand that a public policy be carefully examined from a number of perspectives. The practice of abortion in America raises a number of issues that permit one personally to be against abortion on religious and moral grounds, but to nevertheless judge that a public policy should be flexible and permit persons of various persuasions on the issue of abortion to act in ways that are true to their conscience and convictions. That is where I stand on this issue. I do not think a rigid public policy on abortion would be for the common good of our society. There are times when the concerned citizen needs to put the welfare of our nation's common good above his or her own personal value stance, so long as one is not thereby coerced, and does not coerce others, to act in ways that are a violation to conscience. Hence I support the rigorous protection of the rights of those who do not in conscience approve of participating in abortion practices. In our concern to formulate a reasonable public policy on abortion, we should never forget that many of our fellow citizens consider abortion for any reason a serious and heinous sin.

But you should also never forget that while there is a consensus in the Jewish and Christian traditions that religious convictions provide a firm foundation for considering abortion a serious moral issue, there is not a consensus that abortions should never be practiced, even by faithful Jews and Christians. As Karl Barth, the most prominent protestant theologian of our century wrote, "Let us be quite frank and say that there are situations in which the killing of germinating life does not constitute murder but is in fact commanded." (Church Dogmatics 3:4,421.) It is instructive that Barth includes this sentence in a section on the "Protection of Life" after stating in the previous section on "Respect for Life" that Christians have good theological grounds for believing that "he who destroys germinating life kills a man," a ..."child ...for whose life the Son of God has died." (416) Notions about the humanity of the fetus are not decisive in our religious heritage for determining whether or not a given abortion is morally permissible.

Thank you for the opportunity of providing this statement. I will be available for any further questions.

Senator HATCH. Thank you so much, Professor.

Bishop Hunt, I have about 5 minutes before I have to leave for a vote. If you would like to give your testimony within that time, I will be glad to listen, or if you would like me to go over and vote and come back, we will recess until then.

Bishop Hunt. I would prefer to do that.

Senator HATCH. We will recess the committee until I can get back from the floor.

[Recess taken.]

Senator HATCH. The hearing will come to order again.

I apologize for taking so long. We have another great moral issue going on over there on the Clinch River breeder reactor. I am afraid that it took me a little longer than I thought.

Bishop, we are happy to take your testimony at this time.

STATEMENT OF BISHOP GEORGE HUNT, EPISCOPALIAN DIOCESE OF PROVIDENCE, R.I.

Bishop HUNT. Thank you, Mr. Chairman.

My name is George Hunt. I am the bishop of the Episcopal Diocese of Rhode Island.

I wish to thank you and the committee for the invitation to testify before you. My prepared remarks will deal with the official position of the Episcopal Church, and I would like to follow that statement of position with a short discussion of some of the issues underlying that stance, and then follow that with a brief presentation of my own personal posture with respect to the issue.

In 1976, the Episcopal Church, meeting in its general convention, which is the highest legislative authority of the Episcopal Church, adopted the following as the official position of the church.

> It is imperative for the church as the Body of Christ to provide clear guidelines for human behavior which reflect both the love and the judgment of God. The following principles and guidelines reflect the mind of the Church meeting in this 65th General Convention:
>
> 1. That the beginning of new human life, because it is a gift of the power of God's love for his people, and thereby sacred, should not and must not be undertaken unadvisably or lightly but in full accordance of the understanding for which this power to conceive and give birth is bestowed by God.
> 2. Such understanding includes the responsibility for Christians to limit the size of their families and to practice responsible birth control. Such means for moral limitations do not include abortions for convenience.
> 3. That the position of this Church, stated at the 62nd General Convention of this Church in Seattle in 1967 which declared support for the 'termination of pregnancy,' particularly in those cases where 'the physical or mental health of the mother is threatened seriously, or where there is substantial reason to believe that the child would be born badly deformed in mind or body, or where the pregnancy has resulted from rape or incest,' is reaffirmed. Termination of pregnancy for these reasons is permissible.
> 4. That in those cases where it is firmly and deeply believed by the person or persons concerned that pregnancy should be terminated for causes other than the above, members of this Church are urged to seek the advice and counsel of a Priest of this Church, and, where appropriate, Penance.
> 5. That whenever members of this Church are consulted with regard to proposed termination of pregnancy, they are to explore with the person or persons seeking advice and counsel other preferable courses of action.
> 6. That the Episcopal Church expresses its unequivocal opposition to any legislation on the part of national or state governments which would abridge or deny the right of individuals to reach informed decisions in this matter and to act upon them.

This statement was reaffirmed by the 66th general convention in 1979 in precisely the same words, and only last month the House of Bishops of the Episcopal Church unanimously reaffirmed the statement in their annual meeting.

Behind this official statement of my church on the matter of abortion lie several issues which may be of use to the committee as it considers the bills before it.

The basic issue has to do with the definition of the time when a living group of cells may be considered a person. Three of the bills before this committee, Senate Joint Resolutions 17, 18, and 19, introduced by Senators Garn, Grassley, and Helms, deal directly with this issue.

Some people believe that a person begins to exist at the moment of conception. Others claim the critical moment of personhood, or the ensoulment, or animation, is at the time of quickening, while others adhere to a time at which the fetus is viable and able to live outside the womb. Still others focus on the birth event as the beginning of a new separate person.

No one in the Episcopal Church would deny that at every stage from fertilized ovum through the various fetal stages life is present. The question is whether at any given stage a person is present.

There is no theological agreement on when a living organism becomes a person. Nor is there agreement among philosophers, nor among the medical profession, nor among the social and life sciences. Given this, we must admit the plain fact that we do not know when persons begin to exist. Practitioners in these various fields have opinions, even informed opinions, but none can admit to certain knowledge.

The first major premise lying behind the church's position on abortion is a reflection of this fact. When any issue is problematic, that is, when the facts of an issue cannot be known with certainty, then the matter is subject to decision but not, Senator, to conclusion.

To remove from individuals in such a case the right of decision, the power of making choices as responsible persons is, in the view of this church, immoral. For it is precisely the ability to be responsible decisionmakers that allows us to exercise our true humanity.

This church has no quarrel with those of other religious bodies who choose to give up their right to choose when faced with the issue of abortion, or any issue of morality. However, we resist with all the strength at our disposal the attempt by any person or religious group or state to take that personal right of free choice in moral decisionmaking from anyone.

Second, there lies behind the church's position the issue of dealing fairly with the facts. If we do not in fact know when a fetus can be considered a person, then no person, and especially not the State in its legislative processes, has the right or the ability to create facts by fiat. Merely saying that a fetus is a person does not make it so. The facts of the situation are not subject to legislation. They simply are what they are.

Last week, a priest in my diocese refused to attend a dinner on Friday because meat was to be served. Another priest jokingly suggested that I simply declare the meat to be mackerel, thus solving the first priest's problem. Quite obviously, in my position as bishop of the diocese, I can dispense the priest from the rule of not eating meat on Friday, but I cannot change beef into mackerel simply by declaring it to be so. What I declare has no bearing on the fact that meat is meat, not mackerel.

If the facts are unclear as to when personhood begins in the life of a fetus, then no amount of legislation will in fact make them clear. The church must insist that we do not play fast and loose with the truth.

A third issue behind the church's position is one we would call the pastoral, that is, an issue dealing with compassion and justice in the lives of people faced with ambiguous and difficult situations. I refer here to those pregnant women who are faced with the need to make a decision about aborting the fetus within them.

All four proposals could make criminal a decision to abort for whatever reason and force some women to seek illegal and life-threatening means to that end. Abortions will continue to be performed. Wealthy women will continue to find safe and acceptable means, but women of modest circumstances will be subjected to both criminal liability and physical danger. The church cannot condone legislation which exacts such a personal and social cost from citizens of our country. Human compassion and a sense of elemental justice forbid it.

Fourth, it is the church's position that issues of religion and morality, that is to say, issues which by their very lack of clarity demand personal responsible decisions, should not be subject to legislation. Most such issues are subject to advice and even regulation within religious bodies in this country, including my own. However, it is not appropriate for any religious body to use the state to coerce all citizens into conformity with its particular precepts.

We have all had considerable experience in the United States with such legislative attempts: prayer in the public schools, birth control, the prohibition of alcohol to name but a few. They have inevitably worked against the well being of the body politic as well as that of individuals.

In a pluralistic society, the truth is always larger than any one human configuration. The church considers it important for our society to uphold the constitutional values of religious freedom, so that, while church—of any denomination—may instruct its adherents according to its particular understanding, it must not impose its own values on other church bodies or citizens of the state whose reasoned understandings and values are different from or in conflict with its own, in such a way that their freedom is diminished. To do so violates the guarantee of religious freedom and, in a democracy, runs the serious risk of imposing the view of a minority on the majority.

I would like now to state some personal views. The issue of abortion, whenever it arises in concrete form, is a matter of the most profound significance for the individual, for the church, and for society at large.

When encountered in the life of a woman or a family contemplating the choice, it is not simply a matter of reasoning and thinking, but a time of emotional turbulence and a great deal of personal pain. In individual cases, there are manifold variables and circumstances and motivations. I am profoundly aware that there are no typical cases but only persons in difficult circumstances.

Even so, with that profound awareness, my personal posture is that except in those carefully noted instances in the church's official statement I do not advocate abortion as a first consideration when a person or family is faced with an unexpected or undesired pregnancy. Nor do I advocate abortion on demand or as a convenient means to rid oneself of a difficult situation. Nor would I encourage abortion as a means of birth control or regulation.

I do believe, however, that without the element of choice there can be no morality. I can see the possibility that circumstances other than those presented in the church's official position may obtain. There will be times when the interruption of that life giving process leading to personhood and birth is clearly the lesser of two evils and should be exercised.

My fear is that, if the state should interfere with the already difficult process leading to the decision to abort, personal responsibility will be lessened and additional suffering will be forced on the parties involved. The net result of such legislation as is proposed will be, I believe, that a few will be confirmed in their self righteousness and a great burden will be laid on many, and especially that this burden will fall primarily on the poor in our society.

In my own thinking about these issues, three articles have been particularly helpful to me and I have appended them to copies of this testimony which the committee has received.

Senator HATCH. Without objection, those will be included in the record with your statement.

Bishop Hunt. Thank you.

The first is a legal and philosophical view of the proposed legislation by Charles Kolb who practices law in this city. The second is an ethical view by Joseph Fletcher, a leading ethicist in the Episcopal Church. The third is a theological view by Walter Dennis, suffragan bishop of the Episcopal Church in the Diocese of New York.

The articles deal with the issues I have presented in considerable technical detail. They are not lengthy, and they have the virtue of being remarkably well written, painless in fact. I hope they are as useful to you as they have been to me.

Again, Mr. Chairman, I would like to thank you for your time and your kindness in having me here today.

[The articles submitted by Bishop Hunt follow:]

[FROM THE AMERICAN BAR ASSOCIATION JOURNAL, SEPTEMBER, 1981]

THE PROPOSED HUMAN LIFE STATUTE: ABORTION AS MURDER?

By Charles E.M. Kolb

WHEN does a person begin? When does a person cease?

It is probably safe to conclude that we are no nearer to answering these questions now than almost 240 years ago when David Hume's *A Treatise of Human Nature* "fell," as he expressed it with unintended irony, "dead-born from the Press." Recent public debates over abortion and euthanasia have served to dramatize questions that have puzzled philosophers, scientists, and ordinary citizens for centuries. Advances in medical science have made it possible to prolong "life" in the strict physiological sense almost indefinitely. But does this mean that a "living" body sustained only by a respirator and by life-support systems is a "person"? Would pulling the plug—or, alternatively, failing to plug in the respirator—constitute murder?

These questions have arisen with increased intensity with respect to a recent development in the abortion controversy. Is, for example, terminating a fetus the termination of a person? In its 1973 landmark abortion decision, *Roe v. Wade*, 410 U.S. 113, the Supreme Court declared that it did not have to decide when life began in order to resolve the abortion issue: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Accordingly, the Court refused to decide when a person came into existence, and Justice Blackmun concluded that "the word 'person,' as used in the 14th Amendment, does not include the unborn."

The Court's ultimate resting point was premised on the wholly unsatisfactory concept of fetal viability: abortions during the first two trimesters of pregnancy when the fetus was generally nonviable were, with minor qualifications, legal. Abortions performed in the last trimester, except for certain medical emergencies, were not.

Roe v. *Wade*, however, raised more questions than it answered. First, there was the unresolved "personal identity" question. What if there really is a person in the womb from the moment of conception? If this is the case, viability —a purely scientific notion—is irrelevant. Second, what if medical science advances to such a state that viability outside the womb becomes possible at a much earlier point in time (say conception or shortly thereafter) than is now possible? If this occurs, then the Supreme Court's rationale has effectively been "overruled" by technology. *Roe* has left many of these fundamental issues unanswered for almost a decade.

Enter now the Congress. Now pending is a right-to-life statute that purports to settle every issue left open by the Supreme Court. Introduced by Jesse Helms in the Senate and Henry Hyde in the House of Representatives, the statute is a device for resolving the open issues by simply legislating an end to all uncertainty. The statute decrees that "human life shall be deemed to exist from conception." The outcome is both clever and thorough. It is also one of the most Draconian and potentially divisive legislative exercises since Prohibition. The logic is relentless: if a person exists from the moment of conception, then abortion is murder.

The legal exegesis for this statute has been provided by its originator, Washington lawyer Stephen H. Galebach, whose article, "A Human Life Statute," was recently published in the *Human Life Review* and has been the focus of national attention. Columnist William F. Buckley, Jr., described Galebach's thesis as a "dazzling constitutional insight." *Time* devoted a cover story to the issue, and author Galebach has defended his theory on "The Today Show" opposite Harvard constitutional law scholar Laurence Tribe.

Galebach's thesis is that the Congress, as a matter of constitutional law, has the power and authority to adopt legislation enforcing what he claims is the 14th Amendment's "protection of life." He writes that "when a term of the 14th Amendment cannot be defined by the judiciary in concrete application to a category of beings — here the unborn — then the definition of that term by Congress is appropriate legislation to enforce that amendment."

The debate on the human life statute no doubt will be vigorous. At the same time, it should be principled and clear-headed. Galebach's efforts challenge opponents to do battle with him on the merits, and not only by merely disagreeing with his outcome, his politics, or his religious beliefs.

I strongly disagree with Galebach's thesis (not because I am prochoice as opposed to prolife), and I think that his theory can be rejected on numerous grounds. In short, while it can be demonstrated that his argument is unconstitutional as a matter of legal interpretation, it also can be shown that it reflects an inadequate understanding of philosophy and a dangerous approach to American political decision making.

Galebach uses terms such as "life," "human life," and "person" interchangeably. But they are not interchangeable, and it is this fundamental misunderstanding that undermines his 14th Amendment analysis.

Galebach's essay states that the 14th Amendment protects life. That is incorrect; it protects "persons." The amendment says that no state "shall . . . deprive any person of life, liberty, or property, without the due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There can be no question that whenever we have a "person" we have "life" in the physiological sense. To state, however, that whenever there is physiological "life" there is necessarily a "person" in existence does not necessarily follow. For Galebach, however, it does follow because his statute simply declares it to be so. For philosophers who have contemplated this question for hundreds of years, the answer is less certain.

That Galebach's 14th Amendment analysis proceeds by a tautological sleight-of-hand is apparent when he states: "If Congress decides that unborn children are human life for the purpose of the 14th Amendment's protection of life, it follows *logically* that they are 'persons' as well. By common usage of language, any human being must be recognized as a person."

Unfortunately, the epistemology at work here is all wrong. Galebach equates "unborn children" and "human life" with "persons." But this does not follow logically, unless, of course, you assume that whenever there is physiological life there is a person. The 14th Amendment does not command that equation.

To the drafters of the 14th Amendment, problems of abortion and the status of the fetus probably were not issues. They have only become issues because of modern scientific advances. At the same time, when the drafters used the term "person," they no doubt meant it to accord with the commonly accepted practice and meaning. Medical science, however, has provided the occasion for expanding and complicating that meaning. Galebach now says that the meaning of "person"—a term in the text of the 14th Amendment—can be settled by legislative fiat to include "unborn child" and "human life."

The long-settled rule of constitutional law is that questions of constitutional textual interpretation are for the Supreme Court, not the Congress. Galebach concludes that Congress can fulfill the definitional void because, as he puts it, the 14th Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article," which protects life. The amendment, however, protects persons from the loss of life. It does not protect "life" per se as an abstract concept, but rather persons from losing or otherwise being deprived of "life, liberty, or property."

The scope of constitutional protection, insofar as that scope has been a matter of the textual interpretation of specific terms, has always been a matter ultimately committed to judicial review, not legislative fiat. Interpreting a specific term in the text of the Constitution is not the same thing as determining a "legislative fact." For these reasons, the human life statute must be considered unconstitutional.

But there is philosophical confusion, as well. I stated that "life" could not be equated with "person"—that while all "persons" are alive, not all "life" or even, for that matter, "human life" is necessarily a "person." Where Galebach differs, obviously, is in his assumption that wherever there is human life in the physiological sense, there is a person. This conclusion does not necessarily hold.

Galebach ignores more than 200 years of Anglo-American philosophy with respect to personal identity. This philosophy, while occasionally abstruse, has posed a number of challenging questions overlooked by Galebach and his congressional supporters. Traditionally, at least in Western philosophy, the concept of personal identity has been a unitary, psychophysical one. Both bodily (physical) existence and psychological continuity (of which memory or consciousness perhaps may be the most important characteristics) are necessary to our notion of "person." Eliminate one from the other or separate them, and our entire concept of "person" begins to break down.

Suppose tomorrow morning I wake up and discover that I now possess my sister's memories and she possesses mine. Note that I did not say that I was my sister. Assume further that while in this condition I stab my neighbor to death. A day later our memories revert to their original bodies. Whom do we charge with the crime? Me? My sister? Or some third "person" who went out of existence? While my arm did the act, her consciousness provided the stimulus.

Absurd as this example may seem, it serves to tell us something about how we conceive of a "person." Our present conception of the insanity defense is not entirely unrelated to this example: diminished responsibility for one's actions in such instances is predicated on the belief that an "insane" person's mind should be divorced from his bodily actions for purposes of legal accountability. Society then tries to cure the mind, not punish the body.

Our concept of "person" seems to require the simultaneous functioning of mind and body, working together in the same organism. Consider, for example, this passage from Admiral Byrd's autobiography, *Alone*, describing his weeks in an outpost far inside Antarctica when both his mind and body were on the verge of breaking from the severe strains he was experiencing: "Do the mind and body exist separately along parallel lines? Is the physical part mostly mental, or the mind mostly physical? Indeed, how much division is there between mind and body? The body can take charge of the mind, but isn't it natural and best for the mind to take charge of the body? The brain is part of the body, but I am not conscious of my brain; the mind seems to be the real 'eye.'"

Byrd is raising all the right questions, and the answers are not immediately apparent. Nevertheless, through his own experiences, he was able to articulate something fundamental about the concept of "person."

The contemporary British philosopher David Wiggins discussed the problem of personal identity in these terms: "It would be better . . . to analyse *person* in such a way that coincidence under the concept *person* logically required the 'continuance in one organized parcel of all that was causally sufficient and causally necessary to the continuance of essential and characteristic functioning, no autonomously sufficient part achieving autonomous and functionally separate existence.'"

As a matter of philosophical principle, our concept of "person"—our ability to explain what it is we mean when we use the term "person"—will necessarily fall apart unless we adopt Wiggins's concept. As Sir A.J. Ayer has acknowledged, "it may well be thought a defect in my position that it requires the existence of these psychophysical relations to be assumed 'a priori.' But if this is a defect, it is one that I see no way to remedy."

If Wiggins and Ayer are correct (and if they are not, we will not even be able to discuss the issue intelligently as our language, logically, will break down), then any separation of or lack of continuity in this psychophysical relationship will entail the conclusion that a person does not exist. One can reach this conclusion, moreover, even when there is still the presence of "life."

Take the example of a brain-dead body. The mind is totally dead yet the body "lives" through life-support systems. In many instances these bodies can "live" almost indefinitely—a process which probably constitutes the perfection of the mummification process. But does a "person" exist? Would unplugging the respirator and other life-support systems constitute murder? The answer is no.

This analysis permits us to deal with the equally important question of when a person ceases, as well as when a person begins, and it does so in a principled fashion that, unlike the Supreme Court's concept of viability, is not subject to becoming outdated by technological advances. With respect to the fetus, the answer provided by this analysis is a developmental one, controlled by the fetus and not modern science. At the moment of conception, while there is life, there is no "person." At some point, probably between the fourth and ninth month of pregnancy, the fetus develops physiologically to the stage where a united, functioning mind and body exist. At that point abortion would be murder. At that point there are two lives at stake, not one, and the state is fully justified to act on behalf of that unborn person. But not before.

As a lawyer, what I cannot say is precisely when that point of psychophysical unity in the fetus occurs. Since it probably varies from pregnancy to pregnancy, there probably will never be a definite answer, since the point we are searching for is not static like conception in the sense that it clearly can be identified but rather developmental in the same sense that maturity is. But what I can say is that the point of psychophysical unity does not exist at the moment of conception; nor does it exist until several weeks into a pregnancy. Until that point is reached, the woman should have the right to terminate the life within her womb because that life is not yet a person.

Galebach's article commits a fundamental philosophical mistake: it ignores the distinction between "is" and "ought." As Hume taught, to say or determine that something is the case is not the same as concluding that it ought to be that way. With respect to the proposed human life statute, the typical is-ought controversy is inverted, with its proponents, in effect, arguing that because something ought to be the case, they can simply mandate that it is the case.

Galebach writes that "the crucial point, however, is that Congress does not need to be *certain* of an answer before it declares a national policy on when human life begins." Declaring when human life begins, however, is not a policy question but rather a fact question. Policy questions deal with what ought to be the case; fact questions deal with ascertaining what is the case. It simply makes no sense to speak of having a national policy with respect to a fact. It simply is or it isn't, and declaring it to be the case (if it isn't) won't change things much.

Suppose that for reasons of national policy with respect to defense or space exploration we need to know whether there is life in Galaxy X. At this point, we are, at best, uncertain about the answer. But we nevertheless need to know. So Congress, desirous of implementing its policy goals, simply legislates that life exists in Galaxy X. This answers the question for sure, but how many of us would feel satisfied that the answer is true?

Americans, so a British friend once said, are always confident that every problem has a solution, that every difficulty can always be resolved. While optimism in the face of challenge and uncertainty may lead to perseverence and frequently to success, there is always the danger that failure to resolve a problem or failure to resolve it to one's liking will result in an arrogant disregard for differences of opinion. As a political matter, it is this aspect of the Galebach theory that I find not only unsupportable but fundamentally dangerous to freedom-loving people who resolve issues by trial and error along with persistent, penetrating thought.

The Galebach theory holds that since we cannot be certain about when a person or human life begins, we can nevertheless cut off all further inquiry and mandate certainty. As a matter of political theory, one can do that with policy questions. That is what the "ought" is about—an issue that can and should be resolved by elected representatives. It is when elected representatives assume the arrogant posture of legislating reality or facts that they have overstepped their authority as well as the checks and balances inherent in our political system. It is this feature of the human life statute that creates the most outrage and concern. I say this not because I am prolife or prochoice, but because what the statute seeks to accomplish is fundamentally repugnant to principles of democratic freedom. George Orwell assured us, when he coined the term "doublethink," that we are capable of ascertaining the facts for ourselves. If the facts are complicated, stating that they are otherwise will not make them so. If, on the other hand, we are forced to believe that certainty exists when in fact it does not, or, if we are forced to swallow a policy based on a "fact" that we may or may not believe, then we have sacrificed more than just a fact. We have sacrificed our minds and our freedoms.

Galebach has an answer to this argument, albeit an unsatisfactory one. He notes that Congress is often called on to make decisions in the light of imperfect or uncertain evidence:

"Congress has often taken action to

protect life when the uncertainties were at least as great as in the matter of abortions. Regulating the use of new, relatively untested drugs, regulating or refusing to regulate the use of tobacco, requiring passive restraint devices in cars—all such actions involve a calculation of the risk that human life will be lost without federal action, combined with a rough weighing of how much we value the possible risk of loss of human life. In all these decisions the protection of life conflicts with the convenience of many people. Sometimes, as for instance with drugs, the protection of persons from possible harmful effects conflicts directly with the grave medical needs of other persons. Decisions related to possible risks to human life are not only appropriate for Congress, they are far more appropriate for Congress than for the courts."

His analogies are inapposite, however, for a variety of reasons. Risk calculations depend on probabilities and statistics with respect to expected occurrences. Regulating relatively untested drugs is different from defining when a person begins or ends. The uncertainty with respect to the drugs relates to the frequency of harmful occurrences, not to the fact that the drugs may be harmful. The risk analysis tells us with a reliable degree of certainty that in some instances the drug will be harmful. That determination is a proper legislative fact. Depending upon the probability analysis, the regulatory agency then promulgates its policy with respect to ultimate licensing and marketing of the drug.

Risk analysis, however, tells one nothing with respect to whether we have a person inside the womb at the point of conception. Either there is or there is not. Period. Probability and statistics are no guide to resolving this type of factual question.

As Professor Tribe in *American Constitutional Law* recognizes: "Congress . . . possesses the power to investigate and to compel testimony in connection with the exercise of its powers of self-regulation." He further notes that investigations "in aid of legislation encompass 'inquiries concerning the administration' of existing laws as well as proposed or possibly needed statutes." Yet, at the same time, the "congressional power of investigation is . . . limited by the separation of powers. Congress may not usurp the functions of the courts." It is, after all, the very bedrock of American constitutional law that it is up to the courts, not Congress, to interpret and apply the Constitution.

The Supreme Court, as the ultimate authority on the meaning of the Constitution, has already decided that the definition of "person" — at least as of 1973 — was unanswerable. That determination by itself should be the end of the matter, until such time as the answer becomes clearer. For the Congress to legislate its own definition in light of the Court's pronouncement is itself an unconstitutional step in violation of the separation of powers. Thus, while I disagree on substantive grounds with the definition of "person" Galebach offers and have suggested a positive approach for reconsidering some of these questions, the mere action by the Congress to step into the breach must be deemed unconstitutional as a violation of the separation of powers. Moreover, Congress is in no better position to legislate my prescription than Galebach. *Roe v. Wade* was certainly not an invitation by the Court to the Congress to define a term within the text of the Constitution that the Court itself could not resolve. While wrestling with uncertainty may be uncomfortable, doing so is far healthier than being force-fed "certainty" simply because some legislators feel that we need an answer now.

The proposed human life statute is in effect a bold attempt by some members of Congress to usurp the function of the judiciary. While Congress can determine "legislative facts," it simply should not be in the business of mandating the basic facts that are intended to serve as a substitute for consensus and as an end run around the Constitution. This is especially the case when the fact at issue involves the definition of a constitutional term. That is a job committed to the courts. As a matter of political legitimacy, for Congress to undertake that job is unwise and dangerous. As in the present case, it virtually guarantees the absence of consensus on the very policy question at issue, by virtue of the fact that some people resent attempts at legislating reality. One cannot mandate a consensus by fiat. On the contrary, as Prohibition demonstrated, one creates the conditions for disarray in the body politic.

It is an altogether different matter for Congress (or the courts) to promulgate a policy premised on protecting persons once they are found to exist. The policy is premised on a factual assessment, and factual determinations, even when they are uncertain, cannot be resolved by legislative fiat. The problem is that determining the point at which psychophysical unity arrives is inherently an uncertain process. Making this determination is difficult because persons evolve developmentally, from small clusters of cells to embryo to fetus. Resolving this issue, then, is like pointing out the colors on a spectrum. We can identify blue, green, and yellow. The extremes are clearly defined, but we will never be able to identify precisely at the margins just when blue becomes green and green becomes yellow. Legislating a solution to this type of uncertainty resolves nothing.

Yet, we are faced with a social problem of immense practical significance. The answer should lie in first understanding the concept of "person" as it involves the developmental characteristics discussed earlier. Although we cannot define precisely the moment when a person comes into being, we can state with some degree of certainty that it occurs sometime after a particular period during pregnancy. Then the mother's choice affects not just herself but another person as well, and the state is warranted in adopting a policy that terminates the mother's freedom of choice to seek an abortion. Until this point, freedom to abort must prevail.

This analysis will offend a great many people. Ardent believers in prochoice may be uncomfortable with a qualified approach; prolife supporters will reject the argument that a person does not exist from the moment of conception. Nevertheless, the issue cannot be defined away as the human life statute purports to do. The Galebach theory chokes off debate and discussion by mandating answers to factual questions. But facts are not so malleable: either they are or they aren't. The arguments I have offered constitute a basis for resolving both key questions of when a person begins and when a person ends. The public debate should focus on the developmental continuum in an effort to articulate more precisely just when this point of psychophysical unity occurs. In large part, this research will involve the best minds in medicine, and the answer will not necessarily be readily forthcoming.

A word of caution. In attempting to identify this moment of psychophysical unity, I am in no way suggesting that such an endeavor is or should be qualitative. I am not suggesting that we decide whether or not we have a person solely on the basis of the quality of mental activities present. To do so would run the risk of condemning people of low intelligence in the same manner that courts once permitted involuntary sterilization on the ground that three generations of imbeciles were enough. This, too, is a question that is more readily resolved at the extremes than in the middle of the continuum. I cannot answer the quantitative questions of what activity, how much, and in what relation to the human body. These questions should occupy our thinking and research.

ABORTION—HUMANHOOD ESSAYS IN BIOMEDICAL ETHICS

(By Joseph Fletcher)

Seeing how the humanhood and abortion issues surface everywhere in biomedical ethics, I want to take a more sharply focused look at both questions.

For some of us "human nature" is fixed, a given entity; for others, the human organism and psyche are malleable and adaptable. T. E. Hulme said, "Man is an extraordinarily fixed and limited animal whose nature is absolutely constant." [1] To the contrary, Ashley Montagu explains that babies are not born with a human nature, only with more or less capability of becoming human.[2] In the same vein the Spanish philosopher Ortega y Gasset concluded that people have no nature; they have only their histories.[3]

Actually, we have to ask whether it is human life we put first or Personal life? If it is personal human life, then our first-order concern is with certain qualities and capacities, not just human life as such. In short, may we use "a human life" and "a person" interchangeably? The philosopher Henry David Aiken calls it "fetishism" to believe that a fetus is already a person. But is he justified in saying so? [4] This question is of the greatest practical importance in making decisions about such matters as the terminally ill and when to let the patient go, in dealing with irreversible coma, and whether we ought to "save" what are called monsters at birth. When we quote the Socratic maxim Know thyself, what is the self, the person? Not to know what we mean by these key terms is simply to flounder around when we talk about moral decisions.

Abortion provides a test. Ethically the core issue is whether an embryo or fetus is a human being, and if so, in what sense we call it that. How we assess the morality of abortion follows from how we answer this question.

For example, a Catholic lawyer says flatly, "One person's freedom to obtain an abortion is the denial of another person's right to live." [5] He believes that a fetus is a person or has a person's rights. There is no argument, of course, about a human fetus beign of the species Homo sapiens; it is easily recognizable biologically. Nor is there any question of its being alive. Cell division is proceeding. But what about claims of personhood or human hood for a fetus? If every human fetal organism is a person, and if we think it is immoral to end such forms of human life unnecessarily—at least when self-defense or the common security is not at stake—we will logically look upon abortion at will as immoral. If, on the other hand, we do not regard uterine life as human in the sense of a personal being, we will not believe its termination is "murder"—that is, we won't see it as taking the life of an innocent person. The nonpersonal view of fetuses fits in with the morality of elective abortion or abortion on request, as well as with therapeutic abortion for medical reasons.

The ethical issue is dramatized in a truly tragic situation in a Nazi concentration camp.[6] A Romanian woman doctor secretly aborted three thousand Jewish women in the camp because if the medical report showed them to be pregnant, they would be incinerated—sent to the ovens. If we believe that a fetus is a person, it would follow that the doctor, by killing three thousand human beings, saved three thousand others and prevented the murder by the Nazis of all six thousand. On the nonpersonal basis we would say only and quite calmly that three thousand persons were rescued from a terrible death. (The United States Congress agreed with the latter interpretation. The doctor was admitted to residence and citizenship in America as a war hero.)

The most basic issue is whether a fetus is a person or not. This in turn poses the question, What's the essence of a person? Along with it goes the related question, When does this essential element emerge, whatever it is? The question of what a person is hinges on whatever is held to be the essence. There would be room for some variety of opinion on additional factors, the other things which make for the fullness or optimum of a person. The decisive problem is to identify the essential thing, the sine qua non, that without which there is no person. And to find this key is to get pretty close to answering the question about "when" a person is.

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[1] T. E. Hulme, "Speculation: Essays in Humanism and the Philosophy of Art" (New York: Harcourt, Brace & Company, 1946), 11.

[2] Ashley Montague, "Sex, Man and Society" (New York: G. P. Putnam's Sons, 1969).

[3] José Ortega y Gasset, "Man and People" (New York: W. W. Norton & Company, (1957).

[4] Henry David Aiken, "Life and the Right to Life," in Ethical Issues in Human Genetics, ed. B. Hilton, et al. (New York: Plenum Press, 1973), 182.

[5] J. Noonan, ed. "The Morality of Abortion" (Cambridge: Harvard University Press, 1970), xvii.

[6] See Joseph Fletcher, "Situation Ethics" (Philadelphia: Westminister Press, 1966), 38.

What are the factors or components which people have suggested is the essential one? There are three of them, basically. Some argue that life is the essential element in a person's being; whenever and as long as we are alive, as long as life is present, they say, a human organism is a person. This would mean that a person exists at fertilization, when growth gets started, and continues to exist through the whole complex biological continuum. Indeed, before fertilization oöcytes and sperm are "alive." Death is not complete until the cessation not only of bodily functions but even of cell activity. This opinion identifies the person with life, making the two coexistent or even one and the same. It is the doctrine behind recent agitation to prohibit tests and research with live abortuses, even though there is no possibility of the fetus surviving and even though the knowledge to be gained by obstetricians and pediatricians could save the lives or health of many children yet to be born. It is a radical and sad consequence of an absolute sanctity-of-life ethics.

A second notion is that, not life, but the soul makes a person. In this camp we find two different ideas about the soul's entrance into the living tissue. While they both agree that it enters somehow before the birth of the individual, some guess or believe that the soul or animus enters after conception, probably in the second trimester ("delayed animation") and others guess it enters with fertilization ("immediate animation")—thus coinciding, in the latter case, with the life theory. An obvious absurdity of this latter doctrine is that it means the soul or person of identical twins has been split in two, since after fertilization they separated from a common cell mass or single fertilized ovum. Triplets, quadruplets, and so on, add to the absurdity of the ensoulment-at-fertilization doctrine. Aristole, Augustine, and Aquinas held to the late ensoulment theory and therefore justified abortion, at least in the first trimester; Tertullian, the great heretic, declared for the fertilization idea, and his opinion finally became the official Catholic teaching in 1869, when abortion was condemned at any stage. (The papacy has never actually said when the soul is infused; rather, it has decreed that people must play it safe by acting as if the soul were infused at fertilization.)

The third opinion is that the essence of a person is reason, the rational function, the ratio. In this view everything depends on the mental capability of the individual. This is not to say that reason is everything; feeling is an important part of mental function, too. But without intelligence the feeling alone is subhuman. The cerebral has to undergird the visceral. Before cerebration comes into play, or when it is ended, in the absence of the synthesizing or thinking function of the cerebral cortex, the person is nonexistent; or, put another way, the life which is functioning biologically is a nonperson. This nonpersonal condition can be seen both in the protoplasm at the start of life and in the "human vegetable" which is sometimes all that remains at the end.

Humans without some minimum of intelligence or mental capacity are not persons, no matter how many of their organs are active, no matter how spontaneous their living processes are. If the cerebrum is gone, due to disease or accident, and only the mid-brain or brainstem is keeping autonomic functions going, they are only objects, not subjects—they are its, not thous. Just because heart, lungs, and the neurologic and vascular systems persist, we cannot say a person exists. Noncerebral organisms are not personal.

The Harvard Medical School's ad hoc committee accepted the "brain death" definition, but it is too undiscriminating. So is the Kansas statute modeled on it, and the recent (1972) ruling of the Italian Council of Ministers. It is not the death of the brain that counts. What is definitive is the absence of cerebration or "mind" even though other brain functions continue. A human vegetable is not a person, not truly a human being. It goes without saying, of course, that the loss of the cerebral function must be determined to be irreversible.

According to this third view, perhaps something like a score of twenty on the Binet scale of I.Q. would be roughly but realistically a minimum or base line for personal status. Obviously a fetus cannot meet this test, no matter what its stage of growth.

Nor can a fetus have any of the other traits that make for the full humanum or personal quality, such as curiosity, affection, self-awareness and self-control, memory, purpose, conscience--none of the distinctive transbiological indicators of personality. The fetus-is-a-person doctrine is of necessity the most argumentative one because it has to defend an arbitrary assertion. The nonpersonal view is under no such strain. It asserts nothing not in evidence, and therefore it really does not have to be defended or make a case for itself.

Antiabortion agitators often say, "Well, anyway, there is a potential in the fetus for all of these things that make up a person; for example, the morphon or rudimentary physical basis of mind is present by the eighth month." This is tantamount to admitting that a fetus is in fact not a person. And to argue (which is what this is—arguing) that the potential is the actual is like saying that an acorn is an oak or a promise is its fulfillment or a blueprint is a house. The "as if" argument is a prolepsis which tries to wipe out the vital difference between what is and what could be. Thomas Aquinas was at least right to distinguish between human life in potentia and in sit (actual) and to assign personal status only to the latter, after several months' gestation.

The plain inescapabable fact, as a chemist might say, is that we have no litmus paper test for the presence of a person.[7] Jean Rostand, the French biologist, puts it this way: "It must be said that these differing opinions are held by people who are equally sincere, have the same level of morality, and sometimes even profess comparable philosophical doctrines." Any attempt to impose a single "doctrine" on those who do not share it is ethically intolerable. We are driven to admit that, if anybody wants to believe a fetus is a person at conception or whenever it is "ensouled," he is entitled to. It is a kind of mental Mexican stand-off.

The only possible moral test of these rival views lies in their consequences. When beliefs or nonempirical opinions, neither of them being falsifiable, contradict or clash with each other, the only possible way to choose between them morally is in terms of their consequences if they are followed out logically in practice. The one which results in greater good for people is the correct one. On this basis there is an open and shut case for abortion, obvious and overwhelming; it can be justified very often, sometimes for reasons of human health, sometimes for reasons of human happiness.

Furthermore, the question of when the person comes into existence, the timing, has never found any general agreement or any convincing evidence favoring one opinion over others. In the past people have argued variously that this event or "moment" is at (1) fertilization, (2) the blastocyst or implantation stage, (3) the first heartbeat, (4) the phenomenon of "kicking" or "quickening," (5) viability—when the fetus might maintain its life outside the womb (sometimes in the third trimester), and finally (6) birth. Here, too, we have no litmus paper test, no diagnostic criteria. When the Grand Mufti of Jerusalem says the "moment" is the 120th day of pregnancy, like the theologians who used to say it was forty days in the case of males and eighty days for females, we can only try to keep a straight face.

The most sensible opinion is Plato's, that a fetus becomes a person at birth—after it is expelled or drawn from the womb, its umbilical cord is cut, and its lungs start to work. This has been the opinion held down through the centuries in the common law tradition. It was not until the nineteenth century that abortion was for the first time made a crime—although, be it noted, only against the state because of the supposed loss of a much needed citizen, soldier, or worker. Crowded subways and expressways, growing lists of hard-core unemployment in the midst of highly productive industrial and agricultural machinery—these things make the "public interest" of a century ago archaic.

Later on, some groups began to claim that abortion is a crime against the fetus as well as against the state, with the result in America that new laws began to prohibit termination of pregnancy for any reason other than to save the women's life or, in a few states, her health. In spite of these new statutes, however, no prosecutor has ever returned an indictment for murder in any abortion case before the courts. In cases of miscarriage no birth certificates are made out, and abortions of such fetal tissue are not entered into the vital statistics. Pregnant women traveling abroad have not been required to carry two passports, one for themselves and one for the fetus. Miscarried embryos at a primitive stage are not baptized.

On and on we could go, pointing out similar lapses or discrepancies between what people preach and what they practice. In 1972, before the Supreme Court's decision in January 1973, spokesmen for the Right to Life Movement carried around a fairly fully formed human organism, superficially, and displayed it for the shock effects ("homunculus reaction") on uncritical and impressionable people in audiences. When they were asked if the fetus had been baptized or entered into the birth statistics, christened with a name, and "Why hasn't this child, as you call it, been buried with respect"—their replies were only mumbles, not even clear words.

For some time legislators and courts have been revamping those Victorian laws in a return to the main tradition, to the view that a fetus is not a person or what American lawyers call a "Fourteenth Amendment person." The chief reason for the postnatal definition of a person in the law is that any other doctrine is necessarily only a matter of private faith or belief, and it is morally unjust to impose private beliefs upon others who do not share them. To do so violates the First Amendment of the Constitution which guarantees religious freedom and freedom of thought.

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[7] Jean Rostand, "Humanly Possible" (New York: Saturday Review Press, 1973), 88.

The United States Supreme Court on January 22, 1973, declared that it is unconstitutional for any state to forbid abortion in the first trimester, which only reaffirms the historic position of Western civilization. The question when a pregnancy should be terminated for health reasons is a medical one, the Court explained, and not a proper government function.

This decision knocked down restrictive statutes in forty-six of the fifty states of the Union. It means that freedom of abortion may not be regulated in the first six or seven months—but after the first six months the state would be allowed but not required to limit abortions. The Court rejected any assignment of personal status to the fetus at any stage, and allowed only that a government might find a public interest in potential human life, and even then not until the fetus has become capable of survival independent of the maternal body. It has no rights.

In any case, in the last analysis it remains the patient's choice, on the principle of consent, as in any other medical or surgical treatment. This freedom of choice coerces no physician into doing an abortion nor any patient into having one. The Court did not enter into the ethical-moral question, it is true; yet by finding for the nonpersonal view of fetal life, it put the focus where it really belongs, and more profoundly affected the moral issue than any court judgment for hundreds of years.

Only if we can decide where we stand on these issues can we decide where we stand on the morality of terminating pregnancies. In practical policy terms, there are four positions to choose among, and our choice will depend on what we decide about the status and quality of the fetus. (1) We can condemn abortion altogether, or at most only justify it to save the pregnant woman's life. (2) We can favor a limited permissiveness to prevent ill health, to prevent defective babies, or to prevent the product of rape or incest. This is a policy of compulsory pregnancy but with escape clauses. (3) We can approve of abortion for any reason prior to the ability to survive outside the womb—possibly on the grounds of social needs or some question of justice, although these grounds are not so apparent as they were when we lacked enough labor power and needed lots of soldiers. (4) We can oppose any and all forms of compulsory pregnancy, making the ending of pregnancies, like their beginning, a private or personal matter.

If we adopt the sensible view that a fetus is not a person, there is only one reasonable policy, and that is to put an end to compulsory pregnancy. The ethical principle is that pregnancy when wanted is a healthy process, pregnancy when not wanted is a disease—in fact, a venereal disease. The truly ethical question is not whether we can justify abortion, but whether we can justify compulsory pregnancy. If our ethics is of the humane brand we will agree that we cannot justify it, and would not want to.

Many sensitive people who support abortion in principle nevertheless see it as a sad, even tragic, action. In this view abortion is a reason for regret, but not for remorse or moral guilt. To deplore abortion is a fortiori a strong reason to advocate contraception. To condemn both—both the termination and the prevention of unwanted pregnancies—is an antisexual and inhumane morality. (This is what the official Catholic teaching does, except that it allows "natural" birth control by "rhythm," which helps us to understand the grass roots revolt of Catholics who defy their church's ban on contraceptives and sterilizations.)

THEOLOGICAL CONSIDERATIONS UNDERLYING FREEDOM OF CHOICE IN ABORTION

(By Walter Dennis, Suffragan Bisop of the
Episcopal Church in the Diocese of New York)

At this writing, a so-called Human Life Statute that would endow a human conceptus with full "personhood" and the protections of the Fourteenth Amendment is making its way through the Congress. Its proponents acknowledge that their efforts are a stopgap measure, an interim stategy, adopted because they do not have the necessary votes in both Houses to pass on a constitutional amendment to the States. We should take little comfort from the fact that they are forced to resort to second best strategies, for it is clear that radical anti-abortionism is still on the attack. Instead, we must recognize the threat that this continued militancy poses, representing as it does the attempt to foist upon society an absolute and restrictive "solution" to a complex ethical question about which there is no clear consensus in our pluralistic society. By virtue of their conviction that they alone are on the side of the angels, these militants appear to have a tactical advantage. Defending a relativistic position is always harder in the face of an absolutist onslaught, which can intimidate and carry the less strongly convinced, as well as political opportunists, in its train. This situation is a classic example of the comic strip confrontation between the strident dogmatism of Lucy Van Pelt and the seemingly "wishy-washy" moral relativism of Charlie Brown.

It is an annoying fact that the painful abortion issue is usually portrayed in the media - thanks to a virtual triumph of semantic engineering - as "pro-life" vs. pro-abortion. Nothing, of course, could be further from the truth. As we all know, the issue is really anti-abortion vs. free choice. Underlying both of these patently irreconcilable positions are ethical orientations that are characteristic of the opposing sides. What we have here is the opposition of rule ethics (the categorical view) and case ethics (the situational view). Lest anyone, however, assume at this point that what we are presenting here is a classic example of the opposition of relgious dogmatism and secular humanism, let me stress that both approaches find adherents within the wider Christian community. In Christianity at least, ethical systems represent the application of more fundamental axiomatic principles; they are theological derivatives. The rule ethic approach bases itself on revelation, scripture, and tradition. and derives from them clear-cut, prescriptive rules for behavior. It must be acknowledged that this view predominates among Christian moralists. The other view, the case ethics approach, has an equally venerable theological foundation: the doctrine of free will. This doctrine is central both to the Christian understanding of the nature of God and His purposes and to the nature of man and his relationship to God. Both the Old and New Testaments attest to the belief that God - who is characterized by absolute freedom and perfect goodness, and who is, paradoxically from our view, incapable of evil - gives us freedom to choose, even the freedom to reject Him.

The doctrine of free will has always been problematical. It has an apparently scandalous side and has often left a bad taste in the mouths of many serious thinkers. The problem runs: How can we reconcile the idea of all-powerful and all-good God with the existence of evil? At face value, the answer seems to beg the question. In its human application the classic attempts at an answer suggest that we are like God in that we are free, but we are unlike God in that we are finite, contingent, having the possibility of contradiction and negation. Our moral freedom may well be limited by such factors as intelligence, relevant information, soundness of mind, social environment, and even desperation, but insofar as we are free (an opinions vary as to the degree) we can make wrong choices. Our outrage at the existence of evil makes us all wish at some time or other that God, if God really is - would "fix" things so that evil would not befall us humans. But this cannot be. If we were moral robots, we would be utterly unfree and thus would forfeit our precious and terrifying likeness to God. Without moral choice, we would not be human as the Christian understanding of humanness has it. This understanding is at once disquieting and distressing, yet it holds out the most exalted and dazzling view of human status and calling that has ever been imagined.

To the believing Christian the New Testament embodies God's paradoxical and unexpected answers to the questions of evil, freedom, and divine power that will not coerce us and stack the moral deck. We believe that God took authentic and definitive human form in the person of Jesus of Nazareth. Truly human (therefore finite, contingent, and capable even of evil choice), he was also God, although completely emptied of absolute, coercive power. In perfect obedience he met evil frontally, took it on - both the specific and situational evil of his immediate surroundings and the aggregate of all human evil - and was killed by it. He was alone and without help, forsaken. God did not stop the crucifixion at the last moment. He permitted it, but in his absolute freedom had the last word by raising Jesus from the dead.

The idea of free will has been a pivotal concern in Christian thinking about the human condition and human action. It is an indispensable constituent of humanness. The part of the Catholic tradition called Anglican, which has nourished and formed me, attaches particular value to the doctrine. The seventeenth-century theologian Jeremy Taylor, writing in the first flowering of Anglican thought, stated the theme beautifully: "...liberty is the hand and fingers of the soul by which she picks and chooses; and if she gathers flowers, she makes herself a garland of immortality." H. R. McAdoo, in his classic exposition of Caroline (seventeenth-century Anglican) theology, has put this theme in less poetic terms: "Liberty of choice is not only the determining element in moral actions but *a part of the Divine plan for tempering human souls* (italics mine). Without it, and if actions were pre-determined, there would be no meaning or aim in the spiritual life." For those who believe therefore, as Christians do, that human life has meaning and absolute value by virtue of our God-ward destiny, the corollary to insistence on freedom as a necessary element of the divine plan must be an insistence that freedom be defended and enhanced, so that it may be exercised under divine guidance.

So we are free - free to do good or to murder, pillage, lie, cheat, exploit one another ad nauseam. How then are we to to determine what the good in a situation is, what should be done and what should be avoided? Into which category does a choice of abortion fall? Clearly, this would depend, I believe, on which ethical orientation one subscribed to. I noted before that rule ethics was the dominant view among Christians. Here I should clarify this statement. Some Christian moralists are exclusively of this view; they believe there are only prescriptive ethical answers for every situation. Among those, however, who see case ethics as a fruitful approach to moral decisions, there are few, if any, who subscribe exclusively to this system. Rather, most case ethicists would say that there are situations where rule ethics can reasonably be applied exclusively, but that there are other situations where for a variety of reasons one cannot justifiably say there are categorical prescriptions. This latter situation is more ambiguous and does not have the kind of simple assurance that an explicit and universal rule brings. There is a lot of grey in between the black and white. What criteria would be applicable in determining whether we are dealing with a moral absolute or with a choice situation where genuine variables are present, where the moral agent and not just a rule is relevant in the equation? I would suggest that two factors should be considered - and I am simplifying for the sake of brevity. Firstly, we must weigh the good or evil consequences a possible action might have for others (or ourselves, for that matter). Secondly, we must determine whether a given action falls under a universally accepted moral principle. Where there is clear evidence that moral opinions differ concerning a specific possible mode of action, then we are surely confronted with a grey area. There is a universal consensus on theft, false witness, deceit, and murder. There is not absolute moral agreement about war and capital punishment.

So far so good. There are actions which satisfy the criterion malum in se - categorically evil - and regarding them and their consequences there is little argument. A rule ethics approach is acceptable here. True, rule ethics diminishes the role of conscience and its exercise in moral decison making, but in an unambiguous situation there is a practical value in following the dicatates of tradition without recourse to painstaking reflection. Let us take a hypothetical case: Should you or should you not kill your spouse in order to get the insurance money? As a sweetener, let us add the following: The opportunity presents itself to make your spouse's death seem convincingly to be from natural causes, and thus you will have absolute legal impunity, i.e., you will not get caught, no one will ever know you did it. Under rule ethics there is no question that you should not do it because murder is always wrong. There is no moral ambiguity here. The condemnation of murder (however variously defined and restricted) is universal in virtually every human society. True, you could still do it - you could even refuse to bother yourself about right and wrong, but if you did allow moral considerations to enter, then the prescriptive answer would be unambiguous.

I have purposely raised the issue of murder as a moral illustration because the question of murder touches so directly on the ethics of abortion. As we know, the most adamant opponents of abortion equate abortion with murder and are now trying to enshrine that belief in our statutes. If abortion were demonstrably murder, then there would be a satisfactory prescriptive guide for action/non-action under the canons of rule ethics. Perhaps one might want to consider the matter using the more exacting case ethics approach, but at this point we might be safe in saying that such an approach would be supererogatory, a luxury of the more thoughtful among us.

What is murder? The dictionary defines murder as "the unlawful, malicious, and intentional killing of one human being by another." (By "unlawful" we should understand killing in self-defence or killing under the aegis of the state's war-making or internal police powers to be excluded.) Thus, morally, except under certain conditions, we may not take the life of another human being, another person.

At last, we come to the nub of the question - and the operative word is "person." Is abortion the killing of a person? Is a fetus a person? When does a fetus become a person? What is a person? All of these questions are relevant. Looking at them, we can see how desirable it must appear to adamant anti-abortionists to establish by statute the "personhood" of a fetus. That done, a particular theological viewpoint - however specious - successfully linked to an absolute, coercive moral rule becomes mirrored in the law of the land. All ambiguities are swept aside, without appeal, without exception. Neat!

The attempt to establish by law the fetus-as-person doctrine is an attempt to foreclose all other options by imposing on society a particular theory of what in theological parlance is called animation, ensoulment or hominization, that is, the "moment" when a conceptus-embryo-fetus-neonate might be said to have a "soul" conferred on it. (For those who might generally be reluctant to use the term "soul" or simply do not understand what this referent means, let soul stand for the sine qua non of humanness - that which in this case would make the conceptus-embryo-fetus-neonate a "thou" rather than an "it." In Christian terms, too, "human" has distinct metabiological connotations - the ensouled primate is not merely the occupant of the upper end of the zoological scale.) In other words, a determination of the "moment" of animation resolves the question of human status and clarifies all of its ethical and legal corollaries.

Historically, there are two theories of animation: immediate and mediate (or delayed). Immediate animation is, of course, the current darling of the anti-abortion group. Some of its advocates - most notably Roman Catholics - would have us believe that this is the opinion that has been held either implicitly or explicitly by orthodox Christians from the beginning. Nothing could be further from the truth. Among Roman Catholics the notion gained clear ascendancy only in the mid-nineteenth century. The view was held by the early Christian heretic Tertullian, but its real philosophic underpinning is the now discredited dualism of René Decartes - the soul-body split - where the soul is a discrete entity, a ghost inhabiting the soma "machine." By such reasoning, it is easy to see how one might fantasize a complete human soul being "zapped" into a microscopic organism many months away from independent viability, response, locomotion, volition, and cognition. The mediate (or delayed) animation view, even when it has arbitrarily chosen specific later "moments," is more moderate. Among its advocates can be numbered St. Augustine of Hippo and St. Thomas Aquinas. Under this view "moments" have been suggested ranging from forty days for males, eighty days for females, the first heartbeat, the first "kick," the stage of extrauterine (albeit premature) viability, right up to parturition and the first breath.

The foregoing has been only the briefest and sketchiest review of the animation controversy. In a theological perspective, the notion of animation is a cardinal issue when we consider abortion. The limitation of space does not permit a more detailed exposition, and so we must forego the temptation to examine and refute some of the more amusing metaphysical twists and turns that the immediate animation theory requires when its implications are thought out and applied to specific situations. It seems reasonable to suggest that the "moment" of hominization is not absolutely determinable to everyone's theological satisfaction until independent extrauterine life is possible - if not a fact. Some, for a variety of reasons, may choose to place the "moment" further back in the gestative sequence, but it is safe to say that at the point of genuine extrauterine viability every thoughtful person must acknowledge the presence of a real human being that is entitled to all of the dignities and protections accorded under divine commandment as well as under criminal and civil law. In other words, that alone is the point at which the strictest rule ethics application can become operative without imposing the will of a convinced minority upon a more open-minded - even agnostic - majority. Short of that commonly acceptable point there is no justification for morally imposing the prohibition against taking "human" life or for legally extending the Fourteenth Amendment protection of "persons" to the unborn at an earlier gestative stage, even the inceptive moment.

One small digression from the main theme might be useful here. A subsidiary argument for the protection of the fetus as person is the contention that the pre-viable fetus is, after all, a potential person, but that is another matter again. We are not morally obligated to protect potentialities in any way as we are to protect actualities. If this were true, we would have to give serious thought to the coercive protection of ova and spermatozoa and making every potential parent a procreative ward of the state!

Earlier on, I noted the distinction between the prescriptive rule ethic approach and the situational approach and proposed the rather conservative, last-resort application of the latter, at least in those cases where a degree of ethical ambiguity exists, where consideration of the moral agent and the consequences of a possible action can alone lead to a satisfactory choice. In the case of abortion choice, unless we are willing to let the moment of hominization be set back to the alpha point, we clearly have an indeterminate phase wherein personhood is only potential, deferred. Under such conditions, we are morally free - in fact, morally bound - to consider all of the ramifications of a given pregnancy, including maternal survival and health, genetic indications, family size and economics, the conditions of impregnation, and so forth. No one - neither the potential mother or father, nor physicians, nor counselors, nor any possible adjudicators - should feel constrained to dismiss all of these vital considerations in favor of a preemptive rule that is theologically, philosophically, and scientifically unsupported.

Without a doubt, what is called for is the exercise of painstaking reflection, under divine guidance or according to one's best lights. Moral agents count, and they must be free to make a judicious choice. That right must be defended. That right consists not only in discriminating between good and bad where the alternatives are obvious but also in deciding between greater and lesser evils in more ambiguous situations.

In 1976, the General Convention of the Episcopal Church, after long and painstaking deliberation, made an official statement on the matter of abortion. The position the Church expressed was a wholesome example to society and demonstrated the soundness of this Church's faith in individual human judgment under divine guidance. Nowhere in the statement was there even a hint of a suggestion that abortion is a good thing. Because human life - even potential human life - is inextricably touched with the sacred, we can never view with indifference the interruption of its development, even where there are good and compelling reasons. Abortion is always an evil, but many situations make it a lesser evil than the consequences of nonintervention. Abortion as a convenience is no mere bagatelle, like the removal of unwanted facial hair. It is sinful - not because it is murder, however, but because it may be the consequence of irresponsibility, selfishness, and lovelessness. Abortion is licit only when it is undertaken as a last resort, after prayer, reflection, counsel, and after the moral agent has determined that there is no alternative that would not represent a worse evil. I believe the Episcopal Church's position is consistent with its best traditions, is humane and judicious, respects the conscience of all, and takes congnizance of the fact that we live in a pluralistic society.

Senator HATCH. Thank you. We appreciate the preparation and effort that all three of you have put forth.

Let me ask all three of you this question: Did you or your organizations oppose the Hyde amendment which would limit public funding of abortions? Did you agree with or oppose the Hyde amendment limiting public funding for abortion?

Rabbi SIEGMAN. The organization that I represent, Senator, the American Jewish Congress, has opposed the Hyde amendment to limit public funding, but, I should add, not on the policy grounds contained in my testimony but rather on constitutional grounds, equal protection and so on.

Senator HATCH. Thank you.

Bishop?

Bishop HUNT. To the best of my knowledge, Senator, none of the official bodies of the Episcopal Church have spoken in an official capacity to the Hyde amendment per se, but the resolution of the general convention in 1976, reaffirmed in 1979 and by the House of Bishops this past month, speaks to that indirectly certainly in the sixth resolve which expresses unequivocal opposition to any legislation in this arena.

Senator HATCH. Dr. Reynolds.

Dr. REYNOLDS. That would not be applicable in my case since I am not representing a constituency.

Senator HATCH. What about your university or the Religious Studies Department? Did they take a position?

Dr. REYNOLDS. They would not take a position on that type legislation.

Senator HATCH. What do you feel about it personally?

Dr. REYNOLDS. My own personal view is that it is the kind of issue that is very appropriate for the legislative process to deal with as over against the matter of whether abortion is to be acceptable as a public policy and available to an individual in a choice situation. Those are two very different types of issues.

Senator HATCH. Again, this is addressed to all of you. Have you or the organization which you are representing here today taken any active involvement in recent public policy issues?

I know that the American Jewish Congress does because we have fought side by side on a number of issues and occasionally disagreed on some. For instance, I have received numerous letters recently urging me to support the extension of the Voting Rights Act, which I do, and which is going to be before this committee. We have 8 days of hearings scheduled early next year.

For instance, I remember the classic battle that the American Jewish Congress certainly aided us in involving the direct election of the President. It was a major, constitutional issue of tremendous import from my perspective, and I think from yours, fortunately we won.

The reason I am asking this question is naturally because if we can work on these public policy issues, what is so wrong with other organizations wanting to work on this public policy issue?

Rabbi SIEGMAN. Senator, it is precisely for this reason, to avoid that kind of misunderstanding, that I added to my prepared testimony those introductory comments that there is absolutely nothing inappropriate about other agencies advocating their views and doing so very vigorously.

However, as part of that debate, the wisdom of those policies, and the question whether this is something we ought to do, that is, questions of substance rather than procedure is what is legitimately at issue. I do not think the procedure is legitimately at issue at all.

Senator HATCH. You would all agree with that then?

Dr. REYNOLDS. I would like to comment on that in relation to the question you raised to some other panelists about is it not very appropriate to leave this kind of decision to the people and just let it go through the process and let the people decide what they would like to do.

Senator HATCH. The people's elected representatives.

Dr. REYNOLDS. Right.

Senator HATCH. Rather than unelected judges who impose their will on 230 million people.

Dr. REYNOLDS. Let me comment on that because I see the kind of issue that is before us in terms of its bearing on the religious traditions and histories in relation to abortion and also to Government practice as being similar to setting forth a process that would allow the people to decide what religion we would have as a Nation, or what the appropriate media would be to disseminate information out to the people.

I mean, there is a sense in which if we really believe the Bill of Rights and if we believe in constitutional principles, they set constraints on what the legislation can do, what the legislative process can do, and that is the whole purpose of constitutional government.

The difference between constitutional government and other forms of government is that the constitution places constraints on what is appropriate for the people to decide and not to decide. I see that as what the wars of religion and so forth were all about. We can forget it at our peril.

Senator HATCH. Bishop.

Bishop HUNT. With respect to the Episcopal Church's posture on this, the Episcopal Church is like society at large, a very pluralistic body with many levels of opinion, and for better or for ill—many of us think for better—it only meets in legislative session every third year. I think the church is healthier for that.

In any event, it so happens that the church has taken a position on this. I think the debate is an appropriate one for religious groups to involve themselves in certainly.

Senator HATCH. One reason this dilemma has evolved is because we have really had two extremes on this issue.

For instance, you indicated that legislatures should not impose moral beliefs on the people. On the other hand, there are those who believe that the Supreme Court decisions should not do so either. That is the argument on the one side.

Bishop HUNT. Senator, if I might, it would be useful to comment that the Episcopal Church in this particular regard took a stand in 1967, long before the Supreme Court took its action in *Roe* v. *Wade*. The stand in 1967, although the wording was different than the one I read this morning, was substantially the same and pre-dates this as a constitutional or a legislative issue in the United States.

Senator HATCH. I am pretty well aware of that. This has evolved where we have had the two extremes: abortion on demand, indiscriminate abortion, without limits, or no abortions at all. Those are the two extremes.

Dr. REYNOLDS. Those are the two different value traditions that are behind this.

Senator HATCH. Right.

Rabbi, you indicated that you cannot be for abolishing abortions because you would want to preserve the life of the mother at the very least. I think everybody would admit that. I do not know of anybody in the Congress, even if they wanted to restrict abortion, who would not want to give the mother the preferred right to preserve her life. I do not know anybody in the Congress who would not agree with an abortion to save the life of the mother.

What we have tried to do by coming up with this so-called Hatch amendment is to provide a nonvalue judgment approach toward abortion that does away with *Roe* v. *Wade,* where seven judges have imposed their personal standard on this issue on 230 million people. We have tried to get it out of that arena, shift it to the elected representatives of the people.

Until we came up with this amendment, those who advocated abortion on demand, one of the extremes, were always saying if left up to the people, they would prevail because the polls show, they thought, that they had the people on their side.

Now, all of a sudden, we do exactly that with this type of an amendment and they are the ones raising the biggest fuss about this because, deep down, I think they are afraid that they would lose in the public forum. I submit to you that I know they will lose. However, I am willing to let the people themselves through their elected representatives, make the decisions in this matter.

Dr. REYNOLDS. Senator, I would just have to say that whoever wins, we all lose.

Senator HATCH. Not necessarily.

Dr. REYNOLDS. I think it is a situation where once you set it up that way in that the history of the Nation has been that the courts are unelected—the Supreme Court is unelected and is appointed by elected officials—for very good constitutional reasons to get at an impartial basis for dealing with these kinds of value conflicts——

Senator HATCH. Oh, no. If I can interrupt you on that, I do not think the courts have been put together to deal with moral or social issues. I think they have been put together to deal with constitutional issues.

Dr. REYNOLDS. As those are issues that come before the Court, it has no choice but to address them.

Senator HATCH. They have almost total discretion.

If I were to come back to you, Rabbi, the American Jewish Congress feel that *Roe* v. *Wade* is a good constitutional decision apart from the outcome of the decision?

Rabbi SIEGMAN. Senator, permit me if I may to go back to something you said just a moment ago, this concern about seven men who had not been elected and who imposed their views on the public as opposed to everyone in a very democratic way joining in that.

I would respectfully remind the Senator of the references earlier in the day to the halcyon days of our cooperation in a mutual effort to block legislation and constitutional amendments that Senator Bayh was trying to push through. Our joint position was that in our system we do not bring every citizen to the Grand Canyon and have them vote on all issues. Our system very deliberately built in certain checks and balances, part of which is the role of the Supreme Court in interpreting the Constitution. That is what united us at that time in opposition to attempts to change our electoral system.

Senator HATCH. I do not disagree with that.

Rabbi SIEGMAN. This is why there is nothing wrong when the Supreme Court interprets the Constitution on the question of abortion. There is nothing undemocratic about it. In fact, it is a perfect expression of the intent of the founders of this Nation for those judges to do precisely that.

Senator HATCH. No, and I did not mean to imply that, but there is nothing wrong with the Congress reversing that through a constitutional amendment that recognizes that this is a volatile social issue that only a consensus perhaps will resolve.

Rabbi SIEGMAN. I agree with that, Senator, except——

Senator HATCH. That is the purpose of the amendment.

Rabbi SIEGMAN. Except in this case we are left with no choice in the matter. The point of my testimony was that the present situation is far preferable, since the moral feelings and religious sensibilities of neither side is grievously offended.

Some have challenged this assertion during our break, when it was pointed out to me that those people who oppose abortion oppose not only having abortions themselves, but also someone else having an abortion. That offends them as well.

My response to that, Senator, is that the same is true of those who savour choice. Those who feel that the life of the mother should be saved are offended if she is sacrificed in those kinds of situations, even if it happens to someone else.

Senator HATCH. I am suggesting to you that no reasonable person in the Congress, nor, I think, any reasonable State legislature would not be interested in protecting the life of the mother. I think they would want to have that as a guiding principle no matter which side they take on this very important issue.

I want to go back to my prior question. As an exercise in constitutional law, do you believe the *Roe* v. *Wade* decision was a well thought out constitutional decision?

Rabbi SIEGMAN. I am not a constitutional expert and quite deliberately avoided touching constitutional issues, but insofar as I have some sense of what our legal opinion on the part of our legal staff of the American Jewish Congress is, they do feel that there are remaining constitutional problems that have not been dealt with in that decision. Nevertheless, they are totally in support of the decision insofar as it went.

Senator HATCH. I see. The history of the courts is also a history of some respect for constitutional text and precedent and the intent of the framers of the Constitution, all of which many constitutional scholars argue was violated by the *Roe* v. *Wade* decision.

I agree with you regarding the role of the Court in our society. That is why I have reservations about the human life bill, overturning *Roe* by statute. That is why we have tried to come up with an alternative approach.

I suspect that you will find a reasonable approach toward abortion in America if there is a wide ranging debate on that issue, and an opportunity to frame a consensus.

Dr. REYNOLDS. Senator, I would like to suggest that instead of it leading to more of a consensus, it will in fact lead to much greater animosity and antagonism throughout American society.

Senator HATCH. I do not know how it could. There is a lot of that right now.

Dr. REYNOLDS. Right now, you are having primarily the representatives of various groups that are upset over this. Let us distinguish between a person's conscience being somehow coerced and a person being offended by a practice that they do not agree with.

Your conscience or my conscience is not being coerced unless I am forced to participate directly in an activity that I find objectionable, some kind of direct way where I cannot say that that is part of what I am having to do as a participant in a certain process.

For example, some people say their conscience is offended because of activities related to nuclear energy that our Government is in, or certain things related to Government expenditure of funds here or there. That is a different kind of issue as related to coercion of conscience from saying to any individual, "You have to fight in war."

What we have worked out very finely in this Nation is a process by which a person can be a conscientious objector to participating in a war, but cannot be a conscientious objector for not paying taxes that might go to support war.

That distinction bears very directly on the matter that is before the country in the abortion debate in that it is very appropriate that no one be coerced in any way to do anything as an individual with respect to abortion.

However, it is also appropriate that they realize that in a nation as large and complex and diverse as this one, there may be occasions where things are going to need to be done—and that other people want to do—that will be offensive to them. The democratic process cannot be without offense giving as long as you have diversity.

Senator HATCH. I certainly want to congratulate all three of you for your excellent statements. I personally appreciate your being willing to come here before the committee. In spite of differences, I think all three of you have acquitted yourselves very well.

I feel that these hearings have covered a wide range of viewpoints. We are hopeful that by the time we conclude these hearings we will have covered this issue about as well as it could be covered legislatively. We are hopeful that the very best decisions will be made at that time. Of course that has been my goal from the beginning.

Our next subcommittee hearing on this issue will be on November 12. At that time, we will discuss some of the constitutional and legal issues of the proposed amendment.

Again, I want to thank you for being with us today.

Senator HATCH. With that, we will recess until further notice.

[Whereupon, at 1 p.m., the subcommittee recessed, to reconvene at the call of the Chair.

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

THURSDAY, NOVEMBER 12, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Mathias.

Staff present: Stephen Markman, general counsel; Tom Parry, chief counsel; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. This marks the sixth in a series of hearings by the Subcommittee on the Constitution on proposed constitutional amendments relating to abortion.

During the course of this morning's hearings, we will hear testimony from four constitutional scholars on measures that are pending before this subcommittee and, of course, our own colleague from the House, Representative Ted Weiss.

It might be useful, once again, to review briefly the constitutional background on these hearings. There continues to be great confusion as to the impact of the Supreme Court's abortion decisions in 1973 as well as of its subsequent decisions in this area. I would hope that our distinguished witnesses would elaborate upon some of these issues.

In the 1973 abortion cases—*Roe* v. *Wade* and *Doe* v. *Bolton*—the Court, for the first time, identified a "right to abortion" that apparently stemmed from the "right to privacy" contained in the due process clause of the Constitution and elsewhere. The constitutional "right to privacy" was itself a new right that had only sketchily been developed in one or two earlier cases.

This new "right to abortion," being termed a "fundamental right" by the Court, could only be balanced by some equally compelling State interest. Among other considerations, the Court found no such interest in the fact that the unborn were legal "persons" for purposes of the 14th amendment.

In a decision that has been criticized as much for its jurisprudence as for its substantive outcome, the Court then proceeded to discuss the full scope of this right. During the first trimester of the pregnancy, the pregnant woman's right to an abortion was absolute and unqualified. There was absolutely no State interest in this decision.

During the second trimester of pregnancy, the State may regulate the abortion procedure only to the extent of insuring that the procedure is performed by licensed physicians and within appropriate medical facilities. As during the first trimester, the State had absolutely no interest in the protection of the unborn fetus. No restriction whatsoever upon the actual abortion "right" was to be permitted.

During approximately the final trimester of pregnancy, or the point of "viability," a compelling interest arose that would permit the States to limit or proscribe abortions except—and it is a critical exception—when necessary for the "preservation of the life or health of the mother." Such a determination, Judge Blackmun stated, could be made in light of all factors relevant to the well-being of the patient, including "physical, emotional, psychological, familial" factors as well as the woman's age.

As Dr. Nathanson, the founder of the National Abortion Rights Action League, has testified:

> The "health of the mother" standard amounts to virtual elective abortion throughout the nine months because of the sweeping way in which "health" is used by pro-abortionists to cover every possible problem of mind and situation—recall the infinite elasticity of psychiatric grounds—and because the Court nowhere offers a medical refinement for the term.

As a result of the Court's decisions in January 1973, there is no effective ability in the States to prohibit abortions during any stage of the pregnancy. Ours is literally a regime of abortion on demand. Anyone who doubts that would be well advised to look at the recent series of articles in the Philadelphia Inquirer on the subject of late abortions.

Subsequent Supreme Court decisions have further limited the ability of the States to pass parental consent statutes, spousal consent statutes, and so forth. In the process of the *Roe* and *Doe* decisions and their progeny, the Supreme Court has overturned State laws in every 1 of the 50 States.

The objective of one of the amendments pending before this subcommittee—Senate Joint Resolution 110, which I have introduced—is to overturn the *Roe* and *Doe* decisions, not by prohibiting or proscribing abortions, but by restoring to the States the authority that they possessed prior to these decisions, elected State legislatures, rather than the Federal courts, would once more—as they were for nearly 200 years—be the forum for balancing the interests involved in the abortion controversy.

I look forward to our witnesses today and would appreciate their perspectives on some of the matters that I have alluded to here.

We are going to take each of the witnesses separately, and then perhaps, other than you, Ted, we will have the witnesses on a panel. You are welcome to stay if you would like, but I know that you have to get back to your heavy duties in the House of Representatives.

We are happy to welcome you to the subcommittee, and we will take your testimony at this time.

STATEMENT OF HON. TED WEISS, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WEISS. Thank you very much, Mr. Chairman. I do very much appreciate your courtesy in scheduling me this morning and allowing me to proceed first so that, in fact, I can go back to the House.

With your permission, what I would like to do is to offer my testimony to be submitted for the record in its entirety and then just excerpt certain brief portions of it.

Senator HATCH. Without objection, all formal statements will be placed in the record as though fully delivered.

Mr. WEISS. The statement that I have submitted focuses primarily on the human life federalism amendment that was introduced by the distinguished chairman, which grants both Congress and the States the power to restrict and prohibit abortions. The amendment has been described and promoted as a fair and reasonable middle ground that can be supported by all, regardless of one's position on abortion.

However, I am afraid that this amendment is really no compromise at all. If enacted, Senate Joint Resolution 110 would compel the right to choose by permitting a statute restricting or outlawing abortion to pass Congress or any State legislature by a simple majority vote.

What should be even greater cause for concern is that these abortion statutes would then be insulated from the Supreme Court's scrutiny. In other words, the Congress or any State would be enabled to pass a human life statute that would be immune from challenge on constitutional grounds.

I am aware that today's hearings are devoted to the legal implications of constitutional amendments outlawing abortion. Mr. Chairman, I should say that I find myself in some very heavy and heady company, scheduled this morning as I am, but I do not pretend to be a constitutional expert. However, I believe that the scholarly discussion, which I think is necessary, should not obscure the very real nightmare of pain, suffering, and death that would result from a ban on legal abortions.

A constitutional amendment cannot eradicate the compelling circumstances that lead women to terminate their pregnancies. A constitutional amendment cannot miraculously guarantee infallible contraceptive devices any more than it can perfect human behavior. As experience painfully teaches us, a constitutional amendment does not prevent abortion; it only stops abortions that are legal and safe.

Mr. Chairman, approximately 25 years ago, as a young assistant district attorney in New York County, one of my responsibilities was the investigation and prosecution of illegal abortionists. For the most part, they were without medical knowledge or training. The few who were trained had lost their license or capacity to practice medicine. Neither group was comprised of individuals to whom one would want to entrust the life of a loved one. I saw the results of their butchery—the maiming and the killing of women who did not have the freedom of choice.

What I witnessed was only a small segment of the atrocities that occurred daily in this country before 1973. It is estimated that between 200,000 and 1,200,000 women a year were subjected to life- and health-endangering abortions, that hundreds of women died annually as a result of botched abortions, and thousands of women suffered permanent disability as a consequence of the procedures used by this underground network.

Women who were morally and physically trapped by inhumane laws often had no alternative but self-induced abortions performed with coathangers, turpentine, and other lethal devices. As you consider action on these legislative proposals, I urge you not to close out the reality of those past years and to avoid condemning women to relive them.

It is time that we as a society realized that circumstances will always exist in which some women will decide, after consulting with their doctors, evaluating their options, and struggling with their consciences, that abortion is their only reasonable, responsible, and healthful choice. To preserve this freedom of choice, the Congress should reject these constitutional attacks.

I thank you very much.

Senator HATCH. Thank you, Ted. We are glad to have you here before the subcommittee today; we really appreciate your taking the time to testify.

Mr. WEISS. Again, I appreciate your courtesy.

Senator HATCH. Thank you for being here.

[The prepared statement of Representative Ted Weiss follows:]

PREPARED STATEMENT OF REP. TED WEISS

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO TESTIFY THIS MORNING. I BELIEVE THAT THE CONSTITUTIONAL AMENDMENTS THAT WE ARE ADDRESSING TODAY STRIKE AT THE VERY BASIS OF OUR FREE SOCIETY. THEY WOULD GRANT CONGRESS AND STATE LEGISLATIVE BODIES UNPRECEDENTED POWER TO DENY CITIZENS WHAT ARE NOW GUARANTEED AS CONSTITUTIONAL RIGHTS, REGULATE THE MOST INTIMATE ASPECTS OF THEIR LIVES, AND DICTATE MORAL AND RELIGIOUS BELIEFS TO THE AMERICAN PEOPLE. BEYOND LAW AND CUSTOM, THE PROPOSED AMENDMENTS JEOPARDIZE THE PHYSICAL AND MENTAL HEALTH, AND IN SOME CASES THE LIVES, OF WOMEN IN THIS COUNTRY.

I WOULD LIKE TO FOCUS MY REMARKS ON THE HUMAN LIFE FEDERALISM AMENDMENT, INTRODUCED BY THE DISTINGUISHED CHAIRMAN, WHICH GRANTS BOTH CONGRESS AND THE STATES THE POWER TO RESTRICT AND PROHIBIT ABORTION. THIS AMENDMENT HAS BEEN DESCRIBED AND PROMOTED AS A FAIR AND REASONABLE MIDDLE GROUND THAT CAN BE SUPPORTED BY ALL, REGARDLESS OF ONE'S POSITION ON ABORTION. HOWEVER, I'M AFRAID THAT THIS AMENDMENT IS REALLY NO COMPROMISE AT ALL. IF ENACTED, S.J. RES. 110 WOULD IMPERIL THE RIGHT TO CHOOSE BY PERMITTING A STATUTE RESTRICTING OR OUTLAWING ABORTION TO PASS CONGRESS OR ANY STATE LEGISLATURE BY A SIMPLE MAJORITY VOTE. AND WHAT SHOULD BE EVEN GREATER CAUSE FOR CONCERN IS THAT THESE ABORTION STATUTES WOULD THEN BE INSULATED FROM THE SUPREME COURT'S SCRUTINY. IN OTHER WORDS, THE CONGRESS OR ANY STATE, WOULD BE ENABLED TO PASS A HUMAN LIFE STATUTE THAT WOULD BE IMMUNE FROM CHALLENGE ON CONSTITUTIONAL GROUNDS. THIS AMENDMENT OVERHAULS OUR GOVERNMENT'S SYSTEM OF CHECKS AND BALANCES THAT HAS PROTECTED OUR CONSTITUTIONAL RIGHTS.

THE DISTINGUISHED CHAIRMAN HAS STATED THAT HIS AMENDMENT SIMPLY REENFRANCHISES ELECTED REPRESENTATIVES ON THIS ISSUE. I BELIEVE, HOWEVER, IT WOULD DO SO BY ENACTING THE VIEWS OF A VOCAL AND WELL-FUNDED MINORITY, WHILE IGNORING THE MAJORITY OF AMERICANS WHO SUPPORT FREEDOM OF CHOICE. IT WOULD USE, AND ABUSE, GOVERNMENTAL AUTHORITY TO IMPOSE PARTICULAR MORAL BELIEFS AND CODES OF PERSONAL

CONDUCT ON ALL CITIZENS, WITHOUT RESPECT FOR THEIR DIVERGENT CONVICTIONS.

FURTHERMORE, THE AMENDMENT WOULD ESTABLISH A DANGEROUS PRECEDENT WHICH WOULD ENABLE TO CONGRESS TO VIOLATE OR REPEAL CONSTITUTIONAL RIGHTS AT THE WHIM OF AN APPARENT MAJORITY. IT WOULD OPEN UP A PANDORA'S BOX OF LEGISLATING PERSONAL MORALITY AT THE EXPENSE OF CONSTITUTIONAL LIBERTIES AND CIVIL RIGHTS. WHO'S TO SAY, OR GUARANTEE, WHERE THIS STRIPPING AWAY OF INDIVIDUAL FREEDOMS WILL END? WITH ABORTION? FREEDOM OF RELIGION? RIGHT TO PRIVACY? FREEDOM OF SPEECH? THE AMENDMENT WOULD BRING US ONE STEP CLOSER TO A CLIMATE IN WHICH THE ABRIDGMENT OF PERSONAL RIGHTS WOULD BE AN ACCEPTABLE PRACTICE. WE CANNOT ALLOW THIS TO HAPPEN.

AS WE ARE ALL AWARE, IN 1973 THE SUPREME COURT RULED THAT THE RIGHT TO PRIVACY AND THE CONCEPT OF PERSONAL LIBERTY EMBODIED IN THE FOURTEENTH AMENDMENT GUARANTEED THE RIGHT OF A WOMAN, IN THE FIRST TRIMESTER OF HER PREGNANCY, TO MAKE HER OWN DECISION, IN ACCORD WITH HER CONSCIENCE, TO BEAR A CHILD OR TERMINATE HER PREGNANCY. THIS DECISION RESCUED WOMEN FROM THE HORROR OF BACKROOM ILLEGAL ABORTIONS. FINALLY, ABORTION BECAME A SAFE AND LEGAL CHOICE FOR BOTH A WOMAN AND HER DOCTOR.

OPPONENTS OF THE RIGHT TO CHOOSE CLAIM THAT THE JUSTICES IMPROPERLY IMPOSED THEIR PERSONAL VIEWS ON THE NATION. I MUST EMPHATICALLY DISAGREE. IN REALITY, THE COURT CHOSE A PATH THAT LEAST INTERFERES WITH AN INTENSELY PRIVATE AND PERSONAL ASPECT OF OUR LIVES. NO ONE IS FORCED TO HAVE AN ABORTION AS A RESULT OF ROE V WADE. SIMILARLY, NO ONE IS FORCED TO CARRY AN UNWANTED OR UNINTENDED PREGNANCY TO TERM. THIS FREEDOM OF CHOICE IS ALSO EXTENDED TO DOCTORS, WHO MAY OR MAY NOT PERFORM ABORTIONS; TO MEDICAL FACILITIES THAT MAY OR MAY NOT OFFER ABORTION SERVICES; AND EVEN TO BOTH CONGRESS AND THE STATES, WHICH MAY OR MAY NOT USE PUBLIC MONEY TO FUND ABORTION.

THE SIGNIFICANCE OF THIS DECISION, THEREFORE, IS MORE BASIC THAN A WOMAN'S RIGHT TO ABORTION. ROE V WADE SHOWED THAT THE RIGHT OF INDIVIDUALS TO BE FREE FROM UNREASONABLE AND UNWARRANTED GOVERN-

MENTAL INTERFERENCE IN THEIR PERSONAL LIVES APPLIES TO ABORTION, AS IT DOES TO OTHER INDIVIDUAL LIBERTIES. THIS DECISION IS CONSISTENT WITH THE COURT'S HISTORY OF RESTRICTING UNDUE LIMITATIONS ON INDIVIDUAL FREEDOMS. IN CASES DEALING WITH FAMILY RELATIONSHIPS, MARRIAGE, CHILDREARING, CONTRACEPTION AND PROCREATION, THE COURT HAS PRESERVED INDIVIDUAL AND FAMILY CHOICES BY INVOKING THE RIGHT TO PRIVACY. TO DO OTHERWISE, WITH RESPECT TO ABORTION, WOULD COMPROMISE THE WELFARE AND INTEGRITY NOT ONLY OF WOMEN, BUT OF THEIR FAMILIES AS WELL.

THE SUPREME COURT DECISION ALSO RECOGNIZED HOW DEEPLY DIVIDED WE ARE AS A PEOPLE WHEN CONFRONTED WITH THE COMPLEXITIES OF THE ABORTION ISSUE. THE JUSTICES FOUND THAT A VARIETY OF FACTORS COLOR ONE'S THINKING ON THE ISSUE INCLUDING, AND I QUOTE, "ONE'S PHILOSOPHY, ONE'S EXPERIENCES, ONE'S EXPOSURE TO THE RAW EDGES OF HUMAN EXISTENCE, ONE'S RELIGIOUS TRAINING, ONE'S ATTITUDES TOWARD LIFE AND FAMILY, AND THE MORAL STANDARDS ONE ESTABLISHES AND SEEKS TO OBSERVE." I THINK THAT WE WOULD ALL AGREE WITH THE COURT'S FINDING THAT THERE IS NO CONSENSUS AND, CERTAINLY, NO OVERWHELMING PUBLIC MANDATE ON THIS DEEPLY PERSONAL AND MORAL QUESTION.

GIVEN THIS SPECTRUM OF COMPETING VALUES AND OPINIONS, THE SUPREME COURT APPROPRIATELY CHOSE NOT TO IMPOSE ONE DOCTRINE OF RELIGIOUS AND MORAL THOUGHT ON THE MEN AND WOMEN OF THIS COUNTRY. IN KEEPING WITH OUR FIRST AMENDMENT TRADITIONS, THE COURT ELECTED TO LEAVE THE DECISION IN THE PRIVATE DOMAIN, AS A MATTER OF INDIVIDUAL CONSCIENCE.

FOR THESE REASONS, I BELIEVE THAT THE ROE V WADE DECISION SHOULD MARK THE LAST GOVERNMENTAL DECLARATION ON THIS DIFFICULT AND CONTROVERSIAL ISSUE. THE DECISION PROVIDES SUFFICIENT GUIDANCE TO LAWMAKERS TO INSURE THAT CONSTITUTIONAL RIGHTS ARE NOT ABRIDGED BY UNCHECKED GOVERNMENTAL INTRUSIONS WHILE MAINTAINING THE STATES' INTEREST IN THE REGULATION OF LATE TERM ABORTIONS. I SEE ABSOLUTELY NO JUSTIFICATION FOR AMENDING THE CONSTITUTION WITH THE PURPOSE OF OVERTURNING THIS DECISION.

I AM AWARE THAT TODAY'S HEARINGS ARE DEVOTED TO THE LEGAL IMPLICATIONS OF CONSTITUTIONAL AMENDMENTS OUTLAWING ABORTION. HOWEVER, I BELIEVE THAT THIS SCHOLARLY DISCUSSION SHOULD NOT BE ALLOWED TO OBSCURE THE VERY REAL NIGHTMARE OF PAIN, SUFFERING AND DEATH THAT WILL RESULT FROM A BAN ON LEGAL ABORTIONS. A CONSTITUTIONAL AMENDMENT CANNOT ERADICATE THE COMPELLING CIRCUMSTANCES THAT LEAD WOMEN TO TERMINATE THEIR PREGNANCIES. A CONSTITUTIONAL AMENDMENT CANNOT MIRACULOUSLY GUARANTEE INFALLIBLE CONTRACEPTIVE DEVICES ANY MORE THAN IT CAN PERFECT HUMAN BEHAVIOR. AS EXPERIENCE PAINFULLY TEACHES US, A CONSTITUTIONAL AMENDMENT DOES NOT PREVENT ABORTION; IT ONLY STOPS ABORTIONS THAT ARE LEGAL AND SAFE.

MR. CHAIRMAN, APPROXIMATELY 25 YEARS AGO, AS A YOUNG ASSISTANT DISTRICT ATTORNEY IN NEW YORK, ONE OF MY RESPONSIBILITIES WAS THE INVESTIGATION AND PROSECUTION OF ILLEGAL ABORTIONISTS. FOR THE MOST PART, THEY WERE WITHOUT MEDICAL KNOWLEDGE OR TRAINING; THE FEW WHO WERE TRAINED HAD LOST THEIR LICENSE OR CAPACITY TO PRACTICE MEDICINE. NEITHER GROUP WAS COMPRISED OF INDIVIDUALS TO WHOM ONE WOULD WANT TO ENTRUST THE LIFE OF A LOVED ONE. I SAW RESULTS OF THEIR BUTCHERY, THE MAIMING AND THE KILLING OF WOMEN WHO DID NOT HAVE A FREEDOM OF CHOICE.

WHAT I WITNESSED WAS ONLY SMALL SEGMENT OF THE ATROCITIES THAT OCCURRED DAILY IN THIS COUNTRY BEFORE 1973. IT IS ESTIMATED THAT BETWEEN 200,000 AND 1.2 MILLION WOMEN A YEAR WERE SUBJECTED TO LIFE AND HEALTH ENDANGERING ABORTIONS, THAT HUNDREDS OF WOMEN DIED ANNUALLY AS A RESULT OF BOTCHED ABORTIONS, AND THOUSANDS OF WOMEN SUFFERED PERMANENT DISABILITY AS A CONSEQUENCE OF THE PROCEDURES USED BY THIS UNDERGROUND NETWORK. WOMEN, WHO WERE MORALLY AND PHYSICALLY TRAPPED BY INHUMANE LAWS, OFTEN HAD NO ALTERNATIVE BUT SELF-INDUCED ABORTIONS, PERFORMED WITH COATHANGERS, TURPENTINE AND OTHER LETHAL DEVICES. AS YOU CONSIDER ACTION ON THESE LEGISLATIVE PROPOSALS, I URGE YOU NOT TO CLOSE OUT THE REALITY OF THOSE PAST YEARS, AND TO AVOID CONDEMNING WOMEN TO RELIVE THEM.

IT'S TIME THAT WE AS A SOCIETY RECOGNIZE THAT CIRCUMSTANCES WILL ALWAYS EXIST IN WHICH SOME WOMEN WILL DECIDE, AFTER CONSULTING THEIR DOCTORS, EVALUATING THEIR OPTIONS, AND STRUGGLING WITH THEIR CONSCIENCES, THAT ABORTION IS THEIR ONLY REASONABLE, RESPONSIBLE, AND HEALTHFUL CHOICE. TO PRESERVE THIS FREEDOM OF CHOICE, THE CONGRESS SHOULD REJECT THESE CONSTITUTIONAL ATTACKS.

Senator HATCH. Our next witness will be Prof. Donald Regan from the School of Law at the University of Michigan. He is the author of a number of articles on the abortion right.

We are very happy to have you with us.

STATEMENT OF PROF. DONALD REGAN, SCHOOL OF LAW, UNIVERSITY OF MICHIGAN

Mr. REGAN. Thank you, Mr. Chairman.

I have brought with me a written statement which addresses the general issue of whether we need any constitutional amendment on the abortion topic. I propose to read that statement, with some omissions, and save myself a little time to address a few comments to the particular amendments before us.

This committee is considering proposed amendments to the Constitution. No one should vote for a constitutional amendment at any stage of the process as a matter of mere political expediency.

The question of whether to amend the Constitution should be treated as a matter of the highest principle. Granting that, how does one look for a principled answer to the question, "What should the Constitution say about abortion?" One possible approach is to consider the abstract question, "What would an ideal Constitution for an ideal State say about abortion?"

I am sure many witnesses before this committee, speaking on both sides of the issue, have taken essentially that approach. If I followed them in this, I would produce moral and philosophical arguments that a fetus should not be regarded as a person and that a woman should not be made to bear a child she does not want. But also if I did this, I would only repeat what you have heard before.

There is another way to approach the problem, which is in some respects a better way. You should be asking, "What legal position on abortion coheres best with the general spirit of our laws?" Our laws are a rich fabric, and they reveal more than any philosophical argument about what our values really are.

I believe that laws forbidding abortion are inconsistent with the general spirit of our legal system. Fundamental principles of American law, principles recognized in the common law and statutes as well as in parts of the Constitution that no one suggests should be amended, argue strongly that we should not prohibit abortion.

It is true that we are contemplating changing our laws if we amend the Constitution. But, still, what is being contemplated is a change in one part of our laws. We do not wish to change them all, all at once, nor could we do so.

We should therefore be certain before we make a change that what we propose to add is consistent in spirit with what we already have and are satisfied with. The proposed amendments on abortion fail that test.

The first issue that arises, on my approach as on a standard approach, is whether the fetus is to be regarded as a person. In my view, a general consideration of our laws does not compel an answer to this question either way. I shall therefore concede for purposes of the following argument that it is permissible to regard the fetus as a person.

I suggest that, even so, laws prohibiting abortion are inconsistent with the basic tenets of our legal culture. The reason, simply stated, is this: It is a deeply rooted principle of our law that, in general, one individual should not be legally compelled to provide aid to another individual.

For example, a Pennsylvania court recently held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin, even though the operation involved little risk, even though healthy bone marrow regenerates, and even though there was no other source of aid.

We value highly the freedom to choose one's associations and responsibilities. We do not believe that one individual should be compelled to serve another. Forbidding abortion is tantamount to compelling a pregnant woman to serve the fetus—to give aid, and to give aid of a specially personal, invasive, and burdensome sort. Unless there is some reason to set aside the general principle I have referred to, abortion should not be forbidden.

There are a number of possible objections to this argument. It might be said, "Abortion is not a mere refusal to aid; it is an active killing." It might be said, "Surely it is not a fundamental principle of our law that individuals may ignore others in their need, and if it is a principle of our law, it is time we changed it." It might be said, "We make exceptions to the principle of not compelling aid. Surely laws against abortion would fall under some such exception." These objections are mistaken. I shall do what I can in the limited time available to explain why.

The most troublesome objection is the claim that abortion is not a mere refusal to aid but an active killing. We normally discuss problems about giving aid in terms of acts and omissions. That is the way lawyers talk about the problems. It is omissions that we normally decline to punish. Securing an abortion seems active and therefore seems to fall on the wrong side of the traditional distinction for my purposes.

The truth, however, is not that abortion falls on the wrong side of the traditional distinction; the truth is that abortion does not fit comfortably on either side. In some respects, to be sure, abortion looks like an act, but in other respects it is quite unlike the standard act which we forbid.

In the standard case, when we forbid an act against a victim—murder, for example—we are forbidding an invasion of the victim's life from outside. The victim's interests could be completely protected by removing the would-be actor from the scene entirely. The victim makes no claim on the actor except that the actor go away. That is not true in the abortion context.

We cannot serve the fetus' interest by removing the woman from the scene. The fetus needs the woman. The fetus makes a positive claim and a substantial claim on the woman. The issue is whether the woman should be free to reject the fetus' claim.

In its basic structure then, the abortion situation is most like cases—the bone marrow case, for example—where the issue is whether aid must be provided and where a refusal to aid is a standard omission.

The central issue is whether the woman may reject the fetus' positive claim. That issue is much more basic than whether, because of the special features of the case, the woman's refusal to aid must be accomplished by seemingly active methods.

That brings us to the second question—whether our law embodies a principle allowing one to refuse aid and, if it does, whether we should change it.

There are a wide range of cases in which our laws impose essentially trivial duties of aid—for example, a duty to call a doctor for someone who is injured. In fact, even cases involving these trivial duties are clearly treated by courts as exceptions to a general principle that no aid is required.

If I had time, I would argue at length that the pregnant woman has done less to make herself an appropriate subject for a duty to aid than any of the other individuals on whom we are willing to impose these trivial duties.

But the first point which should be emphasized is that in no other case do we impose duties of aid which involve a physical invasion and physical burdens like those of pregnancy.

I have already mentioned the only decided "duty to aid" case which at all resembles the abortion case in this respect—the case which held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin. The burden that was too great to impose on that man was much less than the burdens of a normal pregnancy.

We must not close our eyes to the fact that pregnancy is invasive. It alters the entire functioning of a woman's body. And it is burdensome. It involves substantial pain, discomfort, and disability spread over many months. Further, many aspects of our jurisprudence, from the disappearance of State-imposed corporal punishment to judicial scruples about organ donation by incompetent persons, show that the imposition of physical invasion and physical pain are specially disfavored.

It is true that some women accept the burdens of pregnancy willingly, even joyfully, if they want the child they are carrying, but the proper measure of the burdens for our purposes is how they appear to women who do not want the child. The issue is what we may impose on them.

If we want to consider cases involving burdens genuinely comparable to the burdens of pregnancy, we must consider hypothetical cases. Would any court punish a parent for not running into a burning building to rescue his child? I think not. Would any court order a parent to donate a kidney to his child? No.

Even though these hypothetical cases involve people who intentionally became parents of living children—in some respects the people most appropriately compelled to give aid—I submit that no court would find a duty in these cases. It follows that a pregnant woman should have no duty to remain pregnant.

Let me say a few words on a topic I have already mentioned, the range of recognized exceptions to the principle that there is no duty to aid. We impose some duties of aid on lifeguards and innkeepers, on parents and social hosts, on people who voluntarily begin a process of rescue, and on people who innocently cause accidents to others. Why not on pregnant women?

All I can do, given the limitations of time, is to sum up in a series of negative propositions the facts that distinguish the pregnant woman from all others on whom we impose duties to aid.

In the standard case of a woman who wants an abortion, the woman has not made any contract to give aid. She has not engaged in an economic enterprise involving the provision of services. She has not invited the formation of a relationship with the particular fetus inside her or indeed with any fetus at all. She has not acted in such a way as to discourage or deflect anyone else who could give the required aid. She has not volunteered aid to the fetus. She has not incurred a duty by barging into the fetus' life and damaging the prospects it enjoyed before her intervention. In short, none of the usual reasons for requiring aid apply.

It may seem that at least one of the standard reasons does apply. It may seem that any woman who voluntarily has sex, even if she uses the best available contraceptive measures, knows there is a chance she will become pregnant and may therefore be held to have assumed the risk that she will be required to aid a fetus.

Is not this "assumption of risk" argument essentially the basis on which we impose a duty to aid on innkeepers, for example? The innkeeper wants healthy guests, not sick ones, as the woman wants to have sex but not to get pregnant. But the innkeeper runs the risk of receiving a sick guest and suffering added responsibility, as the woman runs the risk of getting pregnant and being made to carry the fetus to term.

There are a number of points to be made here. The "assumption of risk" argument provides no basis at all for forbidding abortion in pregnancies resulting from rape. More broadly, it is not the general tendency of our law to hold people responsible for all the risks they can possibly foresee, however small. Strict liability has a place in our law but hardly any place at present when the result would be to impose substantial costs on individuals.

That brings us to the crucial point: There may be cases where we are willing to say that one has a duty to aid because he has assumed the risk, but in no other case do we impose burdens remotely approaching the burdens of pregnancy on such a slender basis as that. We speak easily of the innkeeper's duty to aid, but it would never occur to us to require an innkeeper to donate a kidney, say, to a guest in need.

It may seem that I have somehow forgotten the central point, which is that if the fetus is regarded as a person, then there is a person's life at stake. I have not forgotten that. One of the lessons of my argument is precisely that to say there is a life at stake is not to settle the issue. We have other values besides the preservation of life, and the other values sometimes prevail over the value of life.

There are many cases, having nothing to do with abortion, where we allow refusals to aid even though life is at stake. In such cases, the value of life is outweighed, and it is outweighed by precisely the same values that support a woman's right to choose abortion.

I turn now to the last point in my written statement. I have argued that it is inconsistent with the general spirit of our laws to forbid abortion. To forbid abortion is to impose on the pregnant woman burdens of a sort we impose on no one else.

If that is correct, then the injustice of forbidding abortion is exacerbated by the fact that it is women who suffer. Women as a class have suffered from much discrimination, both private and public. We should not add new discrimination.

Further, no one chooses his or her sex. We should be, and in general we are, particularly reluctant to impose burdens on a class defined by a characteristic over which individuals have no control.

In sum, to forbid abortion is to compel women to give aid to other individuals at substantial cost to themselves in a manner at odds with the general tenor of our laws. It is wrong to impose special disadvantages on any class, and it is especially wrong when the victims are a class such as women.

The force of this argument cannot be avoided by saying that we reject the general principle that one is entitled to refuse aid and that the proposed constitutional amendments before this subcommittee represent first steps toward a better legal order.

First of all, even most opponents of abortion would not reject the basic principle that one may refuse aid in cases such as those raising the possibility of compelled organ donation.

Second, there is no evidence at all that the movement to forbid abortion is the first step in a movement to impose greater duties of aid generally.

Third, and most important, even if we were inclined to impose greater duties of aid, starting by forbidding abortion is starting at the wrong end. The pregnant woman has done much less to invite the imposition of a duty to aid than many others on whom we currently impose no duties at all. The burdens that we would impose on her are vastly more objectionable than any we impose in other contexts.

I think it is also appropriate to remind the subcommittee at this point that, although I have been assuming the fetus may be treated as a person, the status of the fetus is highly controversial, and that controversy further argues against starting with a prohibition on abortion. Even if we are inclined to make enormous changes in the areas of law I have discussed—and I do not believe we are—prohibiting abortion is not the way to start.

Senator HATCH. Thank you, Professor Regan. We appreciate having your testimony.

What I will do is call on each one of you, individually, and then we will bring you up as a panel and proceed with questions.

Mr. REGAN. OK. Do you prefer not to hear the few comments about specific amendments which I mentioned previously?

Senator HATCH. I would be happy to hear them. I thought you were through. I am sorry.

Mr. REGAN. Very briefly, first as to the Helms amendment, the basic difficulty here is that it is utterly vague. In context, I take it, it would have to be construed to forbid abortion on demand. What else it does is totally unclear, given the range of circumstances in which abortion is sought.

Mention of the right to life of the fetus does not say when that life may be outweighed, and I take it practically everybody agrees that that right may sometimes be outweighed, as for example when the mother's life is in danger. This vagueness, I think, is a special problem when we are considering essentially writing a criminal prohibition into the Constitution, a virtually unprecedented sort of constitutional provision.

The Garn and Grassley proposals I can discuss together. They are improvements in the sense that they are much more specific as to the substance, but there are, again, very substantial difficulties with writing a criminal prohibition of private behavior into the Constitution, and the sort of questions that will arise are: What, if anything, are States and Congress required to do by way of enforcement of section 2 of these amendments? Who, if anyone, may attempt to force States and Congress to enforce section 2, and how may they attempt to do this?

We have essentially no jurisprudence on these matters, because this is essentially an entirely novel sort of constitutional provision. There is one precedent for it. That was the first prohibition amendment, which hardly anybody would regard as a salubrious example to follow.

The last proposal before us is the Hatch amendment, and this does seem to me to be the best of the proposals. Still, there are difficulties.

Principally, the Hatch proposal represents an unprecedented invitation to Congress to enter areas of family law and ordinary criminal law. Our whole history presupposes that Congress should leave these areas alone. If we must act, then what we should do is simply return the matter to the States, and I am interested to note that that is how Senator Hatch describes his proposal, although the proposal as written does a bit more.

Senator HATCH. Actually, that is not correct. I have never described it purely as a State's rights amendment. It is not.

Mr. REGAN. I am not denying that, Senator, but I believe you have characterized your amendment as essentially doing nothing but reversing *Roe* and putting the matter back under State jurisdiction.

Senator HATCH. No. I have made it very clear that the Congress can act on this matter. In any event, I believe that Congress possessed some authority over abortion prior to *Roe* as a function of its commerce power.

Mr. REGAN. What I mean is that I believe in your original statement—the statement you read us earlier this morning—you characterized your proposal that way, and you now agree with me that you do in fact create a brandnew congressional power under your proposal.

Senator HATCH. There is disagreement on that point. Some believe that broad congressional power existed before *Roe*, including some of your allies who tried to enact national legalization prior to 1973. Others—and I tend in that direction—see a much more limited, commerce-related power before *Roe*.

All my amendment does, in my opinion, should it be passed by two-thirds of the Congress and be ratified by three-quarters of the States, is provide the opportunity for the people, through elected representatives, State and Federal to determine the outcome of this particular issue.

Be that as it may, your statement has been very provocative today, and I have enjoyed it, in spite of our disagreements.

Mr. REGAN. Despite your comments, I continue to believe that your proposal creates a form of Federal jurisdiction to prohibit and restrict abortion, which conceivably existed previously but would have been regarded as extremely doubtful by most constitutional scholars and certainly represents a kind of legislation which Congress has by and large avoided, I believe.

To make a related but more technical point, this would be an almost unprecedented creation of a situation in which Congress has a power to legislate but not a supreme power.

Ordinarily, of course, Federal law is made controlling by the supremacy clause. You have suggested creating a congressional power and specifically stipulating that it shall not be supreme.

Senator HATCH. That is true this is a very innovative country.

Mr. REGAN. Indeed it is, but there is always a question of whether inventions are a good thing.

Senator HATCH. Occasionally we Senators can be fairly innovative, but most inventions are certainly worthy of debate.

Mr. REGAN. That is a matter on which we could have a long discussion, which I will attempt not to begin.

I have two more very specific points. The stipulation in the Hatch proposal that the more restrictive of two laws, one State and one Federal, shall control is likely to produce severe problems about deciding which of two laws is in fact more restrictive, and I think the most difficult problems may be the least immediately obvious and will arise when States and Congress prescribe different procedures, either different medical procedures for abortion everybody agrees is permitted, or different procedures for deciding whether a specific abortion is permitted under the relevant law. Again, I think that these particular problems are problems that no one really wants to create.

Finally, I cannot help suggesting that one defect of the Hatch proposal, to my mind, is that it would allow States and Congress to forbid abortions even when a woman's life is at stake. I hope that no State or Congress would do that, but one of the advantages of the Garn and Grassley proposals is that they at least suggest that would not be a good idea.

Senator HATCH. If I could interrupt you on that, I cannot conceive of anybody doing that.

Mr. REGAN. I am glad to hear that, Senator. Thank you.

Senator HATCH. Certainly not myself.

We have appreciated your testimony. It has been very interesting and well thought out.

[Material follows:]

REWRITING *ROE v. WADE*

*Donald H. Regan** †

Roe v. Wade is one of the most controversial cases the Supreme Court has decided. The result in the case — the establishment of a constitutional right to abortion — was controversial enough. Beyond that, even people who approve of the result have been dissatisfied with the Court's opinion. Others before me have attempted to explain how a better opinion could have been written.[1] It seems to me, however, that the most promising argument in support of the result of *Roe* has not yet been made. This essay contains my suggestions for "rewriting" *Roe v. Wade.*[2]

Ultimately, my argument is an equal protection argument. I shall suggest that abortion should be viewed as presenting a problem in what we might call "the law of samaritanism", that is, the law concerning obligations imposed on certain individuals to give aid to others. It is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance. In brief, our law does not require people to be Good Samaritans. I shall argue that if we require a pregnant woman to carry the fetus to term and deliver it — if we forbid abortion, in other words — we are compelling her to be a Good Samaritan. I shall argue further that if we consider the generally very limited scope of obligations of samaritanism under our law, and if we consider the special nature of the burdens imposed on pregnant women by laws forbidding abortion, we must eventually conclude that the equal protection clause forbids imposition of these burdens on pregnant women. Some other potential samaritans whom there is better reason to burden with duties to aid are burdened less or in less objectionable ways, and still other potential samaritans whose situations are closely analogous to that of the pregnant woman are burdened only trivially or not at all. (I shall suggest a similar equal protection argument, based on the notion that abortion can be regarded as a problem in the law of self-defense, but I prefer the samaritanism argument and I shall give it much more attention.)

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[1] *E.g.*, Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973); Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

[2] 410 U.S. 113 (1973).

The argument I have just sketched will require a fairly lengthy development. In particular, it will require an extended (though far from complete) discussion of the law of samaritanism. It is worth explaining as well as I can in advance of the discussion why such an extended discussion is necessary. I do this not to justify my prolixity, but in hopes that the reader will be less likely to lose the thread of the larger argument.

The basic problem is that the situation of the pregnant woman is *sui generis*. If we regard the pregnant woman as a potential samaritan, there is no other potential samaritan whose situation is not in some important way distinguishable. This means that it is not possible to exhibit the sort of unjustified inconsistency of treatment that amounts to an equal protection violation just by comparing the pregnant woman with some other particular potential samaritan. Rather, it is necessary to survey the entire field of samaritan law, and to argue that laws forbidding abortion subject pregnant women to treatment which is at odds with the general spirit of samaritan law.

I have explained the necessity for a survey of samaritan law. Unfortunately, samaritan law is complicated. The basic and well-established common law principle is that one individual is not required to volunteer aid to another. But there are numerous exceptions to this principle recognized by the common law. There are also a number of exceptions and apparent exceptions to the principle created by statute. Because no single case is perfectly analogous to the case of the pregnant woman, we shall have to discuss a wide range of cases.

The uniqueness of the abortion case also creates problems when we get to the equal protection argument itself. I shall be compelled to sketch an approach to equal protection questions which justifies my rather unusual suggestion that laws forbidding abortion should be struck down, not because they treat pregnant women differently from the way we treat some other class of potential samaritans who are indistinguishable, but rather because they treat pregnant women in a way which is at odds with the general tenor of samaritan law.

It is perhaps worth noting that my equal protection argument will not turn simply on the fact that laws forbidding abortion seem aberrant when viewed against the background of samaritan law. I regard it as important that laws forbidding abortion impair constitutionally protected interests. (The interests I have in mind are *not* in "privacy" or in freedom of choice with regard to marriage, procreation, and child-rearing, but rather in non-subordination and in freedom from physical invasion.) I also regard it as important that laws forbidding abortion involve a classification which is at least somewhat suspect. These themes, which are familiar elements of the "new equal protection", will be developed further in Section III. The approach to equal protection I shall eventually sketch will differ somewhat from the Court's official doctrine on equal protection. Even so, it will represent not merely the approach I think the Court should take, but also, generally speaking, the approach I think they are taking.

Two final introductory points, on vocabulary. First, I have already referred to "laws forbidding abortion". Obviously there are a great variety of laws and possible laws forbidding abortion in at least some circumstances. What I mean by a "law forbidding abortion" is a law of the general type that was standard in the United States before the decision in *Roe*. I mean a law that forbids abortion in most circumstances, whether or not the law provides exceptions for cases involving rape, or for cases in which there is a substantial threat of death or serious physical harm to the pregnant woman, or whatever. Similarly, when I argue that laws forbidding abortion are unconstitutional, I do not mean that the state may not forbid abortion under any circumstances. I am arguing for something along the lines of what *Roe* guaranteed — freedom to choose abortion in the early stages (or before the final stage) of pregnancy. For the most part it will not be necessary to be more precise about the provisions of "laws forbidding abortion" or about the contours of the freedom for the woman I am defending. The second point on vocabulary is simply that for convenience I shall use the word "fetus" to refer to the conceptus at every stage of its development.

I. THE PREGNANT WOMAN AS SAMARITAN

In this Section of the essay, I shall attempt to locate the abortion problem in the doctrinal landscape of samaritan law. Some readers will object that the abortion problem does not belong in that landscape at all, that I am looking at the wrong map. We usually think of samaritan problems as problems involving *omissions*. The established general principle that one does not have to volunteer aid (which I shall refer to as the "bad-samaritan principle") is normally thought of as equivalent to the notion that there is no liability for a failure to act. But the behavior of a woman who secures an abortion does not look like an omission. It looks like an act. So does the behavior of anyone who helps her. Perhaps the bad-samaritan principle is irrelevant. The first project for this part of the essay, then, is to explain why the abortion problem should be regarded as a problem in samaritan law.

Once we have established that we are looking at the right map, we shall attempt to orient ourselves with regard to some important landmarks, such as the established exceptions and apparent exceptions to the bad-samaritan principle. Two important propositions will appear. First, the abortion case is distinguishable in some significant respects from every other case in which a duty to aid is imposed. A respectable argument can therefore be made that if the pregnant woman is to be treated consistently with other potential samaritans, it is impermissible to impose on her even a trivially burdensome duty to aid. Many readers will not be persuaded by such an argument, however. They will believe that even if the pregnant woman is distinguishable from every other potential samaritan on whom duties to aid are imposed, still the cumulative force of the *similarities* of the abortion case to various other cases where duties are imposed makes it clear that the pregnant woman may be subjected to some burdens. That brings us to the second proposition: There is *no* other potential samaritan on whom burdens are imposed which are as extensive and as physically invasive as the burdens of pregnancy and childbirth. Even if the pregnant woman should be regarded as "eligible for compulsion to samaritanism" to some extent, she is by no means the most eligible member of the family of potential samaritans. It is not acceptable to subject her to specially extensive and specially invasive burdens, as laws forbidding abortion do.

By now every reader who has given any rein at all to his imagination will have thought up at least two or three objections to the claim that laws forbidding abortion are inconsistent with the general tenor of samaritan law. There are many possible objections to be dealt with, and I cannot deal with them all at once. In order that the reader shall not be distracted by impatience to know when I will deal with his particular objections, let me indicate the order of treatment of the major topics in what follows. First, I shall explain why abortion is a samaritanism problem. Second, I shall examine the extent and nature of the burdens imposed on women by anti-abortion statutes. I shall concentrate on the physical and psychological burdens of pregnancy and childbirth, and I shall explain why I think these burdens are more important to the *constitutional* argument concerning abortion than the burdens of child-rearing or the psychological cost of giving up a child for adoption. (It is worth mentioning now that one of the reasons laws forbidding abortion are not validated by analogy to the "parenthood exception" to the bad-samaritan principle is that the burdens of pregnancy and childbirth are physically invasive in a way the burdens imposed on parents are not. As I shall show, physical invasions are specially disfavored by our common and constitutional law. I think this is not the only distinction between the pregnant woman and the parent, but it may well be the most important distinction for my purposes.) Third, I shall explain why the pregnant woman is different from every other potential samaritan on whom common-law duties to aid are imposed, including the parent, the social host, the innocent or negligent creator of a dangerous situation, the samaritan who voluntarily begins to give aid and may be forbidden to terminate the aid, and so on. In the process I shall explain why it is not an adequate defense of laws against abortion that pregnancy is "voluntary". Fourth, I shall distinguish the abortion case from certain exceptions and apparent exceptions to the bad-samaritan principle created by statute, notably the military draft. (The draft involves burdens closely comparable to the burdens of pregnancy, but the draft, I shall argue, is *not* a problem in samaritan law, however much it may seem so at first.) Finally, a few summary remarks will conclude this part of the essay.

A. *Is Samaritan Law Relevant?*

The bad-samaritan principle depends on a distinction between acts and omissions. It would exempt from all liability a physically healthy adult who watched an unrelated child drown in a foot of water, maliciously refusing to pull the child out. It would not, however, permit the adult to hold the child under the water. One might argue that the pregnant woman does not even come within the general scope of the bad-samaritan principle because aborting a fetus, or securing an abortion, is not an omission but a positive act, like holding the child under.

It is clear that from one perspective securing an abortion looks like a positive act. It should also be clear that from another perspective it does not. Carrying a fetus and giving birth are burdensome, disruptive, uncomfortable, and usually to some extent painful activities. In effect, the fetus makes continuing demands for aid on the woman who carries it. The fetus is not like a child being held under water, whose prospects would be satisfactory if the adult holding it under would merely go away. The fetus is much more like the child drowning on its own, who needs the adult bystander to rescue it. The principal difference between the demands of the fetus and the "demand" the child drowning on its own makes of an adult bystander is that the fetus's demands are much greater. If the adult bystander may refuse aid to the drowning child, then surely the same general principle (leaving aside the possibility of relevant exceptions to the principle, which will be discussed later) allows the pregnant woman to refuse aid to the fetus.

The point of the bad-samaritan principle is to establish that, as a general proposition, one does not have to give aid whenever another requires it. One can turn one's back on another's need, declining to subordinate one's own interests. One can choose not to be involved. When a woman secures an abortion in order to avoid the burdens imposed by an unwanted fetus, she is doing just what the bad-samaritan principle, in its standard applications, is designed to allow. It may seem odd to suggest that securing an abortion is really an "omission", but if we want the "act/omission"[3] distinction to reflect the values underlying the bad-samaritan principle, then that is how abortion ought to be viewed.

Suppose that a fetus and the pregnant woman carrying it were attached in such a way that the fetus could be removed without damaging it physically. The removed fetus would eventually die unless it was placed in some other womb, but it would come out of the original carrier's womb in just the same condition it was in inside. If this were the way pregnancy worked, it would be much easier to see that the general right of non-subordination or non-involvement embodied in the bad-samaritan principle would entitle the woman to remove the fetus at any time, unless she had waived or forfeited the right. It would be easier to see that the woman who did *not* remove an unwanted fetus was engaged in a continuing course of charitable conduct, which general samaritan law would permit her to terminate at any time. There are certain situations, to be discussed below, in which one who has started to give aid may not stop. But the general principle is that merely giving aid does not commit one to continuing it.

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[3] The principle is discussed by Prosser in a section entitled "Acts and Omissions". W. PROSSER, THE LAW OF TORTS § 56 (4th ed. 1971).

Now, pregnancy does not work the way I have suggested. It is not possible (at least at the stages of pregnancy where abortions are commonly done, and where they are safest and most desirable for the woman) to remove the fetus without making it inviable. This should make no difference to the conclusion that the woman is permitted by the bad-samaritan principle to remove the fetus. One reason it might be thought to make a difference is that the fetus which was removed without being damaged would have a chance of survival, if another willing carrier could be found in time, whereas the aborted fetus will certainly die. But the bad-samaritan principle protects even omissions that are certain to result in the death of the person denied aid. Unless the pregnant woman falls within some exception to the principle, the principle would permit her to remove the fetus without damaging it, assuming that were possible, even if it were known that the fetus would die because no other carrier could be found. Therefore the fact that the fetus is certain to die does not remove the woman from the scope of the principle.

It might be suggested that removing the fetus in a way which renders it inviable is more clearly an "act" than simply removing the fetus without damaging it. But this does not seem right. It may be that removing the fetus in a way which renders it inviable is likely to be a more complicated act, or a more difficult act. But it is no more an act. Like the mere removing, it is an act in one sense, but it ought to be viewed as an omission, or as part of a course of conduct amounting in overall effect to an omission, under the bad-samaritan principle. It is the only way, in the real world, for a pregnant woman to discontinue the burdensome course of aid to the fetus.[4]

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[4] Another possible objection to the argument in the text runs as follows: Removing-the-fetus-without-damaging-it and removing-the-fetus-and-rendering-it-inviable differ with respect to the actor's *intention*. In the latter case, but not the former, the death of the fetus is a *means* to the protection of the mother. Therefore, in the latter case but not the former the removal of the fetus is impermissible. This is the Doctrine of Double Effect. A great deal has been written about the Doctrine, and I shall not discuss it here. I do not think it has a place in moral reasoning, but that is beside the point. I also do not think it is part of American law, and that is very much to the point. In many situations, appeal

I have argued that abortion must be allowed if we are to respect the pregnant woman's interest in being free to refuse aid, an interest we protect for other potential samaritans. There are two possible counter-arguments, designed to show that we do not really value the potential samaritan's freedom to refuse aid as much as the existence of the bad-samaritan principle might suggest.

The first counter-argument involves the notion that we do not value the potential samaritan's freedom to be uninvolved — rather, we believe only that involvement should not be *legally compelled*. This suggestion strikes me as somewhat odd, but it is not incoherent. A full discussion of the suggestion would be interesting. For the present, however, it suffices to observe that this suggestion does not constitute a reason for thinking that abortion should be treated differently from other samaritan problems. The pregnant woman's involvement with the fetus she carries is not originally created by law, but if she does not desire the involvement, then, in the absence of laws forbidding abortion, she will have no difficulty terminating it. Laws forbidding abortion *compel* her continuing involvement just as much as a general law requiring one to be a Good Samaritan would compel the reluctant adult bystander to be involved with the drowning child.

The second counter-argument suggests that we do not really value either the potential samaritan's freedom to be uninvolved in every case *or* freedom from legally compelled involvement.

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to the act/omission distinction may resemble argument based on the Doctrine of Double Effect, but the two sorts of argument are not the same, *see* Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in P. FOOT, VIRTUES AND VICES (1978), and the latter is not important in our law.

Anyone familiar with the literature on abortion will have assumed, correctly, that I owe the idea of the pregnant woman as samaritan to Judith Thomson's revelatory article, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47 (1971). It is worth noting that Thomson does not unequivocally claim that securing an abortion should be viewed as an omission rather than as an act. Much of her essay seems to be based on this implicit premise, but when she addresses the issue directly, she apparently prefers to view abortion as an act of killing justified by principles regarding self-defense. I think a highly plausible argument can be made along these lines, and I shall devote a brief Section II to the self-defense argument. But I prefer to rely primarily on the bad-samaritan principle. I find it very plausible to view securing an abortion as a refusal-to-aid, and it is clear that our law allows refusals-to-aid for less weighty reasons than it requires for killing, even in self-defense. (In saying this, I do not mean to suggest that the reasons which may support an abortion are not weighty. They are.) One reason Thomson may have had for preferring the self-defense line does not concern me. For purposes of *moral* argument, which she was engaged in, it is much less clear that we accept the bad-samaritan principle than that we recognize a right of self-defense. But there is no doubt that the bad-samaritan principle is a principle of American law.

Instead, it is suggested, the bad-samaritan principle is a response to various difficulties in formulating legal rules requiring aid. In many situations where a person is in need of aid, there will be more than one potential samaritan. Each potential samaritan will be in a position to ask, "Why should I be the one to give aid?" Similarly, in many situations involving potential samaritans, it will be unclear just how much the samaritan ought to be required to do in the way of attempting a rescue, or whatever. Frequently, also, it will be difficult to establish a clear causal connection between the failure to give aid and the harm to the person who needed aid. It may seem that the bad-samaritan principle is a sort of *per se* rule designed to avoid all these difficulties by establishing a general, easily understood, and easily applied rule of non-liability. If so, it may also seem that the abortion case should be an exception to the *per se* rule. When a woman is pregnant and the fetus is in need of her continuing aid, there is no doubt who must provide the aid; there is no doubt what aid is required; and there will be no difficulty in identifying the woman's refusal of aid, if she has an abortion, as the cause of the harm to the fetus.

One answer to this argument is that even if the bad-samaritan principle were a *per se* rule of the sort described, it would not be clear that abortion cases should constitute an exception. There is no question about whose aid is required in the abortion case, and there is no question that a refusal of aid will be the cause of harm to the fetus. Nor is there doubt about what aid is required if the fetus is to survive. But the difficulty about the magnitude of aid which inclines us to a *per se* rule is not primarily the difficulty of deciding how much aid is required. It is the difficulty of deciding how much may justly be required of the potential samaritan. If we did not think there were limits to the aid that could justly be required, we could solve the "how much aid" difficulty by requiring the potential samaritan to do everything in his power that might conceivably be useful. As I shall show in the next Section, the burdens of pregnancy and childbirth are considerable, and they are burdens of a sort disfavored by our legal tradition. They are also far greater than the burdens imposed under exceptions to the bad-samaritan principle on any other potential samaritans, except (possibly) parents. The case for making an exception of the abortion situation would be problematic even if the *per se* analysis were correct and our commitment to the bad-samaritan principle were much weaker than the present scope of the principle suggests.

In any event, I do not think the bad-samaritan principle is adequately explained as a *per se* rule. I do not deny that some legal rules are of this type. Nor do I deny that for someone out of sympathy with the idea that an individual should be free to refuse aid, this sort of *per se* analysis may be the most appealing justification of the bad-samaritan principle available. But it is clear to me that if the difficulties we have mentioned were the only support for the bad-samaritan principle, the principle in its present broad form would not be part of the common law. There are many individual cases not involving abortion in which none of the difficulties mentioned is serious. If these difficulties were the only basis for the bad-samaritan principle, then instead of a flat rule we would consider the issue of samaritans' duties case by case and develop more specific rules. The uncertainty created would be no greater than that created by many hard-to-apply common law rules, and the gain in clarity about what we were doing would be considerable. The common law recognizes the bad-samaritan principle because it does value the freedom to refuse aid, to resist subordination even in trivial ways, to remain uninvolved. If this freedom is important, it is as important for the pregnant woman as for anyone else.

One final point should be mentioned in this Section. It will seem to some readers that even if the *woman's* act of securing an abortion can be viewed as an omission, the same cannot be said of the act of any doctor who assists her by performing the abortion. I agree that the doctor looks more "active" than the woman. That is not primarily because he performs the abortion while the woman suffers it. Rather it is because the doctor is not freeing *himself* from the fetus's demands for future aid, as the woman is freeing herself. The question, then, is whether the doctor is shielded from liability by arguments establishing the woman's freedom to refuse aid.

I do not know of any authority on whether a third party may assist a potential samaritan who needs help in refusing aid. The reason for the lack of authority is clear. It is only in the unusual case, like the abortion situation, that anything resembling a positive act is necessary for the samaritan to refuse aid. There is some law on third-party intervention in the context of the right of self-defense (or, from the point of view of the third party, the context of defense of others). In that context, the currently dominant view, and the view which is still gaining ground, is that third parties are entitled to intervene.[5]

For myself, I find it easy to conclude that if the woman is free to secure an abortion, the doctor should be able to help her. Although I find it easy to conclude this, I do not have much to say in support of my conclusion. I do have one observation. When abortion is forbidden by law, many women suffer severe injury or even death from illegal or self-induced abortions. If we assume that women should not be seeking abortions in the first place, it is possible to ignore this large cost, saying that the women have only themselves to blame. But it seems perverse to say that given the general tenor of samaritan law a woman ought to be permitted to refuse aid to the fetus, and yet to say that she may not receive assistance in this course when the assistance would avoid much suffering and when it is voluntarily offered and privately arranged.

B. *The Burdens Imposed By Laws Forbidding Abortion*

In this Section I shall discuss the nature and extent of the burdens imposed on women by anti-abortion laws. First I shall consider the extent of the physical burdens of pregnancy and childbirth. Then I shall argue that these burdens are of a *kind* that our law is ordinarily specially reluctant to impose on unwilling parties. Finally, I shall explain why these are the burdens most relevant to the *constitutional* status of abortion, even though there are other significant costs associated with or likely to result from an unwanted pregnancy.

1. *The Physical Burdens of Pregnancy and Childbirth*

It will be instructive to begin by listing what two obstetricians, writing for pregnant women and attempting not to alarm but to reassure them, call the "minor complaints" of pregnancy.[6]

First, complaints involving general inconvenience or discomfort: a tendency to faintness (generally limited to the first fourteen weeks); nausea and possibly vomiting (generally limited to the first fourteen weeks); tiredness (pronounced in the first fourteen weeks, then disappearing, to reappear near the end of pregnancy); insomnia (difficulty going to sleep caused by inability in late pregnancy to find a comfortable position in bed, compounded by difficulty going back to sleep when wakened by a kicking fetus or by the need for frequent urination which accompanies pregnancy, also compounded by general disruption of the body's internal temperature-regulation mechanism); slowed reflexes; poor coordination; uncertainty of balance (caused by increase and redistribution of body weight); manual clumsiness in the morning (caused by swollen fingers and carpal-tunnel syndrome); shortness of breath following even mild exertion; and new aversions to certain foods or smells (especially fatty or spicy foods).

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[5] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 76 (1965); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 54 (1972); ALI MODEL PENAL CODE § 3.05 (Proposed Official Draft 1962).

[6] The discussion in the text is based on G. BOURNE & D. DANFORTH, PREGNANCY (rev. ed. 1975). I have not merely copied a list from that book; rather I have collected and arranged observations scattered throughout the book. To give specific citations would, however, pointlessly clutter these pages.

More specific complaints, still involving inconvenience or discomfort, are: tender breasts; stuffy nose; constipation; heartburn (different from nausea, and not limited to early pregnancy); nosebleeds; edema of the feet and ankles; a metallic taste in the mouth; special difficulty in curing any vaginitis that may occur; increased susceptibility to and difficulty of curing urinary tract infection; increased frequency of urination (quite apart from any urinary infection); occasional extreme urgency of urination (as the fetus bumps the bladder); and occasional stress incontinence from the same source. Many pregnant women also report more headaches than when they were not pregnant, though there is no apparent reason for this aside from the increased psychological stress of pregnancy.

Among complaints not merely uncomfortable but painful, some of which can be very painful indeed, we find: backache; costal-marginal pain (caused by the enlarged uterus pushing against the lower ribs); abdominal "round ligament" pain; abdominal muscle pain; pelvic ache; pelvic shooting pain (as the fetus bumps a nerve at the rim of the pelvis); foot and leg cramps; the different pain and leg cramps associated with varicose veins; hemorrhoids; pain and pins-and-needles in the wrist (carpal-tunnel syndrome); and mastitis. Finally, as a result of the general softening of ligaments during pregnancy, along with the extra weight and the loss of balance, there is an increased susceptibility to sprains and to aching feet.

The pregnant woman also experiences changes in her appearance: most obviously, the pronounced change in the shape of her body as a whole; consequent upon the change of body shape, an awkward gait and inability to wear her normal wardrobe; increased dryness of skin (for women with dry skin initially); thin, brittle, unmanageable hair; varicose veins (in the legs or the vulva, and sometimes in pelvis, abdomen, or breasts[7]); swelling of the face; changes in pigmentation (darkening of the nipples and areolae; sometimes darkening of larger patches of the breast; darkening of freckles or moles; the *linea nigra* from the pubic area to the naval; the often blotchy "butterfly mask" or chloasma); stretch marks (which result in part from avoidable excessive weight gain, but which are not always avoidable).

Finally, as a result of hormonal changes, the pregnant woman is likely to be at times markedly irritable, volatile in her moods, or subject to periods of depression. She may also experience a loss of sexual desire.

After the period of pregnancy, there is the actual delivery of the fetus. The days when a woman had a reasonable chance of spending twelve hours or more in sweaty agony are happily gone. But it is still true that for many women parturition is a thoroughly unpleasant and significantly painful experience. It can also involve a major operation, with all the added risk and discomfort that entails, if the fetus is delivered by cesarean section.

I shall say nothing of the rare and dangerous complications of a pregnancy and delivery, except to note that in all probability full-term pregnancy and childbirth involve greater risks of death to the mother than early abortion.[8]

Looking beyond delivery, some of the "minor complaints" of pregnancy listed above persist for varying periods after parturition. There are also a few characteristic post-partum pains, such as the discomfort caused by an episiotomy.

The permanent physical effects of pregnancy which are noticeable by anyone other than a doctor and which are genuinely unavoidable appear to be few, perhaps limited to some stretch marks, some darkening of the nipples and areolae, sometimes varicose veins and hemorrhoids (which become more of a problem as the number of pregnancies the woman has been through increases), and, when a cesarean is performed, the scar from that operation. Beyond these effects, many women attribute to their pregnancies such other permanent effects as weight gain, anemia, constipation, skin damaged by dryness, damaged hair, sagging breasts, weak bladder, and painful feet or back.

The truth may well be that avoiding all the avoidable permanent effects, and for that matter minimizing all the "minor complaints", requires considerable self-indulgence during pregnancy. The woman who can rest in the afternoon, sleep two extra hours at night, persistently oil her dry skin, give her hair extra attention, not stay on her feet for too long at a time, eat small meals every two hours, never put off the urge to evacuate her bowels, religiously do her post-partum exercises, and so on, will suffer less discomfort and fewer lasting effects of pregnancy than the woman who cannot.

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[7] J. GREENHILL & E. FRIEDMAN, BIOLOGICAL PRINCIPLES & MODERN PRACTICE OF OBSTETRICS (1974).

[8] *See* materials cited in Roe v. Wade, 410 U.S. 113, 149 n.44 (1973).

The ills of pregnancy, delivery, and beyond make an impressive list. To be sure, not every pregnant woman suffers all of these ills. Nor do those who are afflicted suffer them in equal degree or at all times during pregnancy. But most of the complaints I have listed are common ones. I suspect it is an unusually lucky woman who does not put up with enough pain, discomfort and disruption of appearance and emotional state to add up to a major burden. (We should perhaps remember that as a society we recoil from being a few pounds overweight, from living in a house where the temperature is below 70° even though we can afford sweaters, or from going to the dentist.)

It may seem that I must have got it wrong — that if having a child were as bad as I suggest, no woman would ever do it voluntarily. Alternatively, it has been suggested to me by colleagues (male) that the pain of childbirth is a "noble" pain, or that having a child is a "transcendent experience" in which the pain becomes a valued part of an incomparably valued whole. These suggestions completely and shockingly miss the point. I have no doubt that all the pain, discomfort, and annoyance of being pregnant and giving birth are worthwhile *if* one wants a child. I do not deny the existence of transcendent experiences, and I am prepared to believe that for some women carrying and delivering a child are just that. (I must say that I know other women, devoted and successful mothers, who say they would never go through pregnancy if one could get a child of one's own any other way.) But the question is not whether pregnancy is worthwhile, or whether it is a transcendent experience, for a woman who wants a child. The question is how burdensome it is for a woman who does *not* want a child.

The answer, clearly, is that for a woman who does not want a child, pregnancy is very burdensome indeed. It is worth mentioning that all of the pains and discomforts listed above are likely to be significantly aggravated when the entire pregnancy is unwanted. It is much easier to bear up under pain and inconvenience when they serve some end one has chosen than when they do not.

An unwanted pregnancy is vastly more burdensome than the actions required of potential samaritans under other exceptions to the bad-samaritan principle. Compare carrying and delivering an unwanted child to calling a doctor for an injured social companion,[9] or to warning the object of a death threat made by one's patient in psychotherapy,[10] or to letting a guest invited in for dinner stay the night,[11] and so on. Even setting aside the small risk of serious complications or death that is associated with pregnancy and with none of those other duties, there is no comparison at all. The one traditional exception to the bad-samaritan principle where the burdens bear comparison to the burdens of pregnancy is the parenthood exception. Even here, the burdens are of a different kind. Being a mother (of a child, not a fetus) does not alter the entire functioning of a woman's body the way being pregnant does. I shall say more about the importance of this point, and about other possible distinctions between the pregnant woman and the parent, later on.[12]

2. *The Disfavored Status of Physical Impositions*

In addition to imposing burdens greater than any of the recognized exceptions to the bad-samaritan principle (except possibly the parenthood exception), anti-abortion laws also impose burdens of a *kind* that is especially suspect in our law. We are traditionally very dubious about practices which involve direct invasions of the body or the imposition of physical pain or extreme physical discomfort.

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[9] *See* Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1976).

[10] *See* Tarasoff v. Regents of the Univ. of Calif., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[11] *See* Depue v. Flatau, 100 Minn. 299, 111 N.W. 1 (1907).

[12] There is some tension for the proponent of "women's rights" between the argument I am making here, emphasizing the burdens of pregnancy, and an argument made about cases like Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), emphasizing the pregnant woman's ability to continue at her normal occupation almost to the point of delivery. The conflict is more apparent than real. First, there is an important difference between asking how great a burden we can impose on the woman for the benefit of the fetus and asking how great a burden the woman can bear while continuing at her usual job if she chooses. Second, the variation in the actual effects of pregnancy on different women works in the woman's favor in both cases. When considering what we can impose on women, we must surely consider, if not the worst possible case (where what we impose, by increasing the risk, is death), at least the worst situation to which a significant fraction of the women affected are involuntarily assigned. In the *LaFleur* situation, by contrast, it should suffice to require individual consideration of the woman's case if a significant fraction of pregnant women can carry on as teachers with their abilities in that role relatively unimpaired.

The clearest example is corporal punishment. Although the Supreme Court has never directly confronted the issue, Mr. Justice (then Judge) Blackmun wrote an opinion for the Eighth Circuit Court of Appeals in 1968 that apparently condemned any use of corporal punishment, even if specifically authorized by statute and judicial sentence.[13] Delaware, which was notorious in the 1960s as the only state which specifically provided for flogging, abolished that punishment in 1972. To my mind, the most plausible explanation of the Supreme Court's surprising decision in *Ingraham v. Wright*[14] that the eighth amendment does not apply in schools is that the Justices did not want either to eliminate corporal punishment in schools or to say that the eighth amendment allows corporal punishment.

More generally, decisions of both the Supreme Court and lower courts make it clear that punishment may not be too "physical". The Supreme Court has indicated that prisoners cannot be deliberately denied medical treatment,[15] and lower courts have held that such disciplinary methods as "strip cells" inadequately provided with hygienic facilities constitute cruel and unusual punishment.[16] In one specially interesting decision, a federal district court found a violation of the eighth amendment where prisoners on death row were denied exercise facilities.[17] There is no logical contradiction in requiring that prisoners awaiting death must be allowed to exercise, or in permitting capital punishment while we have effectively abolished corporal forms, but there is a mild paradox that says something about our attitudes towards pain and physical suffering.

In a different area, the result in *Rochin v. California*[18] was plainly determined by the Court's reaction to the physical brutality of the police and the invasive nature of stomach pumping. (Stomach pumping is not quite what it sounds like. It is accomplished by the introduction of an emetic into the stomach by a tube run through the nostrils and the esophagus. But it can be a distressing procedure, both because of the tube and because of the forced vomiting.) Later cases have established that physical searches — blood samples, mouth searches, rectal searches, perhaps even stomach pumping — are permissible in appropriate cases if carried out with decorum and procedural safeguards. But the few cases which have dealt with surgical searches (as for bullets) seem to draw a line between searches requiring only a superficial incision (permissible) and searches which involve going further into the body (disallowed).[19]

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[13] Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[14] 430 U.S. 651 (1977).

[15] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[16] *E.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

[17] Sinclair v. Henderson, 331 F. Supp. 1123, 1130-31 (E.D. La. 1971).

[18] 342 U.S. 165 (1952).

Other cases that demonstrate the judicial squeamishness about physical invasion, pain, and discomfort are the cases involving so-called "organic therapies" carried out in prisons or other custodial institutions. Organic therapies include psychosurgery, shock treatment, and aversive therapy with emetics or paralytics. There are many problems raised by the use of such therapies aside from the physical invasion or pain they involve. There are procedural issues about the need for medical authorization and supervision on each particular occasion of use; there are questions about the general efficacy of such therapeutic techniques; there are issues about the appropriateness of state-enforced "mind control". But the physically intrusive nature of the techniques is an important factor in the generally negative judicial reaction. One of the most persuasive opinions in the area is Judge Ross's opinion for the Eighth Circuit in *Knecht v. Gillman.*[20] The opinion is persuasive not because of exceptional analysis, but because it emphasizes that fifteen minutes to an hour of vomiting (as the result of an injection of apomorphine) is something known by all of us to be a "painful and debilitating experience".

In another area, a Pennsylvania court recently held that a healthy adult could not be compelled to be the donor for a bone-marrow transplant that represented the only realistic chance for the survival of his cousin, even though the transplant involved no significant risk to the donor.[21] So far as I am aware, the case is unique in confronting the question of compulsory organ donation, but a number of philosophers and lawyers have recently used compulsory organ donation as a hypothetical example of a practice clearly beyond the pale.[22] Evidence for the correctness of this view can be found in decided cases in which judges have been very reluctant to permit organ donation by minors or incompetents, even to close relatives.[23]

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[19] *Compare, e.g.*, Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (Ga. 1972), *cert. dismissed*, 410 U.S. 975 (1973), *with, e.g.*, State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (Ga. 1978). *See generally* United States v. Crowder, 543 F.2d 312 *(en banc)* (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

[20] 488 F.2d 1136 (8th Cir. 1973).

[21] McFall v. Shimp (unpublished, Ct. of Comm. Pleas, Allegheny County, Pa., Civil Division, July 26, 1978).

[22] *E.g.*, R. NOZICK, ANARCHY, STATE, AND UTOPIA 206-07 (1974); Kadish, *Respect for*

It would be interesting to see a case in which the issue was presented of whether a parent has a duty to donate a needed organ to his or her child. My guess is that no duty would be found. To be sure, there are organ donations and organ donations. Donating an eye would not leave one blind, but it would significantly impair one's sight as well as increasing the risk of blindness if something happened to the other eye. Donating a kidney ordinarily has no effect at all so long as the other kidney remains intact. Donating bone marrow has only temporary effects, since the bone marrow regenerates. I would be surprised if any American court ordered even a parent-to-child bone-marrow transplant, an imposition which (not to forget our ultimate purpose) seems more defensible than forbidding abortion in every respect.

I do not claim that our disinclination to impose bodily invasion or physical pain overwhelms all other values. We require immunization against certain diseases for public schoolchildren. As noted previously, we allow physically invasive searches within limits. We may deny heroin to an addict in custody, causing the extreme discomfort and pain of a cold turkey withdrawal. Courts do sometimes approve the use of organic or aversive therapies. We are ambivalent about suicide and the "right to die", even where life may entail considerable pain or else dependence on highly invasive life-support machinery.

I say we are ambivalent about suicide and the right to die. There is the Karen Quinlan case,[24] holding that an irreversibly comatose patient has a right not to be kept alive by extraordinary means. But there is also the possibility that that unique decision is ahead of its time. There is the fact that abetting suicide is still a crime, in most or all states. But the explanation is in part that we are afraid the abettor may have exerted too much influence on the decision. Juries are notoriously reluctant to convict in appealing cases of abetting suicide or even of outright euthanasia of a terminal patient unable to kill himself.

Life and Regard for Rights in the Criminal Law, in RESPECT FOR LIFE IN MEDICINE, PHILOSOPHY, AND THE LAW 83, 93-94 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 918 (1978).

[23] *E.g.*, Lausier v. Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (Wis. 1975); *In re* Richardson, 284 So. 2d 185 (La. App. 1973).

[24] *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

Even in the cases just mentioned, whenever a major invasion or infliction of pain is allowed (that is, in cases involving heroin withdrawal, aversive therapy, or the would-be suicide), there is a significant distinction from the abortion situation. The burdens, whatever they are, are at least arguably imposed for the subject's own good. In a day when many people think constitutional analysis should start from the views of John Stuart Mill, this may seem to make the impositions in question less defensible rather than more. But one can quite rationally take the following position: No man is his brother's keeper, and therefore the law should not require one individual to shoulder burdens for the sole benefit of a particular other. On the other hand, every man is assumed to want to pursue his own interests (except perhaps where he voluntarily chooses to help another), and therefore an individual who acts clearly contrary to his own interests, without thereby helping anyone else, must be incompetent, in which case his choice against his own interests need not be respected. The position I have just outlined may be oversimplified, but I think it is a fair sketch of the relevant part of our legal tradition.

We have wandered slightly from the main point of this Section, which is our reluctance to invade the body or to impose physical discomfort or pain. Let me conclude with three hypotheticals, not the ideal stuff of constitutional argument, but perhaps worth considering.

First, suppose that fetuses were freely transplantable from womb to womb at all stages of development, and suppose that we were confronted with a healthy, normal two-week fetus developing in the womb of a woman who was rapidly dying of some condition that would not affect the fetus until she died in a few days. Would we consider drafting another non-pregnant woman to carry the fetus, choosing her by lot and implanting the fetus, whether she wanted it or not, in her body, forbidding her to abort it?

Second, imagine that we had a machine we could hook a person up to which would cause the person to experience the sensations of a difficult and painful childbirth. Imagine also a completely innocent person who holds in his subconscious mind a piece of information that would allow the police to thwart a planned murder. This person is genuinely unable to recall the relevant information, but he would recall it with the encouragement of the childbirth-simulating-torture-machine. Would we allow a court to order that the person be hooked up to the machine involuntarily?

Finally, consider a simple burning building, with a child trapped inside. Would a court impose criminal liability on anyone, even the child's parent, who did not attempt to save the child at the risk of second-degree burns over one or two percent of his or her body?

In each of these situations, an innocent life can be saved by a physical invasion comparable to or less than pregnancy and delivery. In the third situation, even if the potential rescuer is specified to be the child's parent, liability is unlikely. In all other cases, the suggested imposition is unthinkable in the context of our legal system.

I am aware of arguments that can be made to distinguish these hypotheticals from the abortion case. One problem with the abortion case is that it is not exactly analogous to anything else. My hope is merely that these hypotheticals will help the reader to see what a striking departure abortion laws are from our usual commitment to the bad-samaritan principle and our usual reluctance to impose physical invasions or pain.

3. *Why the Physical Burdens Are Crucial*

So far I have concentrated on those interests of the pregnant woman which are invaded by pregnancy and delivery, including any post-partum or permanent effects of those physiological processes. The opinion in *Roe* and the principal scholarly defense of that opinion[25] give rather more prominence to the woman's interest in deciding how many children she will raise, and when she will have them. It is time for me to explain my relative unconcern with this "family-planning" interest.

To begin with, it may be doubted whether prohibiting abortion invades this "family-planning" interest at all. Ordinarily, the woman can give up a child she bears for adoption.[26] Now, even if the woman can give her child up for adoption, that does not mean that she can avoid post-partum injury to her interests of every kind. She can regulate the number of children she raises, and when she has them, but there may be significant psychological costs associated with giving a child away. There may be personal feelings of guilt over having "abandoned" the child, and there may also be family pressure (in favor of keeping the child) to resist and social disapproval to contend with. In effect, the woman faces, for each child she bears, a disjunctive burden. She must bear *either* the psychological costs of giving up her child *or* the burdens of actually raising the child.

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[25] Heymann & Barzelay, *supra* note 1.

[26] Because of legal restrictions or the unavailability of adoptive parents, this possibility may not always be available. For simplicity's sake, I shall write as if it were. Obviously, when it is not, prohibiting abortion *does* invade the woman's family-planning interest. Whether adoption is impossible often enough to make it clear on that ground that women's family-planning interests are importantly affected is an issue I shall not discuss. For reasons discussed in Section III.B. *infra*, the family-planning interest, even if it is impaired, would be better exploited by a samaritan-type argument than by the "balancing" approach of *Roe*.

If we adopt a relatively straightforward "balancing" approach to the constitutional problem of abortion — if we set out to identify the woman's interests, to identify the state's interests, and then (somehow) to balance — we must presumably put into the woman's side of this balance only the lesser of the two alternatives in the disjunctive burden described above (in addition, of course, to the burdens of pregnancy and delivery already discussed). Defenders of *Roe* ordinarily point to the number of women who keep and raise children they did not want, and assume that the two alternatives in question can be treated as equal for the purposes of constitutional analysis.

My approach, however, is not a balancing approach at all. I do not argue that the sum of the woman's interests in having an abortion outweighs the sum of the state's interests in forbidding it. I do rely in part on the magnitude of certain burdens imposed on the woman, but the magnitude of the burdens is relevant *not* because I want to compare those burdens to the social benefits achieved, but because I want to compare them to the burdens other potential samaritans are required to shoulder or allowed to shirk. The point of my argument is that the invasion of the woman's interests cannot be justified even on the ground that it is necessary to save the life of the fetus, so long as other potential samaritans more eligible for compulsion are allowed to refuse much less burdensome and less invasive life-saving aid.

Given the nature of my argument, I cannot deal with the disjunctive burden described above (involving *either* the costs of raising the child *or* the costs of giving it up) by saying that the two alternatives are about equally unattractive and the woman is as badly treated by being subjected to the disjunctive burden as she would be if she were straightforwardly required to keep and raise the child. The costs involved in giving up the child do not "count" under samaritan law in the same way that the burdens of raising the child would if that alternative were compelled. The costs of giving up the child are genuine costs, but they are not costs of giving aid. Once the child has been born and given away, the mother is free of duties to aid the child in any way. The mother may be made unhappy by the thought that she has abandoned the child, or whatever, but all sorts of laws make people unhappy without violating the bad-samaritan principle. I would say that *for purposes of samaritan analysis,* the effective weight of the lesser of the two alternatives in the disjunctive burden is zero, and the whole post-partum burden must therefore be regarded as irrelevant. The family-planning interest drops out entirely.[27]

The reader may wonder why, if samaritan analysis makes it impossible to consider the family-planning interests or the costs to the woman of giving the child up, I do not abandon the samaritan analysis in favor of some approach that would allow all the costs to the woman to be counted. The answer — which I will develop at greater length in Section III — is twofold. First, among the interests of the woman that are impaired by laws forbidding abortion, it is precisely the interests which count for purposes of samaritan analysis that can be shown to be given special status by the *Constitution.* Second, my approach, comparing the pregnant woman to other potential samaritans, avoids the necessity for a *de novo* weighing of the woman's interest in having an abortion against the state's interest in forbidding it, a weighing which I am not sure favors the woman.

Finally, the reader may be troubled by the fact that I emphasize interests of the woman which many women would not mention in explaining their desire for an abortion. Most women who want an abortion, asked why they want an abortion, would not begin their answer by describing the physical burdens of pregnancy and childbirth. There is a reason for this. The pregnant woman faces at least three possible courses: abortion, bearing and raising the child, or bearing the child and giving it away. A full explanation for wanting an abortion must explain why both of the other courses are rejected. In everyday discussion, however, given that most women want to raise children, the question "Why do you want an abortion?" is likely to be intended as equivalent to "Why don't you want to raise that child?" It is natural, and appropriate, that the answer should focus on the difficulties associated with raising the child, as the answer (I assume) usually does. If the woman were pressed with a further question, "Why don't you bear the child and give it up for adoption?", I believe a high percentage of women would give prominent place in their responses to the burdens of pregnancy and childbirth I have described. I do not assert that these burdens would receive more emphasis than the psychological costs of giving the child away. But I am confident that, at this stage, unwillingness to suffer substantial pain and physical invasion for an individual with whom the woman desired no connection would be a significant factor in many women's explanations. That, I think, is enough to save my argument from the charge of being unrelated to what women really care about.

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[27] Despite what I say in the text, if the vast majority of women would rather raise an unwanted child than give it up for adoption, then it could be argued that many women have no choice. They are compelled by their psychological make-up and by social pressures to undertake the burdens of parenthood once they have borne a child. If this is the situation, then perhaps the burdens of parenthood should count, for purposes of samaritan analysis, as being imposed by the prohibition of abortion. This possibility may be important to some readers. My own view is that a convincing argument for the woman can be based just on the physical burdens of pregnancy and childbirth. But for the reader who disagrees — and in particular for the reader who ends up thinking I have not adequately distinguished the pregnant woman from the parent or the military draftee — it may be that a convincing argument for the woman is possible if and only if the burdens of parenthood count as imposed by laws forbidding abortion. If they do count, there is no doubt that the total burdens imposed by anti-abortion laws are significantly increased.

C. *Exceptions to the Bad-Samaritan Principle*

I turn now to the matter of comparing the pregnant woman to other potential samaritans who are required to give aid under standard exceptions to the bad-samaritan principle. It is worth repeating something I have said before: My object is not to show that by traditional standards the pregnant woman is indistinguishable from the totally uninvolved bystander who may refuse even the most trivial aid. The pregnant woman is not totally uninvolved. She is sufficiently involved that we could appropriately impose slight burdens of aid on her, if imposing slight burdens would do the fetus any good. Unfortunately, imposing slight burdens on her will not do the fetus any good. It is very large burdens or nothing. What I propose to show in this Section is that even if the pregnant woman is sufficiently involved to justify imposing some small duty of aid, she is still *less* "eligible for compulsion" than any of the other potential samaritans who figure in the standard exceptions to the bad-samaritan principle. Her situation is distinguishable, in ways that make her a less appropriate subject for compulsion, from the situation of every other potential samaritan on whom duties are imposed. If we consider in addition that the duties imposed on those other samaritans are ordinarily trivial, both absolutely and in comparison with the burdens of pregnancy and childbirth, it should become clear why I suggest that laws forbidding abortion are out of line with the general framework of samaritan law.

Two of the standard exceptions to the bad-samaritan principle can be disposed of quickly. One is the "statutory duty" exception. Any discussion of the bad-samaritan principle can be expected to include the observation that there *is* a duty to aid if some statute imposes such a duty. Now, statutes forbidding abortion are (on my analysis) statutes imposing a duty to aid. So it might seem that the pregnant woman falls squarely within the first standard exception we look at. But the statutory duty exception, considered as a *general* exception, is not relevant to our purposes. The claim that there is a duty if some statute creates such a duty assumes that the statute in question is constitutional, whereas I am arguing precisely that anti-abortion statutes are unconstitutional because they make an exception to the bad-samaritan principle that is unacceptable given the general state of samaritan law. It is relevant, of course, to compare anti-abortion statutes, and the duty they impose, with other *specific* duty-creating statutes and the duties they impose. Those other statutes are part of the "general state of samaritan law". I shall discuss some other statutory duties, including the draftee's duty of military service, in Section D below.

The other standard exception to the bad-samaritan principle that we can deal with summarily is the "contract" exception. Duties to aid may be undertaken by contract. It might be suggested that when a woman marries, or perhaps when a woman has sexual intercourse, she enters into an implied contract with her husband or with the man involved to carry and deliver any conceptus that results. If there is such an implied contract, the fetus can be regarded as a third-party beneficiary. We do not ordinarily enforce contractual duties by criminal sanctions, but contractual duties to aid the helpless can appropriately be so enforced in some circumstances. The trouble with this argument, of course, is that it is absurd to suggest that sex or marriage always carries with it an implied promise to bear a child. Even among people who are married, there are just too many who do not want children.[28] In arguing against the existence of an implied contract on the basis of what people want, I assume that we are talking about a contract implied "in fact". We sometimes imply contracts "in law" without caring what the parties want. If that possibility is relevant at all in the present context, it is under the heading of "status" exceptions to the bad-samaritan principle, to which I now turn.[29]

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[28] To be sure, we may say that marriage involves an implied promise to have children, *meaning* that unwillingness to beget or bear children is or ought to be a ground for divorce. That is obviously quite a different matter. As to whether a husband's interest in having a child ought, even in the absence of any contract, to entitle him to prevent his pregnant wife from having an abortion, see Section III.B. *infra*.

1. *Exceptions Based on Status or Relationship*

There are a number of cases in which a duty to render aid is based on the status of the potential samaritan, or on the relationship between the potential samaritan and the person in need of aid.[30] A common carrier has a duty to aid a passenger; the master of a ship has a duty to aid a member of his crew; a jailer must aid his prisoner. Others on whom duties to aid are imposed are innkeepers (*vis-à-vis* their guests), storeowners (*vis-à-vis* their customers), employers of all kinds (*vis-à-vis* their employees), schools (*vis-à-vis* their pupils), social hosts, spouses, and parents.

The situation of the pregnant woman can be distinguished from the situations of all these other potential samaritans on whom duties are imposed. In fact, in almost every case there is more than one significant ground of distinction. A ground of distinction which is common to all of the cases, however, is the degree of voluntariness of the assumption of the status or relationship on which the duty to aid is based. Every one of the statuses or relationships I have just named is entered into voluntarily. The condition (or status, or relationship with the fetus) of pregnancy is *not* chosen voluntarily by those women who, once pregnant, want abortions. Some readers may think the distinction just suggested is more apparent than real. I do propose to discuss it further. First, let us consider the extent to which pregnancy is voluntary.

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[29] The text ignores the possibility of an express contract to carry the fetus. Given problems of proof (unless we require such a contract to be in writing), and given the reluctance of the common law to grant specific performance of contracts for personal services, it is not clear that even an express contract ought to be enforceable. Certainly, however, a woman who has made an express contract to carry a fetus is a much more appropriate subject for compulsion than one who has not. Fortunately, we need not decide whether a woman should be allowed to bind herself by an express contract not to have an abortion. I am prepared to restrict the argument of this essay, and my conclusions, to women who have not made the attempt.

[30] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 314, 314A, 314B (1965); W. PROSSER, *supra* note 3, at 340-43; W. LAFAVE & A. SCOTT, *supra* note 5, at 184.

I think it may safely be assumed that most pregnancies *of women who want abortions* are not intentional.[31] Unintended pregnancies may occur for a variety of reasons. Many result from contraceptive failure. (If contraceptive methods of very high effectiveness, say 98%, were used carefully and consistently, there would be hundreds of thousands of pregnancies a year caused by contraceptive failure in a large population such as that of the United States.) Many more, probably, result from inept or inattentive use of contraceptives, or from occasional non-use. And many result from persistent non-use, caused by ignorance, laziness, the expense or disruptiveness of many contraceptive methods, pressure from male partners not to use contraception, and a variety of other possible psychological causes. In none of these cases has the woman who becomes pregnant chosen to be pregnant.

It might be argued, of course, that in every case where a woman becomes pregnant (except the case of rape), she has voluntarily done *something.* She has given in to pressure not to use contraception; or she has given in to her own laziness. If she has done neither of these things — if she is a victim of contraceptive failure despite responsible contraceptive use, or even if she is totally and excusably ignorant about methods of contraception — she has at least had sex. Assuming she is not so ignorant as to be unaware of the connection between intercourse and pregnancy, can she not be said to have assumed the risk of conception?

It is true that in every case in which a woman becomes pregnant (still excepting the case of rape), she has voluntarily had sex. Voluntariness, however, is something that admits of degrees. As Harry Wellington has pointed out, having sex may be more a matter of choice than eating, but it is an act to which most of us feel a strong compulsion.[32] It is clear to me that the choice to have sex is ordinarily not as "voluntary" as the choice to be an innkeeper, or a storeowner, or whatever.

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[31] To be sure, there will be cases where the woman becomes pregnant intentionally and then changes her mind about having the child; but these cases will be comparatively rare. (If the practice of amniocentesis to determine the fetus's sex, followed by abortion of a fetus of the undesired sex, becomes more common, the case in question may not be so rare. That does not affect what I say in the remainder of this note.) In any case which is identifiably of this type, the case for denying the woman an abortion is very much stronger than in the usual case of a pregnancy which is unwanted from the beginning. Whether the case for denying an abortion is strong enough is a harder question. Some of the relevant considerations are canvassed later on, in the discussion of duties created by the voluntary commencement of aid, at pages 1598-1601. I think we can leave this unusual case unresolved without impairing the general argument.

[32] Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221, 308 (1973).

It might be suggested that even if an innkeeper (for example) voluntarily chooses (in a strong sense of "voluntary") to be an innkeeper, he does not choose to be a good samaritan to his guests. He does not even choose that any of his guests shall ever need his aid (beyond room and board). All he *chooses* is to run the *risk* that some guest will have an accident or other misfortune which requires special aid. In other words, the innkeeper does just what the woman does when she has sex. He takes a risk. If the innkeeper may be compelled to be a samaritan when the event he does not want occurs, why not the woman as well?

This suggestion overlooks important differences between the innkeeper and the woman. The innkeeper may not want to be a good samaritan. But he actively invites the formation of the relationship on which his duty of aid is based. The innkeeper wants guests. The woman does not want the fetus. What is true of the innkeeper is true of every other potential samaritan mentioned at the beginning of this Subsection (with the possible exception of the parent, to be discussed shortly). In some cases, the relationship which is the basis for the duty of aid is a relationship of some intimacy in which the potential samaritan chooses the *particular* individual with whom the relationship is to be formed. (I have in mind the relationship of spouse to spouse and of host to social guest.) This obviously makes it easier to accept the imposition of a duty to aid. Innkeepers, storekeepers, and so on, do not choose their guests or customers with such particularity. Even so, unlike the unwillingly pregnant woman, they actively seek the formation of the relationship. That is the point of their calling.

The reference to the innkeeper's "calling" suggests another observation. The innkeeper, the storekeeper, and so on, are all engaged in providing a service for pay. They are engaged in economic enterprise. That clearly contributes to the feeling that it is acceptable to impose duties of aid, to treat them as having "assumed the risk".[33] In fact, every potential samaritan on the list at the beginning of this Subsection (still excepting the parent) not only invites the formation of the relationship but *either* chooses the other party to the relationship with particularity *or* is engaged in an economic activity.[34]

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[33] W. Prosser, *supra* note 3, at 339.

[34] The claim in the text might be denied with respect to jails and *public* schools.

There is another respect in which all the potential samaritans discussed in this Subsection differ from the pregnant woman. All the relationships under discussion — of innkeeper to guest, shopkeeper to customer, parent to child, and so on — are relationships in which the second-named party would *expect* aid from the first. The potential samaritan in any of these categories who refuses aid will disappoint expectations which are likely to exist in fact and which we regard as reasonable. It might be suggested that the expectations exist only because of the legal duties to aid, but I think that suggestion is simply false. Even in the absence of legal duties, most innkeepers would aid guests who fell ill (both for humanitarian reasons and because it would be bad for business to refuse), most social hosts would aid their guests, and so on. Substantial expectations of aid would exist regardless of the legal rule, and one justification for the legal rule is that it protects these expectations. The fetus, in contrast, has no expectations to be protected. (Lest there be any doubt, I have been talking in this paragraph about psychological expectations, not "legal" expectations. The claim that the fetus has no expectations is not a *petitio principii*. It is, I believe, an empirical fact.)

Before we move on to compare the pregnant woman to the parent, let us summarize what we have established so far. There is undeniably *some* reason to regard the pregnant woman as "eligible for compulsion" for the benefit of the fetus. She has (except in the case of rape) voluntarily done an act which created the risk that her aid would be required. On the other hand, the pregnant woman seems a notably less apt candidate for compulsion than the other potential samaritans we have considered. Surely she should not be compelled to undertake greater burdens than they. And yet, so long as there are laws forbidding abortion, she is compelled to undertake much greater burdens than they. The aid required of innkeepers and the others is trivial. It is usually something on the order of calling a doctor or sending for medicine. As one of my colleagues put it, we speak easily of the innkeeper's duty to aid his guests, but we would hardly require an innkeeper to give up a kidney for transplanting into a guest whose kidneys had failed. That would be a duty comparable to

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These cases are special for a different reason: the duties to aid, to the extent they are not imposed on individuals who are providing services for pay, are imposed on the *state*. Whatever value we attach to an individual's being free to refuse aid, we do not attach the same value to the state's having a similar freedom, especially where the relevant relationship, with the prisoner or the public school pupil, is not only "invited" but coerced.

the duty anti-abortion laws impose on the pregnant woman.

Probably the most troublesome comparison, for my argument, is the comparison between the pregnant woman and the parent. I have explicitly excepted the parent from some of the claims made in this Subsection about other potential samaritans whose duties are based on status or relationship. It is not true of all parents, as it is true of all innkeepers, that they have invited the relationship with their child. It is not true of any parents that they have chosen the particular individual with whom to establish the parent-child relationship; and it is true of very few parents, if any, that they have children primarily for economic reasons. In addition, the burdens of being a parent are considerably greater than the burdens of aid imposed on innkeepers and the like. All in all, it may seem that the parallel between the parent and the pregnant woman is very close.

There are, however, significant differences between the parent and the pregnant woman who wants an abortion, differences which make parenthood look much more "voluntary" than unwanted pregnancy. The woman who does not want to be a parent, or the couple who do not want to be parents, can give their child up for adoption. There are costs associated with giving the child up, as I have already noted. But if, as I have argued, these costs are not enough so that the burdens of parenthood count for purposes of samaritan analysis as being imposed on women by laws forbidding abortion, then neither are they great enough so that the burdens of parenthood cannot be avoided by parents.[35] It is much more plausible to view keeping the child as a voluntary assumption of the burdens of raising the child than to view having sex as a voluntary assumption of the burdens of pregnancy and childbirth.

We can make the same point in a slightly different way. It is true that the law imposes burdens of care on parents. It is also true that what we normally think of as "the burdens of parenthood" are very great. But it is not really true that the law imposes on parents all the "burdens of parenthood". Most parents assume most of the burdens voluntarily. They keep their child. They feed it, and care for it, generally speaking. What the law is likely to punish the parent for is some particular refusal of aid fairly localized in time. (Even where the parent's failure is a long-term course of general neglect, the parent is arguably being punished as much for failure to enlist other assistance on the child's behalf as for anything else.) The parent, much more than the pregnant woman, creates the relationship with the child. The parent who refuses aid, much more than the pregnant woman who has an abortion, is like the samaritan who harms the object of his "assistance" by voluntarily embarking on a course of aid and then terminating it after other potential samaritans have turned their attention elsewhere, satisfied that the need is being met. (An extended comparison of the pregnant woman with the samaritan who volunteers aid and then terminates it is reserved for the next Subsection.)

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[35] In years past, when giving the child up for adoption may have been harder to arrange than it is today, it was probably easier to arrange some informal "farming-out" of the child.

Finally, it is worth emphasizing again that the burdens of parenthood, however great they are, are not as physically invasive as the burdens of pregnancy and childbirth. For better or worse, our tradition assigns special disvalue to the imposition of pain or extreme physical discomfort and to actual invasions of the body. I have suggested earlier, with my compulsory-organ-donation and burning-building hypotheticals, that we would stop far short of imposing on parents the sort of physical burdens anti-abortion laws impose on women.[36]

2. *Voluntarily Beginning Aid*

There is substantial authority for the proposition that one who voluntarily begins to aid another assumes certain duties.[37] The aid must be provided in a non-negligent manner, and in some circumstances the aid may not be terminated. It might be argued that a pregnant woman has embarked on a course of aid to the fetus which she may not terminate by an abortion.

The principal objection to this argument is that the pregnant woman has not "voluntarily" begun to aid the fetus. I have already discussed the degree of voluntariness of the woman's choice. I have conceded that, except in the case of rape, her connection with the fetus is not totally involuntary. But in most cases the pregnant woman has not knowingly and intentionally offered the fetus any assistance at all. At most she has taken a small risk, and lost. All of the cases about "voluntarily beginning aid" involve potential samaritans who, unlike the pregnant woman, have knowingly and intentionally embarked on a course of assistance to someone in need.[38]

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[36] As a last word on parenthood, it is worth noting that one sort of burden is arguably imposed on parents who are no more eligible for compulsion than unintentionally pregnant women. I have in mind support obligations imposed on fathers who did not want a child. I think the argument of this essay casts some doubt on the constitutionality of such support obligations. But for the reader who thinks such obligations are obviously constitutional (and I assume most readers will fall into this category), it should suffice to note that financial impositions of this sort are much less disfavored than the physical impositions involved in forbidding abortion.

[37] RESTATEMENT (SECOND) OF TORTS §§ 323, 324 (1965); W. PROSSER, *supra* note 3, at 343-48.

In addition, the cases where voluntarily beginning aid has been found to create a duty are ordinarily cases where the "aid" in question has left the recipient worse off, as where a landlord causes injury by performing negligently a repair he was not obligated to perform, or where a half-hearted samaritan terminates a rescue-in-progress short of completion after other potential rescuers have disappeared, thinking that matters were under control. When a pregnancy is terminated, however, the fetus is no worse off than it was before the only action of the woman that could possibly be construed as the beginning of aid, namely the sexual act as a result of which the fetus was conceived.

This "no worse off" argument may seem fanciful. I admit it is an argument many people are likely to be uncomfortable with. It nonetheless deserves to be taken seriously. The point is *not* just that the fetus is no worse off dead than alive.[39] The point is that the fetus which is conceived and then aborted is not made worse off *by the entire course of the woman's conduct.*[40] This is a significant distinction between the abortion case and most cases where a duty is founded upon a voluntary undertaking to aid.

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[38] The discussion in the text may remind the reader of another traditional exception to the bad-samaritan principle, involving people who negligently or innocently create dangerous situations. That exception is the subject of the next Subsection.

[39] Since the fetus does not have and has never had any conscious desire to live, I think it can be argued plausibly that it is not worse off dead than alive. But that is not the present point.

[40] The reader who does take the argument in the text seriously may object that if the abortion causes pain to the fetus, then the fetus *is* made worse off by the woman's entire course of conduct. However, if we take account of the pain caused the fetus, we ought to take account also of the pleasures of its earlier life in the womb (a life for which many inhabitants of the harsher world outside reportedly pine). How we are to estimate the balance of pain and pleasure here I do not know. Conceivably the balance would weigh against a late saline abortion. In any event, early abortions, by whatever technique, can hardly cause the fetus much pain.

It might also be objected that in saying the fetus is no worse off having been conceived and aborted than if it had never been conceived at all, I am overlooking the possibility that the fetus has a soul. I do not claim much knowledge about the fortunes of fetal souls, but it seems to me that if the fetus has a soul, then it is better off (and therefore no worse off) for being conceived and aborted and spending eternity in Limbo, than if it had not been conceived at all.

At this point, it might be suggested that there are certain cases where a samaritan who begins a rescue may not terminate it, despite the fact that his whole course of conduct leaves the person in need of rescue no worse off. The *Restatement (Second) of Torts* suggests in a comment that one who has pulled a drowning man halfway to shore with a rope might not be permitted simply to drop the rope and walk away, even if no other potential rescuer has been discouraged.[41] Similarly, the *Restatement* says that one who has pulled another out of a trench filled with poisonous gas may not then throw him back in even though he is left no worse off than before the rescue was begun.[42]

These cases both differ significantly from the abortion situation. As to the drowning man, the *Restatement* only surmises that the half-hearted samaritan may not abandon the rescue. It may seem obvious to many readers that the rescue may not be abandoned, but if so, I suspect it is because the picture that springs to mind is of a relatively effortless pulling-to-shore. If we imagine instead a rescue that requires a long-sustained and painful effort, it should seem much less clear that the samaritan who has done no harm and displaced no other rescuer may not quit. For the benefit of any reader who thinks even the highly burdensome rescue may not be terminated, it is worth noting that there is *still* a significant difference between the drowning man and the fetus. One of the reasons we would be appalled (in the case of the easy rescue, perhaps only troubled in the case of the difficult rescue) by the samaritan who abandoned the drowning man halfway to shore is that the samaritan would have raised expectations in the drowning man and then disappointed them. The fetus, as I have observed before, has no expectations.

As to the samaritan who has pulled someone from a gas-filled trench and may not throw him back, the point here is that once the unfortunate is pulled from the trench, the rescue (or that part of it) is complete. Throwing the person rescued back into the trench is not in any sense a refusal to aid. Securing an abortion, while it is in some respects a positive act like throwing the person back into the trench, is the only way the pregnant woman can deny future aid to the fetus. Indeed, it is the only way she can deny very *burdensome* aid which, we should note once more, she never really volunteered in the first place.[43]

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[41] RESTATEMENT (SECOND) OF TORTS § 323, comment e (1965).

[42] RESTATEMENT (SECOND) OF TORTS § 324, comment g (1965).

3. *Harm or Danger Caused By the Potential Samaritan*

There is authority for the proposition that one who injures another, or one who creates a situation which is dangerous to another, has a duty to take steps to minimize the injury or danger, even if it was innocently caused.[44] For example, it has been held that when a vehicle becomes disabled in a position where it blocks a highway, the driver of the vehicle, even though utterly free of fault, has a duty to set out flares or otherwise warn oncoming traffic.[45]

This exception to the bad-samaritan principle is distinctive. It contemplates a duty to aid where the potential samaritan has neither chosen to become involved with the person in need of aid nor invited the formation of a relationship. It might be suggested that the pregnant woman is analogous to the samaritan who innocently creates a dangerous situation. It might be suggested that the pregnant woman has put the fetus in a dangerous situation. Even if she is free of fault, may she not, like the driver of the disabled vehicle, be required to give aid?

There is a significant difference between the pregnant woman and the driver of the disabled vehicle, a difference we have already discussed in another context. If we allow a potential samaritan to refuse aid to someone he has harmed or endangered, he will have made the other worse off by his entire course of conduct. The pregnant woman who has an abortion, however, does not make the fetus worse off by her entire course of conduct. For all practical purposes, the abortion leaves the fetus in just the state it was in before it was conceived. Allowing a woman to have an abortion is therefore quite different from allowing a driver simply to walk away from a disabled vehicle blocking a highway on a foggy night.

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[43] It may seem that the "no worse off" aspect of my argument would tend to justify neonate infanticide. That claim can be rejected for either of two reasons. First, once the infant is born, the woman can refuse further aid with less cost to the infant simply by giving it up for adoption. Second, we can argue that the woman has waived her right to refuse aid sometime before the infant is born. I think a waiver argument is probably adequate to justify the Court's holding in *Roe v. Wade* that third-trimester abortions may be prohibited in most circumstances. *See* pages 1642-43 *infra*.

[44] RESTATEMENT (SECOND) OF TORTS §§ 321, 322 (1965); W. PROSSER, *supra* note 3, at 342-43.

[45] *E.g.*, Scatena v. Pittsburgh & New England Trucking, 2 Mass. App. Ct. 638, 319 N.E.2d 730 (1974).

The reader may wonder whether the "no worse off" idea is really as important as I suggest. It is a difference between the abortion case and the disabled vehicle case, but is it a difference that matters? We sometimes allow a person to escape liability even though he clearly makes another worse off, as where, through no fault of the driver, a vehicle goes out of control and kills someone instantly. If the driver in such a case escapes liability even though he makes his victim worse off, can the duty to aid in the disabled-vehicle case really be explained as simply a duty not to make the victim worse off?

I think the "no worse off" idea *is* important. Where an out-of-control vehicle kills someone instantly, the question of aid to the victim does not arise, because the harm happens all at once. Where the harm does not happen all at once, courts have apparently decided that the right to refuse involvement does not extend to a right to refuse aid to those one has made worse off, even innocently. To make someone worse off, or to put someone in a position where he is likely to be made worse off, is to become involved. The right to non-involvement can be regained only by undoing the damage one has done.

A corollary is that the right to non-involvement ought to be regained once the damage has been undone. Nothing in the cases involving danger innocently caused suggests that the potential samaritan must do more than undo the damage. If the pregnant woman who has an abortion leaves the fetus no worse off than before it was conceived, nothing in those cases suggests that a pregnant woman must instead carry the fetus and thereby confer on it a substantial net benefit.

I have discussed the duty to aid of a potential samaritan who has innocently caused harm or danger. There is a similar, and more firmly established, duty to aid when one has *negligently* caused harm or danger. Now, I have conceded the existence of a duty to aid even when the potential samaritan is innocent, and it might seem that I have therefore answered the strongest possible case against my position. I have eschewed reliance on the fact that many women who become pregnant are entirely innocent and would clearly be excused from any duty to aid that fell only on potential samaritans who *negligently* caused harm or danger. On the other hand, it could be argued that I have made things too easy for myself. It would not be surprising if potential samaritans who negligently caused harm or danger were subjected to more extensive duties of aid than potential samaritans who cause harm or danger innocently. If this were the case, and if it could be argued that most women who become pregnant unwillingly are at least negligent, then I would have made things easier than they should be. In fact, there is no evidence that greater duties are imposed on negligent than on innocent potential samaritans. Even if duties are imposed more consistently on the negligent, the burdens imposed are no greater. Accordingly (returning to my perennial final point), it is as true of the negligent potential samaritan as of the innocent potential samaritan that the duties of aid imposed on him are completely trivial compared to the burdens of pregnancy and childbirth.

4. *Erosion of the Bad-Samaritan Principle*

Scholars do not like the bad-samaritan principle, and they are eager to claim that the principle is being eroded away. Perhaps it is, but if so, then the erosion is very slow indeed.

Two recent cases that might be cited as evidence of erosion are *Tarasoff v. Board of Regents*[46] and *Farwell v. Keaton.*[47] In *Tarasoff*, the California Supreme Court held that a psychotherapist had a duty to warn a person against whom the therapist's patient made a death threat. In *Farwell,* the Michigan Supreme Court said a teenage boy had a duty not to abandon in a parked car a friend who was unconscious from a beating by other boys, suffered during a night of drinking and "cruising" in search of female companionship.

Farwell may represent a slight extension of traditional duties to aid, but the relationship of participants in a social "joint venture" is closely analogous to the relationship of host and guest. Most importantly, the relationship is undertaken knowingly and voluntarily. In addition, there is an element of reciprocity in the relationship that is absent in most samaritan cases. This is a case where the court might plausibly find that a bilateral contract to give minor aid is implied "in fact".

Tarasoff appears unusual at first because the duty found by the court runs to a party not directly involved in the relationship that gives rise to the duty. But the case is not really very striking. There is clear precedent for duties to third parties in cases where the potential samaritan has a more extensive duty to control the behavior of another — for example the duty of a jailer to prevent the escape of his prisoners, or of an employer to control his employees.[48] The fact that a psychotherapist does not have a full-fledged duty to control his patient should not prevent us from recognizing, in the duty to warn, a weaker analogue. It is relevant that the role of psychotherapist, like the role of jailer or employer, is undertaken voluntarily and, ordinarily, for pay.

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[46] 17 Cal. 3d 425, 551 P. 2d 334, 131 Cal. Rptr. 14 (1976).

[47] 396 Mich. 281, 240 N.W.2d 217 (1976).

I cannot discuss every case which might be cited as evidence that the bad-samaritan principle is disappearing. I think there is little persuasive evidence for this proposition. In any event, even scholars who see the rule weakening are thinking of its application to cases where the burdens on the potential samaritan are trivial. Thus Prosser suggests that the bad-samaritan principle may erode to the point where "the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid *with little inconvenience,* creates a sufficient relation . . . to impose a duty of action."[49] Or more recently, Marshall Shapo: "I have evolved as a working principle that one has a duty to aid others in situations in which hazardous conditions necessitate assistance for the preservation of life and of physical integrity, and in which one possesses the power to expend energy in that task without serious inconvenience or possibility of harm to herself."[50]

Whatever else may be said of the supposed duty of a woman to carry a fetus, it is not a duty that can be discharged "with little inconvenience" or even "without serious inconvenience or possibility of harm".

D. *Statutory Duties*

A variety of statutes create duties to act for the benefit of others and therefore create either exceptions or apparent exceptions to the bad-samaritan principle. As I have noted previously, the truth of the general proposition that statutes may create duties to aid does not undermine my argument against laws forbidding abortion, because the general proposition presupposes that the statutes in question are constitutional. However, since my argument is an equal protection argument, based in part on the claim that pregnant women are treated worse than other potential samaritans, it is important to compare laws forbidding abortion with other specific statutes or statutory schemes imposing duties to act.

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[48] W. Prosser, *supra* note 3, at 349-50.

[49] *Id.* at 343 (emphasis added).

[50] M. Shapo, The Duty to Act: Tort Law, Power, and Public Policy 69 (1977).

The most arresting statutorily created exception (or, as I think, apparent exception) to the bad-samaritan principle is the military draft. (Though the draft is not currently in force, there is talk of reinstituting it, and its *constitutionality* is not currently doubted, which is the key fact for our purposes.) One of my principal themes has been that the burdens imposed on pregnant women by laws forbidding abortion are significantly greater than, and different in kind from, the burdens imposed on other potential samaritans. The only potential samaritans who are subjected to burdens at all comparable to the burdens of pregnancy and childbirth are parents (whom I have already discussed) and military draftees.

Now, we could attempt to distinguish laws forbidding abortion from the military draft by reference to the nature of the burdens imposed in the two cases. We could suggest that the burdens of pregnancy and childbirth, even if not greater than the burdens imposed on draftees, are more constitutionally objectionable. They involve invasions of the body, and they more directly touch on the specially sensitive area of sexual intimacy.[51] This does not seem to me a sufficient ground of distinction between anti-abortion laws and the draft.

Draftees are likely to be subjected to a good deal of forced exercise under unpleasant and demanding conditions. For many, this will result in considerable discomfort and even pain. To be sure, the draftee is not compelled to allow another person to grow inside his body, and it might be argued that the pains of military training make the body a more versatile and useful instrument for varied physical activities, while pregnancy makes the woman's body less adapted to physical activities other than carrying a fetus. But these differences do not alter the fact that compulsory military service involves a considerable *physical* invasion.

As to the suggestion that forbidding abortion touches on a zone of special intimacy, that is true, but I am not certain the draft is so different. The draftee is presented with a new group of associates he has no hand in picking. He will eat with them, sleep in close proximity to them, share bathroom facilities with them, and spend most of his leisure time with them. Intimate associational interests of the draftee are strongly affected. Even as to sex, the draftee is taken away from whatever sexual relationships or patterns of sexual behavior he has established for himself in his civilian life and he is thrown into a new society that is likely to have and to enforce by considerable social pressure expectations regarding both what he shall say about sex and what he shall do about it. Remembering that the draftee's tour of duty normally lasts two years while the pregnant woman's lasts nine months, I am not persuaded that the burdens of pregnancy and childbirth are clearly greater than, or importantly different in kind from, the burdens of military conscription.[52]

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[51] For a suggestion along these lines, see Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 275 n.153 (1977).

To my mind, the crucial difference between the pregnant woman denied an abortion and the military draftee is this: The woman is being required to aid a specific other individual (the fetus); the draftee is not. Rightly or wrongly, our tradition distinguishes between obligations to aid particular individuals and obligations to promote a more broadly based public interest. (This, incidentally, is why the draft is only an *apparent* exception to the bad-samaritan principle. The bad-samaritan principle applies only when aid to specific individuals is in issue.)

In the opinion that established the constitutionality of the draft, the unanimous Court gave most of its attention to a federalism question — whether the power to conscript belonged to Congress or to the states.[53] The Court gave the thirteenth amendment issue, which is the relevant issue for our purposes, short shrift. That issue is discussed explicitly only in the final paragraph of the opinion:

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.[54]

If the Justices were genuinely unable to conceive how the draft could be said to impose involuntary servitude, they were deficient in imagination. But the point of their rebuttal is clear.

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[52] The text notwithstanding, a *possible* argument to the effect that the burdens imposed by laws forbidding abortion are greater than the burdens imposed by the draft was suggested in note 27 *supra*.

[53] Selective Draft Law Cases, 245 U.S. 366 (1918).

[54] 245 U.S. at 390.

It does not offend the traditions of a free people to require citizens to perform their "supreme and noble duty of contributing to the defense of the rights and honor of the nation". When the nation calls and the public welfare is at stake, the citizen must respond.

In answer to the suggestion that the draftee serves a public interest while the pregnant woman denied an abortion serves only the interest of the fetus, it might be argued that every interest protected by state power becomes *ipso facto* a public interest. There is something to this. I am protected by law against gratuitous physical assault, and that suggests that in some sense there must be a public interest in so protecting me. Still, the public interest involved is ultimately based on my private interest in physical integrity. Similarly, if the prohibition on abortion is justified on the ground that the fetus has a right to life (as it commonly is these days), then the ultimate public interest is in protecting the private interest of the fetus. This public interest is not enough to justify compelling the pregnant woman to carry the fetus. The reason is that in *every* potential samaritan case there is a public interest in protecting the person in need of aid which is precisely analogous to the public interest in saving the fetus. We cannot rely on this public interest in the abortion situation and ignore it elsewhere.

The draft appeals to a more public, or more general, public interest — in national security. It simply does not present the same issue as abortion. There is a difference between the idea that an individual is not his brother's keeper, which underlies the bad-samaritan principle, and the idea that a citizen owes nothing to society at large.[55]

If the difference between the draft and laws forbidding abortion is what I have suggested, then laws forbidding abortion might well be constitutional if they were justified on grounds other than the right to life of the fetus. In particular, it seems that if there were a genuine national commitment to population growth, abortion could be prohibited in furtherance of that commitment. This will strike some readers as a curious and unacceptable conclusion, but it is a conclusion I am prepared to accept. We do sometimes require great sacrifices in the public interest. The draft is the most extreme example. If it were necessary to require women to bear children in the pursuit of a goal similar to national security, I see no reason why that sacrifice could not be required.

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[55] It may seem that the distinction between public interest and private interest, which I rely on in the text, is a weak reed on which to base a constitutional argument. The idea that private property can be taken only for "public use" has arguably not been a significant limitation on the power of eminent domain. The idea that government can regulate only businesses "affected with a public interest" is as dead as any constitutional doctrine can hope to be. A full-scale discussion of the public/private distinction, while interesting, would take us far beyond a reasonable scope for this essay. Whatever the difficulty of drawing the line in other contexts, it seems to me there is an intuitively arresting difference between making someone serve in the military, in defense of interests which are plainly public if any are, and making someone carry a fetus, for the benefit of the fetus or the child it might become.

In addition to the duty of military service, there are many other statutorily created duties to act for the benefit of others. There are duties to fight forest fires, to work on public roads, to submit to quarantine for infectious disease, to be a witness or a juror. There is the lawyer's duty to serve some indigent clients without compensation, the duty of the master of a ship to rescue at sea,[56] the duty of children to contribute to the support or medical expenses of impoverished parents. Although this list is not exhaustive, I believe a discussion of these representative duties will suffice.

The first thing to say about all of these statutory duties is that they impose burdens very much lighter than the burdens of pregnancy and childbirth. Just as the parenthood exception to the bad-samaritan principle is the only common law exception which resembles laws forbidding abortion in the magnitude of the burdens imposed, so the draft, which I have already discussed, is the only statutory exception or apparent exception which is comparable in this respect.

Every one of these statutory duties differs from the duty to carry a fetus (imposed by laws forbidding abortion) in other ways as well. The duties to fight forest fires, to work on public roads, and to submit to quarantine are, I believe, no longer of great practical importance. Also, like the duty to be a witness or a juror, they all involve *public* service — they are not duties to aid specific other individuals, but rather duties to benefit the community at large. The duty of the lawyer to serve indigent clients might also be regarded as a duty of public service, promoting the public interest in seeing justice done. If this "public" interest seems too closely tied to the private interest of the lawyer's client (since the lawyer does work *for* his client in a way the witness and the juror do not), we can also observe of both the lawyer's duty and the duty of the master of a ship to rescue at sea that these duties are attached to activities ordinarily undertaken for pay. Furthermore, the lawyer and the ship's master are required to render services of *kinds* that they have shown a general willingness to render by their choice of occupation. The same cannot be said of the unwillingly pregnant woman. With regard to the last statutory duty, the duty of children to support impoverished parents, I have always had doubts about the constitutionality of statutes imposing such a duty. People do not choose their parents; they do not even choose to *have* parents. Many states have statutes imposing duties of filial support, but the constitutionality of such statutes has never been passed on by the Supreme Court.[57] Even if such statutes are constitutional, they are distinguishable from laws forbidding abortion. The burdens imposed by filial support statutes, while significant, are monetary. Also, I assume that anyone inclined to defend filial support statutes would rely on the claim that the child was merely repaying the parent for benefits received, a claim which cannot be made in the abortion case.

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[56] 46 U.S.C. § 728 (1976).

E. *Final Comments*

I have argued that abortion is a problem in samaritan law, and I have compared the situation of the pregnant woman with the situations of other potential samaritans and others (such as draftees) who are not strictly speaking potential samaritans (because it is not other *individuals* who require their aid) but who are compelled to act for the benefit of persons besides themselves. As I have noted, the situation of the pregnant woman has no perfect analogue. There is no other case in which noninvolvement on the part of the potential samaritan requires something that looks so much like a positive act; and there is no other case in which the potential samaritan has contributed to the existence of a relationship with the person in need of aid with just the same degree of voluntariness. Expanding on the last point, I have conceded that by having sex the pregnant woman has (except in the case of rape) done *something* that gives us *some* reason to compel her to aid the fetus. On the other hand, the pregnant woman has not done as much to establish a relationship with the fetus as has the parent to establish a relationship with her child, the voluntary rescuer to establish a relationship with the object of the rescue, or even the innkeeper to establish a relationship with his guest. If we bear in mind that no other potential samaritan is required to bear burdens as physically invasive as the burdens of pregnancy and childbirth, and if we bear in mind also that no other potential samaritan (with the possible, but doubtful,[58] exception of the parent) is subjected to burdens remotely comparable in magnitude to the burdens imposed on the pregnant woman, we conclude that laws forbidding abortion are at odds with the general spirit of samaritan law.[59]

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[57] The closest the Court has come was to vacate, with a request for clarification on whether there was an adequate state ground, a California Supreme Court decision that such a statute was *un*constitutional under the federal Constitution, or under the California constitution, or both. Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

One final point. When I suggest that the woman should not be compelled to subordinate her interests to those of the fetus, I sometimes meet with the response: "But if she is allowed to have an abortion, the fetus is subordinated. It is just a question of who shall be subordinated to whom." In a sense, of course, this is correct. There is a conflict of interest between the woman and the fetus, and someone is going to lose. But that is true in every samaritan situation. There is a conflict between the distressed party's need for aid and the potential rescuer's desire not to give it. The point is that our law generally resolves this conflict in favor of the potential samaritan. When a woman is pregnant, it is the fetus that needs aid and the woman who is in a position to give it. If the conflict between the woman and the fetus is to be resolved consistently with the resolutions of the most closely analogous cases, the woman must prevail.

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[58] *See* discussion at pages 1597-98 *supra*.

[59] An issue I have not mentioned is whether, in view of the greater responsibility for the fetus of the woman who has sex without taking measures against conception, a state could make access to abortion conditional on responsible contraceptive use. In theory, this suggestion has considerable appeal. But there are difficulties. Many women are excusably ignorant concerning contraceptive methods. Perhaps before the state makes contraceptive use a prerequisite to abortion it must do a better job of contraceptive education. Also, there are significant side effects from many contraceptive methods. If, as I have argued, the woman who conceives and then has an abortion does not make the fetus worse off by her entire course of conduct, it is not clear that the woman should be required to run any risk to herself in order to avoid these consequences to the fetus. Most significantly, the invasions and uncertainty involved in *enforcing* a rule that conditioned abortion on responsible contraceptive use would be extreme. More could be said on this topic, but since no state has attempted to condition abortion on contraceptive use, no more need be said in this essay.

II. ABORTION AS SELF-DEFENSE

I have already mentioned that for those who cannot bring themselves to view removing a fetus from a woman's body as an omission for purposes of the bad-samaritan principle, there is another possibility. We can concede that the woman who has an abortion actively kills the fetus but argue that she acts in self-defense. We can view the woman who secures an abortion as merely resisting the fetus's unjustified attack on her person.

Obviously the fetus is not like a willful attacker knowingly bent on murder or mayhem. But, despite the absence of much authority, it seems clear that the privilege of self-defense extends beyond a privilege to resist willful attacks. Surely we would recognize a privilege to defend oneself against an assailant one knew to be insane, even though such an assailant would be free of any criminal liability.[60] Indeed, I have no doubt that we would recognize a privilege to defend oneself against an attacker whose conduct could not even be regarded as volitional.[61] Suppose, for example, one found oneself cabined in a very small space with someone who was seized by wild convulsions while holding a sharp cleaver.

There are limits, of course, to the situations in which one can harm an innocent person to avoid harm to oneself. If someone begins to shoot at me, I cannot seize a completely uninvolved bystander and use him as a shield. If I find myself and another non-swimmer on a boat that is foundering, I cannot throw him off to save myself. The question is, where does abortion fall on this spectrum?

It may help to recall some facts about the early stages of fetal life. The fetus begins as a zygote, inside the woman but unattached. It is not until days later that it adheres to the uterine wall, then burrows into the endometrium, sprouts chorionic villi, and grapples onto the woman's insides. Once attached, it sends out its own hormone signals, which trigger the enormous changes pregnancy works on the woman's body.[62] The woman simply is not pregnant until the blastocyst latches on and commandeers the woman's metabolism. On this account, the fetus may seem less "active" than the violent insane attacker or even than the person in convulsions brandishing a cleaver, but the fetus is not at all like an uninvolved bystander. The fetus is involved with the woman carrying it, and it is the fetus's presence and nothing else that threatens harm to the woman. Nor does the fetus seem like the second occupant of a foundering boat. The difference, of course, is that the woman *is* the boat. Perhaps the closest analogue of abortion would be a case where two persons are in an ocean together without any boat at all, swimming or treading water. One tires first and begins in a delirium to cling to the other. Surely the one being clung to may disentangle himself and save himself if he can.[63]

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[60] *See* ALI MODEL PENAL CODE § 3.04, comment 5 (Tent. Draft No. 8, 1958). The *Restatement (Second) of Torts* takes no position on this question. *See* RESTATEMENT (SECOND) OF TORTS §§ 64 (caveat), 66 (caveat) (1965).

[61] *See* Kadish, *supra* note 22, at 68.

[62] *See generally* J. GREENHILL & E. FRIEDMAN, *supra* note 7, at 25-29.

There may be some special wrinkles to self-defense against innocent attackers. First, the *Restatement (Second) of Torts* suggests that there may be a duty to retreat before using force against an innocent attacker in cases where retreat would not be required if the attack were willful.[64] But there is never a duty to retreat except where the harm threatened can be avoided by retreating. There is no escape from the burdens of pregnancy save abortion. Second, there may be no privilege to defend oneself against an innocent attacker if one has provoked or invited the attack.[65] I have noted previously that (except in the case of rape) the pregnant woman has done *something* which made her pregnancy more likely, indeed which made it possible. But at least if the woman has attempted to avoid pregnancy, she can hardly be said to have invited the fetus's attack any more than one invites attack by walking near a mental hospital where one knows there are some violent inmates. Finally, it could be suggested that even if there is a privilege to defend oneself against an innocent attacker, there is no privilege to defend a third person against an innocent attacker, since that involves choosing between two innocents without being impelled by the desire for self-preservation. (The defense-of-third-persons problem arises because women need the assistance of doctors to have safe abortions.) Suffice it to say in response that after early vacillation, our law now generally recognizes privileges to defend third persons wherever they are privileged to defend themselves.[66] Surely the asymmetry between the innocent attacker and the innocent attacked is reason enough to allow third persons to intervene on behalf of the latter. Surely if a woman can defend herself against the fetus, a doctor may help.[67]

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[63] Surely also the stronger swimmer may disentangle himself from the weaker, even if he could carry the weaker swimmer to safety but only at the cost of serious injury to himself caused by the extra exertion and prolonged exposure to stressful conditions.

[64] RESTATEMENT (SECOND) OF TORTS § 64, comment b (1965).

[65] *See* ALI MODEL PENAL CODE § 3.04(2)(b)(i) (Proposed Official Draft 1962).

I have saved for last the most troublesome question raised by the self-defense analysis. On this analysis, the woman is killing the fetus. How does one answer the suggestion that, provided the mother's life is not at stake, the privilege of self-defense is lost because abortion involves excessive force?

Observe first that abortion does not involve force which is excessive in the sense of being greater than necessary to avoid the threatened harm. The woman cannot be spared the burdens of pregnancy without killing the fetus. It might be suggested that if the post-partum interests of the woman are ignored on the ground that they can be avoided by giving the child up for adoption, then the burdens of *late* pregnancy and delivery can be avoided without killing the fetus by removing the viable fetus during the last trimester. But this is a dangerous operation for the woman, surely involving a sufficient risk of death or serious bodily harm so that she can defend herself against the prospect by removing the fetus earlier. The question, then, is whether abortion is excessive in the sense that the harm to the woman involved in a normal pregnancy and delivery is just not great enough to justify killing the fetus.

According to the Model Penal Code, deadly force may be used to defend oneself against death, serious bodily harm, rape, or kidnapping.[68] We must consider whether, in cases where the risk to the woman's life is minimal, the burdens of pregnancy and childbirth can be assimilated either to serious bodily harm or to rape. To my mind, there is a good case on both counts.

The Model Penal Code, although it talks of "serious bodily harm", never defines it. It does define "serious bodily injury", used in analogous contexts in such a way as to suggest that the phrases are intended to be equivalent, as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[69] The comments to the *Restatement (Second) of Torts* also indicate that the permanent or protracted loss of function of any important member or organ counts as serious bodily harm.[70]

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[66] *See* materials cited in note 5 *supra*.

[67] Model Penal Code provisions making self-abortion a lesser crime than abortion-on-others and forbidding aid-to-suicide even though suicide is not a crime. ALI MODEL PENAL CODE §§ 230.3, 210.5 (Proposed Official Draft 1962), are *not* examples of rejecting intervention by third parties even though the act of the "principal" is innocent. The authors of the Model Penal Code plainly do not approve of either self-abortion or suicide. They treat them as lesser crimes or as no crime at all for reasons of common sense and efficient administration.

[68] ALI MODEL PENAL CODE § 3.04 (2)(b) (Proposed Official Draft 1962). *Cf.* RESTATEMENT (SECOND) OF TORTS § 65 (1965) (allowing the use of deadly force in self-defense against a threat of death, serious bodily harm, or ravishment).

What a woman suffers from pregnancy is a protracted impairment of function of her body as a whole. It does not seem particularly plausible to view her as losing the function of *a* member or *an* organ. If it were important to identify *an* organ, we could specify several whose functioning is altered during pregnancy: the pituitary and the hypothalamus, for example. But the real point is that the woman's entire hormonal system and consequently her entire body are altered. Aside from the pain and discomfort of being pregnant, any activities that demand grace, flexibility, balance, coordination, muscle tone, or significant physical exertion are likely to be impossible for the last half of the pregnancy. Surely for an athlete or a dancer, the last four months of pregnancy would involve protracted loss of important bodily functions. And even for the woman who is not primarily an athlete or a dancer, sports or dancing or comparable physical activities may be very important.

It is interesting to note that one of the comments in the *Restatement (Second) of Torts* includes an illustration which strongly implies that a broken arm is serious bodily harm.[71] The illustration in question does not *say* that a broken arm is serious bodily harm, because the primary object of the illustration is not to define serious bodily harm but rather to indicate the legal effect of a mistake on the part of the attacker about the extent of harm he is likely to cause. Nor does the illustration specifically say that deadly force can be used to avoid the broken arm, since what force can be used depends in part on how much force is actually necessary in the circumstances. However, the illustration appears in connection with the basic section on the use of deadly force in self-defense, and it would lose its point if it were not intended that a broken arm should represent a higher level of harm than the harm which justifies the use of non-deadly force. It seems to me that, so far as one can compare these things, a broken arm and pregnancy involve similar interferences with normal physical activity.

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[69] ALI Model Penal Code § 210.0(3) (Proposed Official Draft 1962).

[70] Restatement (Second) of Torts § 63, comment b (1965).

[71] *Id.* § 65, Illustration 2.

There will be those who suggest that pregnancy does not represent any "impairment" or "loss of function". This suggestion seems plausible because there is a sense in which pregnancy is "normal" while a broken arm is not. Even for a woman who wants to be pregnant, however, pregnancy entails a significant interference with normal activities. To say that pregnancy is "normal" in some sense, and even often desired, is not to say that it imposes no costs. Furthermore, as I have said before, the proper point of view in this discussion is the point of view of the woman who does *not* want to be pregnant. For her the pregnancy represents a major burden without redeeming benefits.

Two further objections may be made against my suggestion that an unwanted pregnancy is serious bodily harm justifying the use of deadly force in self-defense. First, it might be suggested that the force used to repel an attack must always be proportionate to the harm threatened, and that even if pregnancy constitutes serious bodily harm, it cannot be avoided at the cost of the death of the fetus. This objection ignores the fact that, in formulating many sorts of rules, our law tends to divide physical harms into two categories. One category is death-or-serious-bodily-injury. The other category is harms less than death-or-serious-bodily-injury. Whatever some people might like, our law does not take the position that death is in a class by itself.[72] Unquestionably one can kill in self-defense in order to avoid some harms less than death. Surely one can kill to avoid being made a quadriplegic. Surely one can kill to avoid being made a paraplegic. Surely one can kill to avoid being blinded. There is, of course, a line-drawing problem. But we frequently operate on the assumption that there is *one* line, between death-or-serious-bodily-injury and everything less.

It might still be said, however, that before something can count as serious bodily injury it must involve a substantial *risk* of death. It is probably true that most cases where an attacker threatens serious bodily injury involve a significant risk of death, and it may be that this is one reason why we assimilate serious bodily injury to death. But I think it is not true that before something can count as serious bodily harm it must involve a risk of death. The Model Penal Code and the *Restatement* both say quite explicitly that serious bodily injury is injury which involves *either* substantial risk of death *or* protracted loss of an important physical function. The broken arm illustration, noted above, involves no risk of death (and pregnancy does, though not a risk so substantial that I would argue pregnancy was serious bodily harm on that account alone).

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[72] Our law does *sometimes* take the position that death is in a class by itself, as in formulating the law of murder. But it does not treat death as special in all contexts.

Let us consider now whether pregnancy can be assimilated to rape, which is generally understood to justify the use of deadly force in self-defense. Why is rape so appalling that a woman may kill to avoid it? Being raped is likely to be painful. Given the habits of rapists as a class, being raped also involves a significant risk of death. Being raped involves an intrusion into the most intimate parts of the body. Being raped may create fears and anxieties that interfere with the victim's normal sexual relations. Finally, being raped is humiliating because the victim's body is being used, treated purely as a physical object.

Everything I have just said about rape is true also of pregnancy imposed by prohibitions on abortion. Pregnancy is painful. It involves a significant risk of death. It represents an intrusion into the most intimate parts of the woman's body. It is likely to interfere directly with sexual relations while it continues (during the latter part of the pregnancy), and the fear of pregnancy, if abortion is not available, is likely to make sexual relations less satisfactory even after the pregnancy is over. Finally, the woman who is compelled to carry a fetus she does not want is in effect being used as an incubator. She is being used as a physical object quite as much as the victim of rape.

There are differences, of course. Being raped may make a woman fearful every time she goes out into the street. Indeed, it may make her fearful *everywhere,* whether or not she is one of those victims so unfortunate as to be raped in their homes. Unwanted pregnancy, in contrast, makes the victim fearful only of sex. (Remember, however, that being fearful of sex may poison a great deal more of one's life than just the time spent in intercourse.) Also, it may be that the statistical risk of death associated with rape is greater than that associated with pregnancy. So far, I should say, we have mentioned differences of degree that do not amount to differences in kind for present purposes.

One who objects to the comparison of pregnancy with rape is much more likely to think there is an intrinsic horror to rape that is absent from pregnancy. Does it not make a difference that the rapist, unlike the fetus, is a full-sized, visible, malevolent, *active* attacker?

At this point, it is difficult to know what to say. For a start, anyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion. Here both the woman's feelings of being used during the pregnancy and her dismay at the consequent choice between actually raising the child and giving it up for adoption are plainly relevant. Also, if rape involves a malevolent, active attacker who uses the victim's body, laws forbidding abortion involve the requisitioning of the woman's body by the state. Is it clearly worse to be treated as an object by one deviant individual than to be relegated to the status of a broodmare (for this is how the pregnant woman may well view the matter) by society at large?

Two final points. First, we are discussing, in this section, self-defense against an *innocent* attacker. The general rules of self-defense allow the use of deadly force to avoid serious bodily harm or rape, and I have argued previously that we would allow the use of deadly force to avoid serious bodily harm at the hands of an innocent attacker. But it might be thought that rape is different, that the injury from rape depends more on the hostility of the attacker. It might therefore be suggested that deadly force cannot be used on the innocent rapist or, by extension, on the fetus. There is something in this suggestion. Imagine a woman being raped by a man whom she knows is suffering from the insane delusion that she is his wife, who enjoys resisting and being taken by force. (We can make the attacker more sympathetic by supposing that he actually has such a wife and that his delusion concerns only the identity of the woman he is attacking.) Would this woman be permitted to kill her assailant, if necessary? Certainly the case is harder than that of the ordinary "sane" rapist. To my mind the case is less strong from the woman's point of view than the case of pregnancy imposed by laws against abortion. Yet I believe that if the case arose a privilege to use deadly force would be found.

Finally, it might be suggested that all the normal rules about self-defense assume the impossibility of deliberation — that, at least to the extent these rules allow deadly force to be used for any other purpose than to avoid death, they represent a concession to the way imperfect human beings will behave in emergencies. The fetus is unique among "attackers" in that it allows its victim time to reflect; and it could be argued that the woman should decide, on reflection, to submit to the fetus's intrusion and the attendant costs so long as her own life is not at stake. I have no decisive response to this argument, but I do not find it convincing. I admit that the justification for the use of deadly force in response to non-deadly force seems weaker when there is time to reflect. On the other hand, comparison of the law of self-defense with the law of voluntary manslaughter and of duress makes it clear that the right of self-defense is not *merely* a concession to predictable human weakness. The law of self-defense is shaped in part by the notion that there is an asymmetry between attacker and attacked (even when the attacker is innocent) which justifies the attacked in protecting himself or herself even in some cases where the cost to the attacker is greater than the harm from which the attacked is spared.

III. THE CONSTITUTIONAL ARGUMENT

I have spent quite a number of pages trying to show that if we viewed abortion as a problem in samaritan law, or if we viewed it as a problem in the law of self-defense, abortion would be allowed. It is time now to say more about the constitutional argument I think my observations support. I shall treat explicitly only the constitutional argument suggested by the discussion of samaritan law. An argument that is similar in outline could be based on the law of self-defense, but I find the samaritan argument more persuasive. Enough of what I say about the samaritan argument would carry over to the self-defense argument that a separate treatment of the latter is unnecessary. Having spelled out the constitutional argument, I shall comment briefly on two further topics: (1) the advantages of my argument over the Court's actual argument in *Roe*, and (2) the consequences of my argument for other problems in the general area.

A. *The Nature of the Argument*

John Hart Ely has rightly insisted that constitutional arguments ought to be based on values that can be inferred from the text of the Constitution, the thinking of the Framers, or the structure of our national government.[73] The argument against laws prohibiting abortion is based on three such values: non-subordination, freedom from physical invasion, and equal protection. Before I specify the precise nature of the argument, let me say a few words about the first two of the values just mentioned.

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[73] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

The non-subordination value that is implicit in the bad-samaritan principle of the common law is also at the core of the thirteenth amendment. The thirteenth amendment speaks not merely of slavery, but of "involuntary servitude". In numerous cases,[74] the Supreme Court plainly viewed peonage as a form of involuntary servitude, and not just as a vestige of slavery which Congress may prohibit on a theory like that of *Jones v. Mayer.*[75] The objection to peonage is best summed up in one of the early decisions, by then Associate Justice Hughes: "The plain intention [of the thirteenth amendment] was to abolish slavery of whatever name and form . . .; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."[76] Unwilling pregnancy is not slavery in the fullest sense, nor does it involve labor of the sort Hughes was referring to; but it certainly involves the disposition and coercion of the (intensely) personal service of one "man" for another's benefit.[77]

The second value, freedom from physical invasion or imposed physical pain or hardship, is embodied in the eighth amendment and also plainly counts among those fundamental values of our society which are traditionally subsumed under fifth and fourteenth amendment due process. The due process clauses are vague, and it might be objected that to say something is subsumed under the due process clauses is not really to name a connection with any recognized constitutional value at all. That may be true in some cases, where the claim that something comes under the due process clauses is a novel one. But there is nothing novel about the claim that the due process clauses speak to the matter of physical maltreatment.[78]

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[74] *E.g.*, Taylor v. Georgia, 315 U.S. 25 (1942); Bailey v. Alabama, 219 U.S. 219 (1911).

[75] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[76] Bailey v. Alabama, 219 U.S. 219, 241 (1911).

[77] Peonage is not less objectionable when it is "voluntarily" entered into. Pollock v. Williams, 322 U.S. 4, 24 (1944). Nor is peonage less "involuntary servitude" because it is not a permanent status. (Peonage contracts apparently tended to be open-ended, the effective term being "until the laborer pays back his advance". In *Pollock*, the Court overturned a conviction secured less than three months after the laborer received his advance. In Bailey v. Alabama, 219 U.S. 219 (1911), there was a definite term of one year.) On both counts, compare an unwanted pregnancy which the woman is forbidden to terminate.

It may be that an adequate constitutional argument against abortion statutes could be based on these two values alone. The non-subordination value is not enough to prevent all impositions of duties to aid, as many of the exceptions to the bad-samaritan principle, involving trivial impositions, make clear. Similarly the physical integrity value is not enough to prevent all physical invasions, nor even all serious physical invasions, as the example of the draft and perhaps the example of medically proven and carefully supervised aversive therapies make clear. But the woman who is prevented from terminating her pregnancy can appeal simultaneously to both of these values. There is no other case, I believe, in which the law imposes comparable physical invasion and hardship as an obligation of samaritanism. We might plausibly suggest that imposing such invasion and hardship for the benefit of a third person is flatly inconsistent with our nation's fundamental traditions.

There are two difficulties with this suggestion. First, I am not certain that laws imposing comparable impositions more uniformly would be, or should be, held unconstitutional. If a state altered the bad-samaritan principle by statute, creating an obligation to undertake even physically dangerous rescues, I would be disinclined to say that the new statute was unconstitutional. Nor am I confident that the Court would invalidate it. Similarly, if a state passed a statute requiring parents to donate needed organs to their children (where this would not endanger the life of the parent), I am not certain that the statute would be, or should be, held unconstitutional. If these hypothetical statutes *would* be held unconstitutional (and I am sure some readers will think they would be), then statutes forbidding abortion should be held unconstitutional for the same reasons. But if these hypothetical statutes would not be unconstitutional, then abortion statutes cannot be held unconstitutional just on the basis of the values so far considered.

The second difficulty with the argument under consideration (to the effect that, equal protection aside, laws forbidding abortion violate our fundamental traditions with regard to non-subordination and physical integrity) is the fact that statutes forbidding abortion had, until *Roe,* been on the books in all states for many years. This history does not conclude the constitutional question. On occasion, the Court has overturned a great deal of history. But the Court has rarely overturned as much history all at once as it did in *Roe v. Wade*. That surely ought to give us pause.

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[78] *See, e.g.,* Rochin v. California, 342 U.S. 165 (1952).

I do not say, of course, that history is entirely on the side of those who would defend abortion statutes. The values of nonsubordination and freedom from physical invasion are very much a part of our history. Although arguments nominally based on our "fundamental traditions" often have little to do with our traditions, fundamental or otherwise, that is not true of the "fundamental traditions" argument I have suggested.

On the other hand, there is no logical reason why our traditions forbidding subordination of one individual to another, or forbidding physical invasions, should not recognize exceptions. It is not implausible to suggest that one of the exceptions our traditions recognize is for laws prohibiting abortion. That is why I do not find the pure "fundamental traditions" argument sufficient.

We need to bring in the equal protection value. We need to argue that even if those parts of our tradition which forbid subordination or physical invasion have historically included an exception for abortion laws, the exception is impermissible. It creates an inequality that is inconsistent with an even more fundamental part of our tradition, reflected in the equal protection clause and the due process clause of the fifth amendment. It is no accident, I think, that the greatest inroads on history (that is, the most sweeping invalidations of existing legal arrangements) have come in equal protection decisions like *Reynolds v. Sims*[79] and *Brown v. Board of Education*.[80] For all of our failures in the pursuit of equality, and for all of our (justifiable) uncertainty about just what equality means, there are few values, perhaps none, with deeper roots in our traditions or a firmer hold on our imaginations than the value of equal treatment under law.

Some readers may doubt that the value underlying the equal protection clause is relevant to the abortion problem. Antiabortion statutes do not look like the sort of statute that normally raises equal protection issues. The state does not draw a line between blacks and whites, or between women and men, and treat the two classes differently. The state does not even draw a line between optometrists and opticians and say the former may offer services which the latter may not.[81] The state simply says that no one may have an abortion. It is true that only some people want abortions. But so long as the state denies abortions to everyone who wants them, there does not seem to be a problem of the equal protection variety.

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[79] 377 U.S. 533 (1964).

[80] 347 U.S. 483 (1954).

To see the equal protection problem, we must look at abortion in a broader context. Life in society produces many situations in which one individual is in a position to give needed aid to another individual. That is to say, life in society offers many opportunities to be a good or bad samaritan. The objection to an anti-abortion statute is that it picks out certain potential samaritans, namely women who want abortions, and treats them in a way that is at odds with the law's treatment of other potential samaritans. Women who want abortions are required to give aid in circumstances where closely analogous potential samaritans are not. And they are required to give aid of a *kind* and an *extent* that is required of no other potential samaritan.[82]

The preceding paragraph, sketchy as it is, is enough to reveal that the equal protection argument I am suggesting is nonstandard in two respects. First, I do not claim that the situation of the woman who wants an abortion has any perfect analogue among the situations of other potential samaritans. The abortion case is unique in requiring us to view what is in some sense an act as being, for purposes of samaritan law, an omission. The abortion case also differs from every other case except that of parenthood in that the woman has, by her prior behavior, contributed to the creation of the fetus which needs her assistance.

I argued in the course of the discussion of samaritan law that the woman seeking an abortion falls somewhere on a spectrum of eligibility for compulsion to be a samaritan, a spectrum that runs from the totally uninvolved bystander at one end to the parent at the other. I do not assert that the pregnant woman is placed under greater burdens than other potential samaritans who are precisely as eligible for compulsion. It is not clear just where on the spectrum the pregnant woman belongs. Rather, I suggest that the burdens imposed on the pregnant woman are out of line with the general treatment of other potential samaritans *all along the spectrum*. There are some cases in which other potential samaritans who might be viewed as less eligible for compulsion are nonetheless compelled. But the burdens they are compelled to assume are incomparably less than the burdens of pregnancy. Parents, who are the most eligible potential samaritans, are placed under heavy burdens. But even these burdens are not physically invasive in the way that pregnancy is, and no state imposes on parents (or, I think, would impose if a case came up) the burdens that would be most comparable to the burdens of pregnancy, such as the burdens of a genuinely dangerous rescue or of compulsory organ donation.[83]

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[81] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[82] Recall that the draft, which might seem to provide a counterexample, is not a true samaritan case at all.

I said earlier that there were two respects in which my equal protection argument is non-standard. One respect, which I have been discussing, is the lack of any precise analogue for the pregnant woman. The other respect, which is related but distinct, is that the argument goes so far afield for its comparisons. Laws which classify on the basis of race or sex, or which draw lines between opticians and optometrists or between advertising on a truck for the owner's business and advertising for someone else's,[84] suggest equal protection issues to anyone. But most people, unprompted, do not connect the abortion problem and the problem of samaritanism. It may seem that courts should not look so far afield. There are enough equal protection problems presented on the faces of statutes without looking for problems in imaginative comparisons. As Justice Douglas said in *Railway Express Agency v. New York*, "[T]he fact that New York City sees fit to eliminate from traffic this kind of distraction [certain advertising on the sides of trucks] but does not touch even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[85] I shall refer to the notion that courts should not concern themselves, in equal protection analysis, with comparisons so far-ranging as that between the pregnant woman and other potential samaritans as the "too far afield" objection to my argument.

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[83] As a matter of logic, it might seem that the strongest part of my argument is the comparison of the woman seeking an abortion with the parent. Should I not simply say that the woman seeking an abortion, who is less eligible for compulsion than the parent, is subjected to greater burdens (or at least greater burdens of the particular physically invasive sort that are specially disfavored) and leave it at that, eschewing comparison with any other potential samaritans? There are three reasons for not doing this. First, the most telling comparisons between the woman seeking an abortion and the parent are in a sense hypothetical. I *assume* that parents are not required to rescue their children from burning buildings or to donate organs. Certainly there are no statutes or cases imposing such obligations. But then, so far as I know, there are no statutes or cases specifically rejecting such obligations either. There is simply no explicit authority. Second, parents do bear heavy burdens, of a general sort, even if they are subjected to less in the way of physical invasion than the pregnant woman. Finally, since the pregnant woman is not precisely analogous to any other potential samaritan, but is somewhere in the middle of the spectrum of eligibility for compulsion, it seems foolish to drop from the argument the fact that in virtually all cases where obligations of samaritanism are imposed, the burdens are trivial.

[84] *See* Railway Express Agency v. New York, 336 U.S. 106 (1949).

We now have before us two questions: (1) What do we make of the "too far afield" objection? In other words, should the Court even consider an argument which proceeds by comparing the pregnant woman and other potential samaritans? (2) If the argument merits consideration, does it justify the conclusion that laws prohibiting abortion are unconstitutional? It might seem that the first question is logically prior to the second and should be disposed of first. Whatever the logic of the matter, the considerations relevant to the two questions overlap considerably. Because the second question is of a more familiar sort than the first, I propose to begin with the second question. Let us hold the "too far afield" objection in abeyance and attack the substantive issue.

If there were a non-controversial general theory of equal protection, all we would need to do at this point would be to apply the general theory to the case of abortion. Unfortunately, there is no non-controversial theory. Even more unfortunately, I do not have a general theory to suggest. Still, given the uncertain state of equal protection theory, it seems desirable to say something on a general level before turning to the specific problem at hand.

What I propose to do is to describe some features I think an acceptable general theory is likely to have. My list of general features will be in some degree controversial, but I think it will establish enough common ground between me and a sufficient number of readers that I can then proceed to a meaningful discussion of the abortion problem. I would emphasize that little of what I shall say on the general level is original. Nor will it be necessary for the reader to accept everything in my general remarks to find elements of the specific argument about abortion persuasive. Finally, I would observe that within the tolerance of this schematic presentation, I think I shall be describing both what courts ought to be doing in the equal protection area and what the Supreme Court is doing. (What the Court is doing is somewhat different, in my view, from what the majority of Justices say they are doing.)

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[85] 336 U.S. 106, 110 (1949).

For a start, I approve of the "new equal protection" to this extent: I think it is appropriate to subject different laws to different levels of judicial "scrutiny". Actually, to say one law deserves more scrutiny than another may mean two quite different things. It may mean that judicial resources are more appropriately spent in reviewing the law which deserves more scrutiny, or it may mean that that law should be held to a higher standard of justification in terms of its tendency to promote significant state interests. The Court has generally concentrated on the second meaning, ignoring the first so far as theory goes. (They have not ignored it in their traditionally unexplained decisions regarding choice of cases.) Ordinarily, considerations that tend to justify heightened scrutiny in the sense of greater judicial attention will also tend to justify it in the sense of requiring a stronger justification for the law, and vice versa. But there may be some situations in which special judicial attention is called for, but not a requirement of special justification. As it turns out, this distinction between different ways of giving special scrutiny is of limited relevance to the present problem. I shall have scant occasion (though I shall have some occasion) to mention the distinction in what follows.

Although I accept the idea of different levels of scrutiny, I do not think the Court's official "two-tier" model is satisfactory. I agree with those Justices and commentators who think the Court is not actually applying such a model.[86] Instead of regarding all classifications as either suspect or innocent, the Court seems to perceive a range of classifications of varying degrees of suspectness. Race is thoroughly suspect, along with national origin or ethnicity. Sex and illegitimacy are somewhat suspect, but not as suspect as race. Alienage is probably still somewhat suspect, though the question is confused by the federalism aspects. Similarly, there is a range of rights — some more fundamental, some less. The right to vote is fundamental, but not quite so fundamental is the right to vote by absentee ballot.[87] The right of a criminal defendant to certain assistance in his defense is fundamental. The right to education is apparently fundamental up to a point, but not fundamental or certainly less fundamental thereafter.[88] Marriage and divorce seem both to be "somewhat" fundamental.[89]

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[86] *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70-137 (1973) (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring); Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

[87] *See* McDonald v. Board of Election Commrs., 394 U.S. 802 (1969). *But see* O'Brien v. Skinner, 414 U.S. 524 (1974).

Although I do not endorse all the Court's decisions about which classifications are suspect (and to what degree) and about which rights are fundamental (and to what degree), I regard the general approach the Court seems to be following as the correct one. I approve of "variable suspectness", "variable fundamentality", and consequent "variable scrutiny".

I do *not* think the eventual scrutiny should be just a matter of vetting the law in issue for an appropriate degree of "goodness of fit" between means and ends. We could build a theory in which the suspectness of classifications and the fundamentality of rights were appealed to only as the basis for selecting an appropriate level of review for the "goodness of fit". But that is not the sort of theory I have in mind. The mere use of suspect classifications imposes costs. Any impairment of fundamental rights is a cost. Differential impairment of different persons' fundamental rights is a special cost. These costs must be justified by what is achieved by the law under review. A law that is perfectly designed to achieve an insufficiently important end is still unacceptable.

It may seem that what I have sketched so far is a "balancing" approach to equal protection. We throw into the scales on the individual's side the costs imposed by the use of suspect classifications or by the impairment of fundamental rights. These costs will of course vary with the degree of suspectness of the classification or the degree of fundamentality of the right involved. We throw into the scales on the government's side the benefits achieved by the law, which depend upon the weightiness of the state interest and the degree to which the law promotes the interest. Then we "balance".

This sketch of the process is not entirely off the mark, but it is incomplete or misleading in two respects. First, and most important, talk of balancing suggests that *any* interests of the individual are eligible to be labeled "fundamental" and put into the scales against the law. One of the unsatisfactory aspects of the

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[88] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973).

[89] As to marriage, *compare* Zablocki v. Redhail, 434 U.S. 374 (1978), *with* Califano v. Jobst, 434 U.S. 47 (1977); as to divorce, *compare* Boddie v. Connecticut, 401 U.S. 371 (1971), *with* Sosna v. Iowa, 419 U.S. 393 (1975).

Court's opinion in *Roe v. Wade* (which is not, of course, an equal protection opinion but which does deal with "fundamental rights") is that it lists a variety of interests belonging to a pregnant woman that laws against abortion may impair, but it gives very little attention to the question of which of these interests are actually protected by the Constitution. Under the scheme I have in mind, rights would be regarded as fundamental or classifications as suspect only if the rights in question were protected, or the classifications disfavored, by the Constitution or by constitutionally based values as developed in our legal tradition. (Incidentally, it seems to me that if we try to identify fundamental rights and suspect classifications by reference to our constitutional tradition, it is almost inevitable that we should end up with "variable fundamentality" and "variable suspectness". It would be a poor tradition indeed, and not ours, which recognized only two degrees of importance of rights, or only two degrees of acceptability of classifications.)

The second reason the "balancing" sketch above is misleading is that it suggests that once the Court has decided to take an equal protection question seriously, there is no further room for deference to the legislature. Obviously deference to legislative judgment is not something that is easily defined or quantified, but I think some deference is appropriate even in cases where specially protected rights or specially disfavored classifications are involved.

I prefer to think of my suggested approach to equal protection as a "reasonable American legislature test". According to this test, an inequality of treatment imposed by the law is unconstitutional if and only if it is one that a reasonable American legislature could not countenance. The reference to *reasonableness* (which is something more than mere rationality) captures the balancing aspects of the approach, the role of specially protected rights and specially disfavored classifications. The reference to the reasonable *American* legislature reminds us that decisions about what rights and classifications raise special problems are to be made on the basis of our constitutional tradition. Finally, the formulation of the test in terms of the behavior of a reasonable American *legislature* emphasizes that even when dealing with fundamental rights or suspect classifications, legislatures must have some leeway.

Labels, for all their usefulness, can be misleading. Although I have attempted to explain my choice of the phrase "reasonable

American legislature test", there is some danger that the phrase will create precisely the wrong impression. I do *not* suggest that the Court should try to decide what it would do if it were the legislature. The question is not what the "ideally reasonable" legislature *would* do, but rather what a "humanly reasonable" legislature (steeped in and concerned for our national traditions) *could* do. A law is constitutional, under this test, if a reasonable American legislature *could* pass it or fail to repeal it. The relationship I envision between the Court and the legislature is somewhat like the relationship between a trial judge and trial jury.

Another aspect of the theory I am now outlining deserves mention. Legislative *purpose* is important. The Court may have gone slightly too far in its unqualified pronouncements about the importance of purpose in recent cases,[90] but basically it is on the right track. Suspect classifications are suspect in considerable part because of the "badge of inferiority" aspect, and because they are specially resented. A classification that is neutral (non-suspect) on its face but that produces effects significantly describable in terms of some non-neutral (suspect) classification does *not* have the same "badge of inferiority" aspect unless the apparently neutral classification was chosen by the legislature with a bad purpose, that is, as a surrogate for an impermissible classification.

Justice Stevens is right to remind us that bad effects are often the best evidence of bad purpose.[91] And Paul Brest is right to suggest that *indifference* to bad effects may sometimes be so extreme as to count as bad purpose.[92] (This is especially likely to be the case where what is in issue is the legislature's failure to repeal or modify a scheme that was adopted with innocent purposes, but that now produces bad effects.) But as a general proposition, where the only objection to a statute is that it has bad effects (in terms of suspect classifications), the legislature's innocent purpose ought to protect the law from being held unconstitutional.

This treatment of purpose is also suggested, to my mind, by the label of the "reasonable American legislature test". It may be that an ideal legislature would never pass a law that had a disparate impact on a class protected against purposeful discrimination without weighing the special costs such a disparate impact would impose by aggravating historic disadvantages. But unless the disparate impact is extreme, it is enough for the humanly reasonable legislature to avoid, or to weigh carefully, the explicit use of suspect classifications and to refrain from using apparently neutral classifications with the *purpose* of discriminating.[93]

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[90] Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Personnel Admr. v. Feeney, 99 S. Ct. 228 (1979).

[91] Washington v. Davis, 426 U.S. 229, 253-54 (Stevens, J., concurring).

[92] Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 14-15 (1976).

So much for my outline of an equal protection theory. The approach I suggest will strike many readers as unacceptably "unprincipled". I concede that the "reasonable American legislature test" does not lend itself to mechanical application. On the other hand, it should not be taken as a license for unbridled judicial interference with legislative decisions. The court applying this test should be constrained both by attention to our tradition and by deference to legislative decisions. Those constraints can be real even though they are not precisely definable nor their effects on judicial decision precisely measurable. Furthermore, within the context of a fairly loose general theory, it is still possible for judges to tell us a great deal about why individual cases strike them as they do, and why different cases strike them differently. Candid discussion by judges along these lines may tell us more about both the judges' thinking and our traditions than discussions concerning the application of some purportedly mechanical test. The "reasonable American legislature test" may do little more than emphasize that there is no mechanical test in the equal protection area. But it is better to have a vague "test" that captures the right idea than a precise test that captures some wrong idea.

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[93] Just as legislative purpose is relevant, so is legislative process. That is, whether a law is constitutional may in some cases appropriately turn on what the legislature thought about in passing it, and on how hard they thought about it. There are at least two reasons for this. First, a legislative judgment about what is required by our constitutional tradition is entitled to some deference. How much deference the judgment is entitled to in any particular case depends in part on how thoroughly considered it was (if it was made explicitly at all). Second, and probably more important, the legislature is entitled to rely on any empirical proposition that an American legislature could reasonably accept. The fact that a legislature has acted on a particular empirical proposition is always *evidence* that a reasonable legislature could accept it. But the strength of this evidence varies with the amount and nature of the consideration given by the legislature to the empirical proposition in question. Although I think there are probably objections to the legislative process behind many abortion statutes — particularly regarding the extent to which significant constitutional interests have been overlooked — I shall not rely on process arguments in this essay. Deficiencies of process can be cured. But even careful legislative reconsideration would not answer the objections to abortion laws detailed below.

It is time to return to the abortion problem and to explain why abortion laws are specially problematic and why, ultimately, they should be held unconstitutional. In the process I shall expand implicitly on some of the features of my general approach to equal protection. I shall continue to hold the "too far afield" objection (the objection that my comparison of the pregnant woman to other potential samaritans ranges too far afield for an equal protection argument) in abeyance for the present.

First, it is important that the inequality of treatment between pregnant women and other potential samaritans touches on the constitutional values of non-subordination and freedom from physical invasion. A woman who is denied an abortion is compelled to serve the fetus and to suffer physical invasion, pain, and hardship. As already noted, it can be argued that the Constitution prohibits this imposition outright, without regard to any inequality of treatment. I have said that I do not find this argument persuasive. But the fact that such an argument can plausibly be made surely means that any inequality of treatment we can point to becomes harder to justify. Inequalities with regard to interests given specific constitutional protection are likely to be more costly, in terms of our community value structure, to the relatively disadvantaged parties than inequalities involving other interests. For this reason, and also because of the apparent hypocrisy of guaranteeing a full measure of the constitutionally sanctioned interest for some people but not for others, inequalities with regard to such interests are likely to be specially resented by the disadvantaged parties. If these inequalities are both specially costly and specially resented, that is surely some reason for the Court to look at them carefully and to require special justification for them.

I have indicated that subjective resentment on the part of the individuals disadvantaged is a significant element in equal protection analysis. It might be suggested that even women who want abortions do not resent the specific inequality (between the treatment of them and other potential samaritans) that I focus on. There is some truth in this. The precise comparison between pregnant women and other potential samaritans is not a standard one. On the other hand, it is clear that there is a great deal of resentment among women of laws forbidding abortion. (That many women do not feel this resentment does not strike me as important. Many women *do* feel it.) Furthermore, it is clear that a good deal of the resentment is based on a feeling among women that they are being used in a way no one else, or almost no one else, in our society is ever used. The perception on the part of women that they are being used — more specifically that their bodies are being taken over by the state for the benefit of third persons — in a way which is at odds with our society's general practices is sufficient, to my mind, to constitute resentment of the inequality I rely on.

Other reasons for the Court to give the abortion problem special attention are related to the suspect classification idea. Only women need abortions. Parents of both sexes might be required to undertake physically dangerous rescues, or to donate organs, and people of both sexes find themselves in most of the standard potential-samaritan situations. But the one potential samaritan who is singled out for specially burdensome treatment is a potential samaritan who must, given human physiology, be female. Why is this important?

First, any inequality that flows from an unchosen and unalterable characteristic is likely to be specially resented. It also works against the idea, deeply rooted in our culture, that people ought to be masters of their own destinies, at least within the limits of legally acceptable behavior that apply to everyone. Since pregnancy happens only to women, and since no one has any choice about whether to be a woman, susceptibility to pregnancy (and to being in the position of wanting an abortion) is a nonchosen characteristic. (It is not an unalterable characteristic, since a woman might have herself sterilized, but this method of altering the characteristic itself involves a significant physical invasion.)

It might be objected that even if susceptibility to pregnancy is an unchosen characteristic, pregnancy itself is not, and that laws attaching unpleasant consequences to pregnancy therefore do not interfere with women's controlling their own destinies. Even if such laws are resented, the objection continues, the resentment is unjustified. Now, many pregnancies are not chosen in the fullest sense. They are the result of accident, of carelessness, or whatever. I assume this is true of the vast majority of pregnancies which the women involved want to terminate by abortion. What the objector presumably means, when he says that pregnancy is not unchosen, is that the woman *could* avoid pregnancy (leaving rape out of account) by eschewing sexual intercourse. This is true. Women could avoid becoming pregnant. But the only method of avoiding pregnancy with certainty requires, for many people, extraordinary self-denial. The availability of sexual abstinence as a means of avoiding pregnancy does not, to my mind, eliminate the force of the suggestion that pregnancy is often sufficiently "unchosen" so that laws specially disadvantaging pregnant women limit women's control of their lives, are justifiably resented, and deserve more-than-minimal judicial attention.[94]

Another reason for heightened equal protection scrutiny of abortion laws is that women (and perhaps pregnant women especially) have suffered from a history of discrimination in our society. They have suffered not just from occasional laws counter to their interests, but from an extensive pattern of discriminatory laws and social practices. This makes them suspicious and resentful (and justifiably suspicious and resentful) of any particular inequality, however it is supposed to be justified. It is certainly worth investing some extra judicial resources in review of laws that impose inequalities tied to sex in order to allay this suspicion and resentment. It is probably worth requiring more-than-minimal substantive justification for such laws, both to minimize resentment and to avoid adding to the continuing burdens resulting from past injustices whose effects have not been entirely eliminated. An inequality that would be tolerable against a background of equal treatment may be intolerable when it is an extra burden imposed on top of other disadvantages.[95]

It is worth adding that, at the level of statistical generalities, the women who suffer most from prohibitions on abortion are likely to be the same women who have suffered most from other sorts of discrimination or injustice. I have in mind both poor women and women who want to pursue careers outside the home. These two groups of women have suffered from distinct but overlapping injustices in our past, and they have probably both suffered more than the adequately-provided-for woman whose life has focused primarily on her family.

It might be suggested that the "suspect classification" elements in the argument just presented should all be discounted because there is (or may be) no legislative *purpose* to disadvantage women. I have indicated previously that innocent purpose is relevant principally in cases where we are confronted with bad effects of a classification which is not suspect on its face. Now the inequality created by abortion laws is not expressly an inequality between women and men. It is between pregnant persons and others. But pregnancy is much more closely connected with sex, both empirically and in our habits of thought, than are, say, educational qualifications[96] or wealth[97] with race. Classification in terms of pregnancy is sufficiently like classification explicitly in terms of sex, especially when we remember the costs of definitively avoiding pregnancy, that classification in terms of pregnancy should be regarded as significantly suspect regardless of legislative purpose.

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[94] The claim that pregnancy is "unchosen" for present purposes is refined somewhat in the discussion at pages 1633-34 *infra*.

[95] *See* Brest, *supra* note 92, at 10-11.

Of course, to say that classification in terms of pregnancy should be regarded as significantly suspect is not to say that all laws disadvantaging pregnant women should be held unconstitutional. For example, I tend to think that *Geduldig v. Aiello,*[98] in which a California disability insurance plan for private employees disabled by an injury or illness not covered by workmen's compensation was upheld by the Court even though the plan excluded normal pregnancies from coverage, was rightly decided. Without discussing *Geduldig* extensively, it may help to illustrate the approach to equal protection I have in mind if I explain why a reasonable American legislature could regard the scheme at issue in *Geduldig* quite differently from the statute at issue in *Roe.*

First, no established constitutional interest was impaired in *Geduldig.* The supposed "right to procreate" is not inferrable from the text, historical background, or structure of the Constitution. In this respect it differs from the interests in non-subordination and in freedom from physical pain and invasion. Even if we say that there is a constitutionally protected interest in procreation (citing the ninth amendment, the fourteenth amendment privileges and immunities clause, and *Skinner v. Oklahoma*[99]), that interest is not impaired by denying disability benefits in connection with pregnancy in the same way that the interests in non-subordination and physical integrity are impaired by laws forbidding abortion.

Furthermore, the choice to be pregnant is much more likely to be a fully voluntary choice in the *Geduldig* context than in the abortion context. Most women who want abortions did not want to be pregnant in the first place. But I assume it is still the case that most children in this country are wanted, which is to say that most women who are pregnant and do *not* want an abortion *did* want to be pregnant. To be sure, I am now generalizing. I am ignoring cases such as the woman who did not want to be pregnant but who rejects abortion for moral reasons. But the likelihood that the relevant pregnancy is voluntary is very different in *Roe* and *Geduldig*. Also, it is more appropriate to rely on generalizations, even if we know there are exceptions, when we are justifying features of an insurance scheme that allocates monetary benefits among a group of employees, than to do so when we are justifying direct state interference with individual decisions. To a considerable extent the real question in *Geduldig* is whether those employees who do not want (additional) children shall subsidize, indirectly, those who do.

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[96] *See* Washington v. Davis, 426 U.S. 229 (1976).

[97] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

[98] 417 U.S. 484 (1974).

[99] 315 U.S. 535 (1942).

This discussion of the difference in "voluntariness" of the pregnancies involved in *Roe* and in *Geduldig* suggests a refinement of the claim that classification in terms of pregnancy should be assimilated to classifications in terms of sex. Perhaps we should say that classifications in terms of pregnancy are just as suspect as classifications in terms of sex for purposes of justifying the expenditure of resources in judicial review, but that whether they are as suspect for purposes of raising the level of required substantive justification for the law in question depends on just how "voluntary" are the pregnancies affected.

Before I attempt to say where all of this leaves us, let me point out an argument I have *not* made. I have not suggested that laws against abortion deserve special judicial scrutiny because women are politically powerless or because most legislators are male. That argument is not persuasive in this context. Both sides in the abortion controversy have been well organized politically. Further, many of the opponents of abortion are women. This is simply not an issue to which the partial exclusion of women from the political process is relevant. Generally speaking, the reasons I have suggested for special judicial concern about abortion do not depend on the political powerlessness of women as a class. On the contrary, they show why legislators should not be able to hide behind the claim that because many women oppose abortion the sex-specificity of the burdens of unwanted pregnancy is irrelevant.

It is time to take stock. In view of the considerations I have mentioned, could a reasonable American legislature pass or fail to repeal a statute forbidding abortion? I think the answer is "No." I am certain that most legislatures would defend laws against abortion on the ground that they protect human life (or potential life). This is certainly the most promising defense of such laws. But, in the context of our legal system, the defense is inadequate. The inequality between the treatment of pregnant women and the treatment of other potential samaritans who are not required to undertake burdens (often very much smaller burdens) in order to save life is too great. The inequality trenches on two distinct constitutionally protected interests — the interest in non-subordination and the interest in freedom from serious physical invasion. In addition, the inequality disadvantages a class that is defined by a non-chosen characteristic (whether sex or unwanted pregnancy) and that has suffered from a history of discrimination. This is more than any reasonable American legislature would tolerate.

An argument that might be made on the other side runs as follows: As a society we simply discount the pain and invasion of pregnancy, as compared to other pains of comparable intensity or invasions of similar extent. We view pregnancy as special, either because so many women undertake it voluntarily, or because it is a "natural" part of the process of continuing the species, or both.

I do not deny that there is a tendency to view pregnancy as special and to devalue accordingly the pain and invasion it involves. I suggest that this tendency is one that reasonable American legislators, looking squarely at the question properly formulated, would overcome. The fact that many women willingly undertake the burdens of pregnancy, for reasons of their own, is no reason to discount the burdens as they affect women to whom they are unwelcome. Similarly, the fact that some women must bear children if the nation is to continue is no reason to impose the burdens of pregnancy on women who are unwilling, so long as there is an adequate supply of volunteers.

It might also be suggested that a reasonable American legislature would remember and be swayed by a fact that has somehow been pushed from center stage in my analysis, namely, that a *life* is at stake.[100] This objection depends on a common assumption that preserving life is the highest value in our tradition. But the assumption is either stated too broadly or simply wrong. The equal protection argument I have made about abortion could not be made were it not that in many *other* cases involving potential samaritans our legal system prefers values such as non-subordination and physical integrity to the value of preserving life. It is simply not possible to claim that in our system preserving life takes precedence over everything else.

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[100] I shall explain in Section III.B. *infra* why I think we must accept the proposition that a life is at stake *for purposes of constitutional argument about abortion laws.*

Finally, it might be suggested that a reasonable American legislature would (or at least *could*) reject my argument at its very first step, the step where I decide that securing an abortion counts as an omission in the context of samaritan law. For purposes of constitutional analysis, viewing my entire argument through the lens of the reasonable American legislature test, I think this first step is the most problematic. It seems clear to *me* that if we want to be faithful to the spirit of our law regarding samaritanism, we must conclude that securing an abortion is more an omission than an act. But, just because the degree of deference due a contrary legislative judgment is not precisely quantifiable, I am not completely comfortable asserting a proposition (which I do nonetheless assert) that is essential to my argument, namely the proposition that any reasonable American legislature would, on reflection, see this matter as I do.

I do not claim to have established beyond doubt that laws against abortion deny equal protection. There are limits to how far logic and analysis can carry us. If the ultimate test in the equal protection area is whether a reasonable American legislature could have passed (or in some cases, could fail to repeal) a particular law, then there comes a point at which the judgment of persons imbued with and sensitive to our traditions is worth more than hypotheticals and distinctions.

In effect, the Court in *Roe* decided that a reasonable American legislature could *not* have passed (or failed to repeal) most state abortion laws. To be sure, the Justices did not explain themselves in this way. To my mind, they did not even explain as well as they might have why abortion laws presented a hard constitutional question — why they were not obviously constitutional. But I have tried to explain why abortion laws *do* present a hard question. Against that background, the most important fact about the decision in *Roe* is that seven Justices, including some not known for their activist tendencies, were impelled to strike down abortion laws even though they must have realized that their arguments were not very persuasive. In this case, given the nature of the issue, the fact that the Court held abortion laws unconstitutional is evidence for the proposition that they *are* unconstitutional, even though the Constitution does not simply mean what the Court says it means.

Of course, the Court's decision would be stronger evidence (to my mind) if the Court had cast its argument about why abortion was a hard question in the terms of this essay. If the Court must exercise judgment, it is better that it exercise its judgment on properly formulated questions. If the Court had decided there was no general "right of privacy" and no right inferrable from the Constitution to decide how many children to bear, and if it had formulated the question in my equal protection terms, it is possible that it would have upheld abortion laws. If so, then the decision in *Roe* should be reconsidered. But my guess is that the Justices would have answered my question the same way they answered their own. And my judgment is that they would have been right. If one considers dispassionately the question, "Could a reasonable American legislature, remembering the constitutionally protected interests impaired by abortion laws, focusing on the inequality of treatment between some potential samaritans and others, and bearing in mind all the other considerations we have mentioned, pass or fail to repeal a law forbidding abortion?", I think the correct answer is "No."

There is one final matter to be dealt with. We have yet to answer the "too far afield" objection, the claim that courts simply should not entertain equal protection arguments which depend on such far-ranging comparisons as that between abortion and other samaritan problems. I can think of four possible arguments against such far-ranging comparisons: (1) Allowing such comparisons expands vastly, and unacceptably, the number of laws subject to equal protection scrutiny. (2) Allowing such comparisons raises issues too subjective and formless to be appropriate for judicial decision. (3) Striking down a law on the basis of such a comparison suggests implicitly a criticism of the legislature, which criticism may be undeserved. If the comparison is too unusual, the legislature may not have been at fault in failing to take it into account. (4) Inequalities that are revealed only by far-reaching comparisons are unlikely to be resented in the same way as traditional, immediately apparent inequalities. They therefore do not impose the same social costs or call for as much judicial solicitude.

These arguments are not without substance. They suggest that a degree of circumspection may be appropriate where far-reaching comparisons are suggested. But they do not, to my mind, justify a general refusal to consider such comparisons. Nor do they weigh strongly against considering the comparison I suggest in the abortion case.

As to the idea that far-ranging comparisons will cause new equal protection issues to spring up everywhere, it is a sufficient answer that other aspects of the approach I suggest — the attention to tradition in defining specially protected interests and specially disfavored classifications, and the general deference to the legislature — will limit the number of problems which need to be taken seriously and will limit results overturning legislative choices. In the abortion case, as we have seen, two specially protected interests are impaired by an inequality of treatment involving a specially disfavored classification.

As to the idea that far-ranging comparisons give rise to questions that are too subjective, the answer is that every serious equal protection problem eventually reduces to a question that is subjective in the same sense. I say "subjective in the same sense" advisedly, since the ultimate question is *not* "subjective" in the strongest sense in which that term is commonly used. Ultimately, every equal protection problem comes down to a question about whether some law is or is not consistent with our legal tradition. There is no mechanical way for a judge to answer such a question. However, the conscientious judge who attempts to answer such a question is doing something quite different from attempting to decide whether the law before him comports with his own sense of justice. Also, even if the ultimate question is subjective in some significant sense, the example of this essay demonstrates (I hope) that argument and analysis are important in identifying the precise contours and context of the ultimate decision about what our tradition allows.

As to the suggestions that far-ranging comparisons will require the courts to consider inequalities which legislatures reasonably overlooked and which no citizen is troubled by, I think the answer is that some far-ranging comparisons will have more force than others. The comparison of the pregnant woman with the potential samaritan is not yet a commonplace of legal or public discussion of the abortion issue. But my experience is that most people, once introduced to the comparison, see that it is a significant and troublesome comparison. It is easy to overlook, but it is not easy to put aside as fanciful or irrelevant, once it is noticed. Even if legislatures have not noticed this comparison, I suggest that any reasonable American legislature would be persuaded by the comparison to repeal abortion laws once the comparison was brought to its attention. If that is so, then it is appropriate for courts to strike down abortion laws on the basis of the comparison without waiting for legislative reconsideration. No serious criticism of legislatures is implied.

With regard to the claim that members of the public, or women in particular, are not disturbed by this specific comparison, I have explained previously why many women's manifest resentment of abortion laws is based on considerations closely related to the equal protection argument of this essay, even if the considerations have not been articulated in quite the same way.

In sum, whatever we may think of other arguments based on far-ranging comparisons, the argument I have suggested against abortion laws cannot be brushed aside on the ground that it ranges too far afield.

B. *The Consequences of the Argument*

In this final Section, I shall comment very briefly on why I regard my argument as stronger than the Court's argument in *Roe* and on what it would mean for other cases involving abortion or "privacy" generally if my argument were adopted.

The Court's argument in *Roe* posits a "right of privacy" that is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy".[101] The Court's argument has been elaborated in the scholarly literature by Heymann and Barzelay,[102] who infer constitutional protection for the woman's interest in having an abortion from a series of cases running from *Meyer v. Nebraska*[103] to *Eisenstadt v. Baird.*[104] According to Heymann and Barzelay, these cases establish a "realm of private decision as to matters of marriage, procreation and child rearing".[105] Unfortunately, as John Hart Ely has pointed out, the cases relied on are a rag-tag lot.[106] Most of them either claim to be or are best understood as being primarily about something other than "marriage, procreation and child-rearing". It is not clear that they add up to anything at all, especially when one remembers other cases in which colorable claims concerning marriage, procreation, or child-rearing have received short shrift.[107]

My argument, unlike the Court's, appeals to constitutional values — non-subordination, freedom from physical invasion, and equal protection — which are firmly established. I do not claim that my argument generates the result in *Roe* by unassailable logical deduction from unimpeachable premises. Constitutional argument does not work that way. I do claim that my argument is better grounded than the Court's in what are undeniably constitutional values.

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[101] 410 U.S. at 153.

[102] Heymann & Barzelay, *supra* note 1.

[103] 262 U.S. 390 (1923).

[104] 405 U.S. 438 (1972).

[105] Heymann & Barzelay, *supra* note 1, at 769.

[106] Ely, *supra* note 73, at 931-32 n.79.

[107] *E.g.*, Sosna v. Iowa, 419 U.S. 393 (1975) (marriage, or actually divorce); Dandridge v. Williams, 397 U.S. 471 (1970) (procreation); Baker v. Owen, 423 U.S. 907 (1975), *summarily affg.* 395 F. Supp. 294 (M.D.N.C. 1975) (child-rearing).

The Court's argument not only relies on a right to make decisions about "marriage, procreation and child rearing", but it also relies heavily on what I have referred to as the post-partum "family-planning" interests. In enumerating the costs to the woman of being denied an abortion, the Court emphasizes costs associated with actually *raising* the child.[108] However, it is not appropriate to count all of these costs even in a "balancing" process unless we are persuaded (as I am not) that the psychological cost to a woman of giving up a child for adoption is as great as the cost of rearing an unwanted child. (We should remember also that what is relevant is not the cost to a woman who wants a child of being compelled to give it up once it is born, but rather the cost of parting with the child for a woman who did not want it in the first place. The woman may be ambivalent at all stages, and being compelled to bear the child and then give it up, instead of aborting it, may make the feelings of attachment to the child harder to deny. Even so, this is an aspect of the problem where remembering the relevant viewpoint, which is that of the mother who does *not* want a child, seems to make the cost smaller rather than greater.) My argument, as I have explained, does not rely on these "family-planning" interests.

Perhaps the greatest advantage of my argument is that it makes it possible to avoid the question of whether the fetus is, or may be treated by the state as, a person. Justice Blackmun claims at one point that the Court need not decide "when life begins".[109] But his general argument, which during the first two trimesters prefers the woman's "right of privacy" over the state's interest in protecting "potential life", seems plainly to assume that the fetus is *not* a person until the point of viability (at the earliest).[110] Indeed, Blackmun elsewhere suggests that if the fetus were a person within the meaning of the fourteenth amendment, the woman's claim to an abortion would be foreclosed by the

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[108] 410 U.S. at 153.

[109] 410 U.S. at 159.

[110] *See, e.g.*, 410 U.S. at 163.

Constitution itself.[111]

On the last point, I think Blackmun is mistaken. Even if the fetus were a person for purposes of the fourteenth amendment, it would not follow that abortion was forbidden by the Constitution or that states were required by the Constitution to have laws forbidding abortion. The people who need the assistance of potential samaritans in ordinary samaritan cases are persons under the fourteenth amendment, and yet the general common law bad-samaritan principle is not unconstitutional. (Similarly, the fact that fourteenth amendment persons are killed does not vitiate the ordinary law of self-defense.)

Although I think Blackmun is mistaken about what would follow from a holding that the fetus is a person under the fourteenth amendment, I think he is right that the fetus is not a person under the fourteenth amendment.[112] That, however, is not enough to justify his refusal to treat the fetus as a person for purposes of weighing the interests affected by the Texas abortion statute. The fourteenth amendment does not say that the fetus is a person, but neither does the fourteenth amendment say that a state may not decide to regard the fetus as a person, if the state so chooses.

It is essential to Blackmun's argument that he brush aside the state's attempt to regard the fetus as a person. As far as I can see, there is no adequate constitutional justification for this brushing aside. My argument, unlike Blackmun's, does not depend on refusing to allow the state to regard the fetus as a person. Everything I have said is consistent with the assumption that the fetus is a person. Other persons are allowed to die when potential samaritans are authorized by the bad-samaritan principle to deny aid. The personhood of the fetus, even if it be conceded, is not an adequate reason (indeed it is no reason at all) for treating the pregnant woman differently from other potential samaritans.

A similar but more general point in favor of my argument is that it is not a "balancing" argument.[113] Even after the Court decides that the fetus may not be treated by the state as a person (during the first two trimesters), the Court must still balance the woman's "right of privacy" against the state's interest in protecting *potential* human life. It is far from clear that this balance favors the woman. Whether or not the cases from *Meyer* to

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[111] 410 U.S. at 156-57.

[112] 410 U.S. at 158.

[113] *See* pages 1589-90 *supra*.

Eisenstadt establish a right of family-related freedom-of-choice, none of those cases involves a state interest remotely like the interest in protecting "potential" but *already conceived* human life. Accordingly none of those cases establishes or even suggests that the right of family-related freedom-of-choice is weighty enough to overcome the state's interest in forbidding abortion.

My argument, on the other hand, does not require any such balancing by the Court. I doubt that it is correct to regard the bad-samaritan principle and the right of self-defense as based on "balancing" at all, but even if they are, the balancing is already done when those doctrines are accepted. Whether or not the interests in physical integrity and non-involvement "outweigh" the interest in human life, our law leaves no doubt that they prevail over it (and *a fortiori* over the interest in potential life) in the relevant contexts.

Finally, my argument justifies more clearly than the Court's argument the Court's conclusion that abortion may not be forbidden even in the third trimester when the life or health of the mother is at stake.[114] If the problem is ultimately one of balancing, as the Court's opinion suggests, it is not clear why the state's compelling interest (as the Court describes it) in protecting the potential life of a fetus already capable of "meaningful life outside the mother's womb"[115] (in the Court's phrase) is outweighed even by the woman's life, much less by her health. On my approach, however, the matter is clear. Even the reader who rejects my general conclusions must admit that there is no other case in which we would even consider requiring one individual to sacrifice his life or health to rescue another.

Since I have suggested that my argument provides a better justification than the Court's for the result in *Roe,* it is worth asking whether my argument justifies *all* of the result. In particular, does it justify drawing a line at the end of the second trimester, after which abortion may be generally forbidden? To be sure, the burdens of pregnancy and delivery that will be avoided by an abortion diminish as the pregnancy advances. Even so, an abortion by induced labor early in the third trimester would spare the woman two months of advanced pregnancy plus the difference between the pain and discomfort of a full-term delivery and the lesser pain and discomfort of an easier, earlier-induced delivery.

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[114] 410 U.S. at 163-64.

[115] 410 U.S. at 163.

The burdens avoided by even a third-trimester abortion are distinctly greater than the burdens imposed by other exceptions to the bad-samaritan principle.

I think the Court's line between the second and third trimesters can be justified on the ground that the woman who allows her pregnancy to reach the third trimester without having an abortion (assumed to be permissible in the first two trimesters) has waived her right of non-involvement with the fetus. Surely by the end of the second trimester a woman has had knowledge of her pregnancy long enough to have had a reasonable time to think through the difficult issue of whether she wants an abortion. There is a genuine state interest in encouraging decision at the earliest reasonable opportunity, even if it is only the interest in avoiding the greater dismay of many members of the public at late abortions.[116] Admittedly, this argument does not tell us precisely where the "waiver" line should be. But if we consider the possibilities for denial by the woman early in the pregnancy, the difficulty of the issue for many women, and, on the other hand, the desirability of some clear line so long as it is not too early, a line at the beginning of the third trimester seems a reasonable solution.[117]

Since *Roe*, the Court has dealt with a number of subsidiary issues involving abortion — procedural requirements,[118] parents' consent requirements,[119] husband's consent requirements,[120] public funding,[121] and so on. With the possible exception of the cases on public facilities and public funding, these cases largely involved state attempts to forbid abortion by indirection. Generally speaking, my argument leads to the same results in these cases that the Court has reached. To the extent that there is more to these cases than mere striking down of attempts to avoid *Roe,* my argument may explain the Court's results marginally better than the Court's argument does.

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[116] The text may seem inconsistent with the earlier suggestion, made in discussing the military draft, that there is no genuinely "public" interest in forbidding abortion. If there is sufficient public interest to support a requirement that the woman decide whether to have an abortion by a certain time, why may not the abortion be forbidden on the basis of the same interest? A full answer to this question would require an extensive discussion of constitutional "waiver" theory. I shall not give a full answer. The short answer is that I think certain public interests may be enough to require an individual to make a decision and stick by it even though those interests are not enough to compel a particular decision and may not even count towards compelling a particular decision.

[117] Actually, it seems to me that a reasonable American legislature could probably put the "waiver" line *somewhat* earlier. But I cannot be sure of that without looking more carefully than I have at the mechanics of arranging abortions for women in various circumstances.

[118] *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973).

[119] *E.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[120] *E.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[121] *E.g.*, Maher v. Roe, 432 U.S. 464 (1977).

For example, the step from saying the state may not forbid an abortion when the woman and her husband both want it (or when there is no husband in the picture) to saying the state may not forbid an abortion when the woman wants it and her husband does not is not quite so simple on Blackmun's approach as Blackmun claims.[122] After all, if the whole issue is one of balancing, might it not be that the state's interest, which is less than the interest of the woman or of the woman and her husband together when they are aligned, is greater than the *difference* between the interests of the woman and her husband when they are opposed? Indeed, given the weightiness of the state's interest and the similarity of the woman's interests to her husband's (especially while the Court emphasizes the "family-planning" aspect rather than the physical burdens of pregnancy), is it not quite likely? On my approach, however, it is clear that the state can no more make the unwilling woman serve the fetus and her husband than it can make her serve the fetus alone.

As to the issue of parents' or judges' consent to abortion for minors, this is a difficult problem. It is far from obvious that a statute which was well calculated to encourage identification of the minor's best interests (a statute, that is, which was not a mere anti-abortion statute in disguise) would deserve to be struck down. But again, if the Court is committed to striking down such statutes (and this is much less certain after *Bellotti II*[123] than it seemed before), the justification seems somewhat stronger on my approach than on the Court's. The interests of the woman which my approach makes central (interests in avoiding physical burdens) are more easily appreciated and weighed by a minor than the comparatively abstract family-planning interests emphasized by the Court.

With regard to the public facilities and public funding cases, there is also little to choose between the Court's approach and mine. I tend to think the Court decided these cases correctly, though I shall not argue for that view here. My approach may make the correctness of the decisions a bit clearer than the Court's. The Court's approach more easily suggests a fundamental right of the woman to have an effective choice whereas my approach emphasizes that what is objectionable is the state's compelling the woman to serve the fetus, a compulsion which is absent once abortion is no longer forbidden.

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[122] *See* Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976): "[T]he State cannot delegate authority to any particular person, even the spouse, to prevent abortion [when the State alone may not prevent it]."

[123] Bellotti v. Baird, 99 S. Ct. 3035 (1979).

It is when we look at problems not involving the right to abortion that the difference between my approach and the Court's becomes striking. One noteworthy feature of my argument is that it is asymmetric. Unlike Blackmun's argument, it provides no support for a right to bear children. I regard this as an advantage. There may be a right of some sort to bear children, but such a right does not find much support in the *Meyer*-to-*Eisenstadt* line of cases (aside from some quotable language here and there). The right, if it exists, must be founded rather on the sort of argument Harlan advanced in his *Poe v. Ullman* dissent,[124] and it must, I think, be an incident of marriage.

Looking beyond procreation, there is a considerable literature suggesting that a broad "right of privacy" was established in *Roe.* The Court's language certainly encouraged this belief. Yet litigants who have tried to persuade the Supreme Court to implement the right of privacy outside the abortion area have generally been disappointed. Consider *Doe v. Commonwealth's Attorney,*[125] in which the Court summarily affirmed a decision upholding Virginia's sodomy statute. It is far from obvious why something called the "right of privacy", which encompasses the right to bring about the death of a fetus in a clinic serving the public, should not encompass the right of consenting adults to engage in the nonviolent sexual behavior of their choice in private. It *is* obvious, however, that my argument in support of *Roe,* based on the bad-samaritan principle or the self-defense analogy, says nothing at all about the right to engage in homosexual (or heterosexual) relations. The argument I suggest in justification of *Roe* is much more closely tied to the specific problem of abortion than is the Court's argument. My argument therefore seems more in line with the Court's later decisions in the "privacy" area.

ENVOI

If I had been writing an essay about moral philosophy instead of about constitutional law, I would have made the argument in favor of abortion turn centrally on the proposition that a fetus is not a person. I would *not* have relied on the proposition that there is no general duty to aid a person in serious danger even when one can do so at trivial cost to oneself. I would not have appealed to any notion that corporal punishment is impermissible, nor indeed would I have given the same negative weight to physical invasions generally that I do in the present essay. I would not have claimed that there is a right to kill an innocent rapist. However, I have not been writing about moral philosophy. I have been writing about American constitutional law. For reasons I cannot explain here, I think the projects are quite different.

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[124] 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

[125] 425 U.S. 901 (1976), *summarily affg.* 403 F. Supp. 1199 (E.D. Va. 1975).

Sometimes the argument of this essay seems to me an adequate constitutional justification of the result in *Roe*. Sometimes it does not. (My principal nagging doubt is about the very first step of the argument, when viewed from the constitutional perspective. I think the general thrust of samaritan law requires that securing an abortion be treated as an omission in that context. Indeed, I have no doubt on that point. But might not a reasonable American legislature simply disagree?) Adequate or not, the argument I have presented almost always seems to me the best justification of the result in *Roe* that I know of.

Senator HATCH. Our next witness will be Prof. Lynn Wardle of the J. Reuben Clark Law School of the Brigham Young University in the great State of Utah. He is the author of several books on the abortion right, a person in whom I place a great deal of confidence and for whom I have the utmost of respect.

Lynn, we are happy to have you here.

STATEMENT OF PROF. LYNN WARDLE, SCHOOL OF LAW, BRIGHAM YOUNG UNIVERSITY

Mr. WARDLE. Thank you, Senator Hatch.

I apologize for my tardy arrival. I am afraid that if I told you the reason I would undercut my credibility as a witness.

Senator HATCH. Maybe we had better not hear the reason then.

Mr. WARDLE. I am honored to address the Subcommittee on the Constitution, an important subcommittee of distinguished Members of the Senate.

The subject under investigation is a matter of grave and immediate concern to the citizens of this country. Before examining any proposal for an amendment to the Constitution, I believe it is appropriate to put the matter in perspective by asking why a constitutional amendment is necessary.

I believe there are four reasons why this amendment is necessary and should be adopted now. In my prepared statement I go into these reasons in detail, but I would like to just summarize them rather than going into detail at length.

Senator HATCH. That will be fine. Without objection, your prepared statement will be placed in the record, as will all prepared statements.

Mr. WARDLE. Thank you, Mr. Chairman.

The Constitution is the supreme law of the land. In *Roe* v. *Wade,* the Supreme Court held that a woman's decision whether or not to have an abortion was a fundamental right embedded in the Constitution and that State laws restricting abortion violated that right of abortion privacy and were unconstitutional. Moreover, in *Roe* and its progeny, the Court spelled out the meaning of this constitutional right in great detail, giving it an enormous scope and range.

But where in the Constitution is this detailed, powerful State law invalidating right to abortion found? The word "abortion" does not even appear in the Constitution; nor does the word "privacy." How is it then that the Constitution has invalidated historic State laws prohibition abortion, some of them nearly as old as the Constitution itself and all of them based on common law principles which have been respected for centuries, both before and after the Constitution was adopted?

The answer is that the constitutional right to abortion was created by a majority vote of the nine members of the U.S. Supreme Court. Although nothing in the text of the Constitution or the history of its adoption so much as suggests that States are powerless to restrict or prohibit abortion, that is presently the supreme law of this land because the Supreme Court said that is what the Constitution means.

That is why many people think that *Roe* v. *Wade,* should be overturned for reasons that have little to do with the rightness or wrongness of abortion. They and I believe that the Supreme Court violated the basic constitutional rule of separation of powers when it decided *Roe* v. *Wade,* as it did.

The ostensible basis for the Supreme Court's action in *Roe* was the judiciary's authority to interpret the Constitution, which has been recognized and respected for 178 years.

But the power of Federal courts to interpret the Constitution is not unrestricted, and in his first inaugural address Abraham Lincoln explained the reason why:

> If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation, he said, between the parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of the imminent tribunal.

In a similar vein, Justice White wrote in his dissenting opinion in *Roe,* "The upshot of *Roe* v. *Wade* is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other."

Second, I consider an amendment to be necessary to protect the quality, integrity, and independence of the Federal judiciary. For many of us who admire the Federal judicial system, the abortion cases represent a radical departure from the established high standards of quality of professionalism and performance in the Federal judicial system. As a leading Supreme Court decision, *Roe* v. *Wade* is an example for the lower Federal courts of professional standards and practices, and it is a bad example.

As I illustrate in my prepared statement, it has had a devastating effect on the professionalism and craftsmanship of the Federal judiciary in the 200 or so reported Federal court opinions dealing with abortion that have been decided since *Roe* v. *Wade.*

Third, a constitutional amendment is necessary, I believe, to overturn a radical substantive doctrine of law. The substantive rule of law established by *Roe* v. *Wade* and *Doe* v. *Bolton* is simply abortion on demand. That is, the Court held that the Constitution requires States to legalize abortion on demand until viability, and even after viability States must allow abortions whenever the life or health of a woman is endangered, and "health" of course is a catch-22 term. This position, as a substantive rule of law, is far more extreme than any State law had adopted prior to *Roe* v. *Wade.*

Starting from that extreme, the Federal courts have carried the doctrine of abortion privacy to even greater extremes. I do not have the time to detail here what I mean, but I do in my prepared statement. Let me just give you one example.

The abortion industry, which only a decade ago was illegal almost everywhere and characterized by the dangerous and unethical practices of all illegal industries, has wrapped itself in the robes of *Roe* v. *Wade,* challenged many simple and ordinary State regulations, from record-keeping laws to parental notification laws, and today is largely constitutionally immune from many ordinary medical regulations.

It is my opinion, based on the work that I have done over the last 4 years trying to follow every single abortion case decided by the Federal courts, that *Roe* v. *Wade* and its progeny leave very little room for the States to protect unborn life.

There is very little the States now can do to protect unborn humans without violating the right to abortion, not that they have not tried, I might add. From 1973 to 1979 more than one-half of all fertility-related legislation that was passed by State legislatures concerned abortion—that is, a total of 176 separate abortion bills were enacted into law by the States during that time.

Most legislation dealing with abortion has been challenged, dragged into Federal court, and in almost every case based on the reports that I have read—and I have read every reported Federal opinion—I cannot think of one case in which an abortion bill that has been challenged has come out unscathed. Substantial portions have been invalidated time after time after time. So there is very little that States can do to protect unborn life without violating this right of abortion.

The consequence of this extreme, substantive law is evidenced by the incidence of abortion since *Roe* v. *Wade*. Abortion is now the most frequently performed surgical procedure in the country. The number of abortions performed in this country every year exceeds the population of 14 States.

In 1978, which is the last year for which we have complete abortion statistics, there were 1.5 million abortions performed. Of every 1,000 known pregnancies in 1978, 294, or nearly 30 percent, were terminated by abortion. About one-third of all abortions—more than 400,000 in 1978—were obtained by teenaged girls. A substantial number of teenagers are having repeat abortions, multiple abortions, and 75 percent of the abortions in 1978 were obtained by unmarried women; 57 percent of the women who obtained abortions that year had no children. These are significant statistics, especially the latter one, for health consequences.

Most importantly perhaps, the number and percentage of abortion repeaters has risen every year since *Roe* v. *Wade*. Thirty percent of the abortions performed in 1978 were performed on women who had previously had one or more abortions. In other words, abortion has become just another, ho-hum, method of birth control.

Finally, a constitutional amendment is necessary, because *Roe* v. *Wade* is constitutional law, and it cannot be modified by mere legislation. It will take a constitutional amendment or a reversal by the Court itself to change the right of abortion privacy.

I would like to focus specifically on Senator Hatch's recently proposed Senate Joint Resolution 110 and offer my analysis of its provisions.

The amendment that is proposed by this resolution is primarily a structural amendment that is aimed at correcting a significant shift in the structure of our constitutional democracy. The first sentence of this amendment does so by erasing the doctrine promulgated by the Supreme Court in *Roe* v. *Wade* which overextended the right of judicial interpretation. Since the Court was without jurisdiction, so to speak, to decide the issue as it did, its decision must be set aside and should not be perpetuated.

The second sentence of Senate Joint Resolution 110 specifies the exact allocation of governmental power to deal with the abortion controversy as between the States and the Federal Government. It reaffirms the historic power of the States to restrict and prohibit abortion, and so that there will be some national uniformity as to the minimum legal protection for the unborn, it confers concurrent power on Congress to restrict and prohibit abortion.

Senate Joint Resolution 110, in my opinion, substantially parallels the 21st amendment's approach to repeating an obnoxious provision of constitutional law, and this is, I think, one of its great strengths. Let me explain the similarity.

The 21st amendment, as you all know, was adopted to repeal the 18th amendment, which did two things. The 18th amendment adopted a very extreme position substantively on the question of to what extent the manufacture and sale of liquor could be legal. That is, it mandated, as you know, total prohibition. Procedurally, the 18th amendment severely restricted the authority of the States to authorize the sale or manufacture of liquor. That power was taken from the States.

The 21st amendment did two things also. Substantively, it repealed the 18th amendment and prohibition. Procedurally, it not only restored to the States their former authority to regulate and authorize the use of liquor, but it granted to the States even greater plenary authority to deal with the issue.

Roe v. *Wade* can be compared to the 18th amendment. Like the prohibition amendment, *Roe* v. *Wade* adopted one of the most extreme positions possible on this substantive issue—whether or not a controversial practice should be legal. It mandated as a matter of constitutional law the legalization of abortion on demand. Procedurally, it severely restricted the authority of the States to decide this controversial issue and to regulate abortion.

Senate Joint Resolution 110 would likewise do two things. Substantively, it would repeal *Roe* v. *Wade's* ruling that the Constitution mandates legalized abortion on demand. Procedurally, it not only would restore to the States their pre-*Roe* authority to restrict and prohibit abortion, but it would give Congress concurrent power to address the issue.

Thus, the overall approach of Senate Joint Resolution 110 parallels that which was successfully utilized in the 21st amendment. Moreover, it is a moderate, a cautious, and a sensible approach, and it harmonizes well with the tone and tenor of the Constitution.

It is important to note that the first sentence of this proposed amendment repeals only the right to abortion and not the right of privacy. The phrase "right to abortion" has been used in 84 Federal court decisions since *Roe* v. *Wade*. It is used as a shorthand for the constitutional right created in *Roe* and its progeny–that is, the right of a woman to choose whether or not to have an abortion free from State restriction.

The use of the carefully limited phrase "right to abortion" in the first sentence of the amendment makes it clear that the amendment covers and repeals only the abortion decisions. It does not repeal the right of privacy; the contraception cases are unscathed, as are the family privacy cases, and so forth.

This proposed amendment, in the first sentence would only disestablish one theory of constitutional law. It does not establish a new constitutional theory.

Some pro-life advocates have expressed some discomfort with Senate Joint Resolution 110 because it does not specifically establish a substantive right to replace the *Roe* v. *Wade* right to abortion that is being erased, especially personhood. Some people think that personhood should be established in a constitutional amendment to undo *Roe* v. *Wade*. Those people, I believe, misunderstand the legal significance of the personhood discussion in *Roe* v. *Wade*.

Personhood was only relevant to the *Roe* decision insofar as the personhood of the unborn might have provided a compelling State interest, thus justifying abortion prohibitions. But this proposed amendment directly establishes the power of the States and of Congress to prohibit abortion.

Moreover, the 14th amendment does not grant an absolute right to life to any persons. It only provides that, if persons are deprived of their rights to life, they must be accorded whatever process is due. Thus, the establishment of the personhood of the unborn would not do any more than Senate Joint Resolution 110 would do. In fact, I believe it very well might do less.

Furthermore, once we begin talking about personhood, we get into a great deal of extraneous debate. I say extraneous not because I am disinterested but because I believe it is not relevant to the crucial constitutional issues. I just do not think that personhood is essential to the abortion controversy.

Snail darter fishes are not persons. Neither are historic buildings or wilderness areas. Yet the law protects each of those nonpersons against wanton destruction. Likewise, the law can and should protect the unborn against wanton destruction whether or not they are persons.

The second sentence of this proposed amendment uses the term "concurrent power." The term is used in only one other place in the Constitution, in the 18th amendment, which provided that both States and Congress had the concurrent power to enforce prohibition.

Unless there is a contrary intent behind this amendment that is clearly expressed, it is likely that the phrase would receive the same interpretation in this amendment were it to become law, as it did in the 18th amendment.

The phrase "concurrent power" in the 18th amendment was interpreted as describing a system of dual, coequal, and coactive sovereigns. The Supreme Court stated:

> We have here two sovereignties deriving powers from different sources capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition. Each government, in determining which shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other.

In another case, the Court said that both the State and the Federal Government could pass laws dealing with the subject; they did not have to be parallel; they did not have to be endorsed by each other; they could use different schemes, different approaches, have different penalties. The Court said these laws may not only coexist but be given full operation, each independently of the other. Violations of the separate laws could be punished separately by the different sovereigns.

In addition to the creation of a concurrent power, Senate Joint Resolution 110 contains a proviso clause. The proviso clause says that, "A law of a State which is more restrictive than a law of Congress shall govern." The use of the word "govern" here creates, I believe, some ambiguity, for it implies supremacy, superiority, or preeminence, and that assumes a conflict. There would be no conflict in an 18th amendment type of coequal concurrent sovereignties.

However, reading the amendment as a whole, it is apparent that the proviso means that a State law more restrictive of abortion than an act of Congress shall not be invalid or shall not be superseded. The proviso clause apparently was meant to insure that the supremacy clause of the Constitution would not apply, so that if Congress were to enact some abortion prohibition scheme it could not be argued that a State prohibition scheme that was more restrictive would be superseded or preempted by the Federal law.

I think the intent is clear. The intent was merely to avoid article 6 of the Constitution, the supremacy clause. But there is ambiguity, and I would suggest that the subcommittee reconsider and possibly rephrase the second sentence to clarify its intent. This could be done either by deleting the proviso entirely or substituting for the word "govern" the phrase "not be invalid."

In conclusion, I appreciate your great patience with me, Senator Hatch, but let me just give my concluding statement on this point. It is my opinion that Senate Joint Resolution 110 is a very moderate and appropriate means of correcting the substantive excesses and structural imbalances promulgated by *Roe* v. *Wade.* I believe that this amendment is needed now.

I cannot understand how people who claim they are only interested in protecting a right to choose are afraid of letting the citizens of this country choose whether or not abortion on demand should be a constitutional rule of law.

Senate Joint Resolution 110 brings this issue before the Nation in exactly that posture. It is a modest and sensible way to step out of the mire created by the judicial decisions. I endorse Senate Joint Resolution 110 and urge this subcommittee and the full committee to do likewise.

Thank you very much.

[The prepared statement of Lynn Wardle and additional material follow:]

PREPARED STATEMENT OF LYNN D. WARDLE

A MODEST APPROACH TO CORRECTING THE EXCESSES OF ROE v. WADE[1]

I am honored to participate in these important hearings. The subject of abortion legality is one of enormous interest in the country today, and I commend the members of this Subcommittee for facing the issue .

Before examining any proposal to amend the Constitution to overturn Roe v. Wade, I believe that it is appropriate to put the matter in perspective by asking why a constitutional amendment is necessary. I believe there are four reasons: (1) to correct a significant shift in the constitutional balance of powers; (2) to protect the quality, integrity, and independence of the federal judiciary; (3) to overturn an extreme and dogmatic interpretation of constitutional law which, if not restrained, will lead to a physical and spiritual holocaust of unprecedented dimensions; and (4) because a constitutional amendment is the only vehicle through which the excesses of the abortion cases can be corrected.

A Constitutional Amendment is Necessary to Correct a Significant Shift in the Constitutional Balance of Powers

The Constitution is the supreme law of the land, prevailing over any other source of law that conflicts with it. In Roe v. Wade, the Supreme Court held that a woman's decision whether or not to have an abortion was a fundamental right imbedded in the Constitution, so precious that historic state laws restricting abortion were declared unconstitutional. Moreover, in Roe v. Wade and its progeny, the Court spelled out the meaning of this constitutional right in great detail, giving it an enormous scope and range.

But where in the Constitution is this detailed, powerful, state-law-invalidating right to abortion found? The word "abortion" does not even appear in the Constitution, nor does the word "privacy." How is it, then, that historic state laws prohibiting abortion (some of them nearly as old as the Constitution itself, and all of them based on common law rules which had been respected for centuries, both before and after the Constitution was adopted) could be said to violate the Constitution? The answer is that the constitutional right to abortion was created by a majority vote of the members of a small, elite tribunal consisting of nine persons--the United States Supreme Court. Although nothing in the text of the Constitution, or in the history of its creation, so much as suggests that states are powerless to prohibit or restrict abortion, that is presently the supreme law of the land because that is what a majority of the members of the Supreme Court said the Constitution means. That is why many people think that Roe v. Wade should be overturned for reasons that have little to do with the rightness or wrongness of abortion. They and I believe that the Supreme Court violated the basic constitutional rule of separation of powers when it decided Roe v. Wade as it did.[2]

The ostensible basis for the Supreme Court's action in Roe v. Wade was the authority of the judiciary to interpret the Constitution. For almost two centuries, since the landmark decision in Marbury v. Madison,[3] it has been recognized that the judiciary has the responsibility for interpreting and applying provisions of the United States Constitution. But the power of federal courts to interpret the Constitution is not unrestricted. In his first inaugural address, Abraham Lincoln explained why:

> [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions[,] the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of the imminent tribunal.[4]

When President Lincoln made this statement, he had in mind a specific decision of the Supreme Court, Dred Scott v. Sanford.[5] In that case, the United States Supreme Court, inter alia, established that blacks were "nonpersons" in a legal sense because "they had no rights which the white man was bound to respect. . . ."[6] That decision inflamed the passions of the country and ignited the Civil War. Many scholars have compared not only the result reached by the Supreme Court but also its opinion in Roe v. Wade to the result and opinion in Dred Scott v. Sanford.[7] Thus, as Justice White wrote in his dissenting opinion in Roe v. Wade:

> "The upshot [of Roe v. Wade] is that the people and the legislatures in the fifty States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other."[8]

Justice White characterized the abortion decisions as "an exercise of raw judicial power,"[9] and many constitutional scholars agreed.

The Need to Protect the Integrity, Quality, and Independence of the Federal Judiciary by Constitutional Amendment

I also consider S. J. Res. 110 to be necessary to protect the quality, integrity, and independence of the federal judiciary. Let me explain why.

No citizens have been more disturbed over the abortion decisions of the Supreme Court than admirers and defenders of the federal judicial system. I take great pride in the history of competency and professionalism of the federal courts. For many who admire the federal judicial system, the abortion cases represent a radical departure from the established high standardsof quality of performance and professionalism in the federal judicial system. Roe v. Wade, as a leading Supreme Court decision, is an example of the professional standards and practices for the entire federal judicial system. And Roe v. Wade is a very bad example. It has had a devastating impact upon the professionalism and craftsmanship of the federal judiciary in the 200 or so federal court opinions dealing with abortion decided in the last 8 1/2 years.

The Supreme Court abortion decisions have been condemned almost unanimously by legal scholars for the lack of craftsmanship and judicial discipline. The late Professor Alexander Bickel chastised the court failing to justify its result: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject."[10] Professor Ely has written: "At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking."[11] Moreover, he observed that the opinion in *Roe v. Wade* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[12] Professor Richard Epstein commented that the Supreme Court's rationale for its abortion decision was so poor that "[w]hat seemed to make sense as a matter of principle to a lot of people and a lot of lawyers is all of a sudden suspect."[13]

The abortion decisions of the Supreme Court are so poorly justified that in many abortion cases the lower federal courts have turned to a result-oriented approach. They cannot understand the *reason* for *Roe*, but they can see the *result*. That is, the "constitutional principle" that has undergirded their judgment has been simple prejudice against any abortion restrictions.

Moreover, because the abortion decisions are so poorly reasoned, many federal court judges have avoided attempting to fashion a principled doctrine of law and have simply resorted, inappropriately, to *stare decisis* to resolve new issues concerning abortion. This is a grave concern because only in times of decay or stagnation of the law does such excessive resort to the doctrine of *stare decisis* occur. Nothing is more dangerous to the legitimacy and authority of the judicial system than stagnation in the law. The "sheltering" or legal doctrines from the internal processes of criticism, distinction, and refinement leads to institutional instability.

The abortion decisions also threaten the integrity of the federal judiciary. *Roe v. Wade* represents a departure from the liberal tradition of federal courts (and I am using the term "liberal" in its classic philosophical sense, not in a political context). For centuries, American courts have been places of refuge for the weak. Courts have offered special protection to children and the incompetent upon the premise that it is the particular duty of the law to protect those who are unable to protect themselves. Deeply imbedded in the liberal concept of justice is the notion of protecting the weak against the strong and defending the defenseless.

The abortion decisions of the Court represent a shocking break with the history and ideals of the federal judiciary. They are "out of character" for federal court decisions. Perhaps the best illustration of this is the "discrete and insular minority" exception to the rule that federal courts ought not to overturn laws duly enacted by the elected representatives of the people. Justice Stone once suggested that judicial action overturning legislation is appropriate when the legislation is "directed at particular religious, national or racial minorities" because "prejudice directed against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."[14] In the abortion context, the unborn are clearly the "discrete and insular minority" because they are least capable of protecting themselves in the political arena. Yet they were the victim, not the beneficiary, of judicial intervention. The Supreme Court "outlawed" the unwanted unborn. And it did not just turn its own back on this "discrete and insular minority" but it ordered all other branches of government to refrain from protecting them.

Finally, I believe that S. J. Res. 110 would undo the damage done by Roe v. Wade without impairing the independence of the federal judiciary. The formal checks on the Court's power of constitutional interpretation have seldom been invoked, primarily because the federal courts have traditionally shown enormous self-restraint in exercising their power to amend the Constitution by judicial interpretation. Self-restraint has been the key to the political independence of the federal judiciary. When the federal courts abandon self-restraint, and begin to usurp political responsibilities, the independence of the judiciary is in jeopardy. So long as extremely provocative social policy decisions continue to be made by the federal judiciary without principled justification, the seeds of a constitutional confrontation between the judiciary and the political branches of government are being nurtured. If Roe v. Wade is corrected now, before the doctrine of abortion privacy is carried to even greater extremes, and by the moderate approach of S. J. Res. 110, it may preclude other serious legislative attacks on the independence of the federal judiciary.

A Constitutional Amendment is Necessary to Overturn A Radical Doctrine of Law

The substantive rule of law established by Roe v. Wade and Doe v. Bolton ~~was~~ is abortion on demand. That is, the Court held that the Constitution required states to legalize abortion on demand. Until viability, states cannot restrict the decision of a woman to get an abortion in any way (although in the second trimester states can regulate how and where the abortions will be performed). Even after viability, states must allow abortions whenever the "life or health" of the woman is endangered, and the term "health" is a "catch-22." Several decisions, including decisions of the Supreme Court, suggest that "health" could be interpreted so broadly as to mean abortion on demand.[15]

The courts have carried the doctrine of abortion privacy to incredible extremes. I do not have the time here to detail what I mean, but I can give you a few examples. The abortion industry, which only a decade ago was illegal almost everywhere and characterized by the dangerous and unethical kinds of practices that are associated with other illegal industries, has wrapped itself in the robes of Roe v. Wade, challenged many simple and ordinary state regulations (from recordkeeping laws to parental notification requirements) and today claims constitutionally immunity from many medical regulations. Laws requiring that abortions be performed by not just anyone with a medical license have been invalidated.[16] Laws regulating the facilities in which abortions are performed during the first trimester have been invalidated.[17] Laws requiring second trimester abortions to be performed in hospitals also have been struck down.[18] Laws requiring a second medical opinion or committee approval for abortions have been invalidated.[19]

Even post-viability regulations, which the Court originally stated could virtually prohibit all abortions, have been invalidated. Laws attempting to give the term "viability" a uniform and objectively applicable definition have been invalidated.[20] In one of the best examples of judicial dogmatism in this area, in Floyd v. Anders,[21] a federal court enjoined prosecution of a doctor for performing an illegal post-viability abortion on a woman in her 25th week of pregnancy. The abortion resulted in the birth of a premature child. The baby lived for

20 days, then died. In the eyes of the federal judges, the death of the infant established that the physician could not be convicted of performing a post-viability abortion because: "Seemingly the child was not viable in the sense that he did not live indefinitely outside his mother's womb. . . ."[22]

Laws requiring doctors to determine whether the unborn child is viable before performing an abortion have been invalidated by several courts, including the Supreme Court.[23] Even laws requiring the abortion of a viable fetus to be performed by methods least likely to kill the unborn child have been invalidated by the Supreme Court.[24]

General informed consent laws have been upheld. But almost all informed consent laws challenged during the last two or three years have been invalidated because the federal courts seem to believe that they required the women to be "too" informed before giving her consent. Thus, laws requiring disclosure of the risks of abortion and the facts of fetal development have been invalidated.[25] Furthermore, courts have invalidated requirements that a brief "cooling off" or "deliberation" period (24 hours or 48 hours) transpire between the initial decision or consent to abortion and the performance of the procedure.[26] And courts have effectively invalidated the rights of parents and states to significantly participate in the abortion decisions of their minor children or spouses. In fact, the overwhelming number of federal courts have even invalidated mere parental and spousal notification requirements,[27] although the Supreme Court now appears to have taken the other position.[28]

I do not have time to go any further. Suffice it to say that there are approximately 200 reported federal court decisions in abortion cases that have been decided in the past 8 1/2 years.[29]

The substance of the constitutional doctrine of abortion law that has developed in the wake of Roe v. Wade and Doe v. Bolton is important for two reasons. First, you must understand the scope and extent of the doctrine of abortion privacy. Another witness to testify before this subcommittee stated that the Supreme Court abortion decisions "left intact much of the power of both the state and federal governments to protect unborn life."[30] I strenuously disagree. If this statement is true, it is the best kept secret in the country today. Even the federal judiciary does not know that it is true. It is my opinion, based on the work I have done over the last four years trying to follow all of the abortion cases in the federal courts, that Roe v. Wade and its progeny leave very little room for states to protect unborn life. I do not believe that the abortion cases need to have developed in this way. In fact, I believe that most of the decisions go to extremes uncontemplated by the Court when it decided Roe v. Wade. But the actual court decisions clearly show that there is very little the states now can do to protect unborn human life without violating the right to abortion.

Perhaps some facts and figures on the number and demographic impact of abortion will underscore the effect of the doctrine of abortion privacy.[31] The last year for which we have complete abortion figures is 1978. During that one year, there were 1,410,000 reported abortions in the United States. Accounting for unreported abortions, the number of actual abortions performed in America that year was approximately 1.5 million. This is approximately three times the number of abortions performed in 1972, the year immediately preceding the Supreme Court abortion decisions. Abortion is now the most frequently performed operation in this country; hysterectomies are second and tonsillectomies are third. The number of abortions performed in this country every years now exceeds the population of fourteen states.

The ratio of abortions to known pregnancies was 294/1000 in 1978. That means that of every 1000 known pregnancies in 1978, 294 (or 29.4%) were terminated by abortion. In some areas of the country (including Washington D.C.) there are more abortions reported annually than live births, and nationally it has steadily risen since Roe.

About one-third of all abortions in 1978 (more than 400,000 abortions that year) were obtained by teenage girls. A substantial number of teenagers are having multiple abortions. 75% of the abortions in 1978 were obtained by unmarried women. 57% of the women who obtained abortions that year had no children.

The number and percentage of abortion repeaters has risen every year since Roe v. Wade. 30% of the abortions performed in 1978 were performed on women who had previously had one or more abortions. Nearly

10% of all abortions are performed after the end of the first trimester, and about 1% of the total number of abortions are done after the 20th week of gestation, when the child presumably is viable.

Second, the extremes to which the abortion doctrine have been carried by the federal courts are significant. Before Roe v. Wade no state had a law that went so far to remove abortion from state regulation. Roe v. Wade invalidated, wholly or in part, abortion laws in effect in every state in the union. Since Roe v. Wade, states have been extremely active in attempting to effectuate public policies protective of prenatal life. The same year the Supreme Court decided Roe, 39 different abortion bills dealing with abortion were passed by various state legislatures. Six years later, in 1979, 41 new abortion laws were enacted by state legislatures. From 1973 through 1979, more than one-half of all fertility related legislation has concerned abortion; a total of 176 separate abortion bills were enacted into law by state legislatures during that time.[32] (Regrettably, however, much of this legislation has been invalidated by federal courts.)

This indicates that the public still wants to protect unborn life. It did before Roe v. Wade, and it continues to want to do so. While there may be no national consensus regarding the cases in which abortion should be legal, there clearly is broad consensus against the legalization of abortion on demand, which is the rule of law established by Roe v. Wade.

A Constitutional Amendment Is Necessary Because Roe v. Wade Is Constitutional Law

In Roe v. Wade, the Supreme Court effectively amended the Constitution. Its interpretation of the Constitution is, like the Constitution itself, the supreme law of the land. Thus, the passage of mere legislation, by the states or even by Congress, cannot overturn or modify Roe v. Wade. There are only two ways in which a Supreme Court declaration of constitutional law can be overturned. The Court can reverse its own prior decision. That is one way. The other way is established by Article V of the Constitution. That is the amendment process. Since the Court has shown no indication of a willingness to reverse its own decision, if the excesses of Roe and its progeny are to be corrected, it must be done by the process of amending the Constitution. (However, it is my hope that once a Constitutional Amendment is proposed, the Court will take some action itself to correct the mistake it has perpetuated.)

An Overview of S. J. Res. 110

I would now like to focus specifically on S. J. Res. 110 and offer my analysis of its provisions. I do this for two reasons. With all respect for the excellent proposals sponsored by many other senators and representatives, I think that Senator Hatch's proposed amendment, S. J. Res. 110, is most likely to accomplish what needs to be accomplished now without causing undesireable side-effects. I also think that it is a very moderate and sensible approach that reasonable men and women who have different opinions about abortion can support.

S. J. Res. 110 would have Congress propose and submit to the states for ratification the following amendment to the Constitution:

> "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern."

The overall structure of this amendment is its first strength. S. J. Res. 110 substantially parallels the Twenty-First Amendment's approach to repeal an obnoxious provision of constitutional law. Let me explain the similarity. The Twenty-First Amendment, as you know, was adopted to repeal the Eighteenth Amendment, which did two things. Substantively, it adopted a very extreme position on the question of to what extent the manufacture and sale of liquor should be legal. It mandated total prohibition. Procedurally, it severely restricted the authority of the states to authorize the sale or use of liquor. That power was taken away from the states. The Twenty-First Amendment did two things, also. Substantively, it repealed the Eighteenth Amendment and prohibition. Procedurally, it not only restored to the states their former authority to regulate or authorize the use of liquor, but it granted to the states even greater, plenary authority to deal with the issue.

Roe v. Wade can be compared to the Eighteenth Amendment. Like the Prohibition Amendment, Roe v. Wade adopted one of the most extreme positions possible on the substantive issue of whether or not a controversial practice should be legal. It mandated, as a matter of constitutional law, the legalization of abortion on demand. (Effectively, the Supreme Court "outlawed" unwanted pregnancies.) Procedurally, it severely restricted the authority of the states to decide this controversial issue and to regulate abortion. S. J. Res. 110 would, likewise, do two things. Substantively, it would repeal Roe v. Wade's ruling that the Constitution mandates legalized abortion on demand. Procedurally, it not only would restore to the states their pre-Roe authority to restrict and prohibit abortion, but it would also give Congress concurrent power to address this issue.

Thus, the overall approach of S. J. Res. 110 parallels that which was successfully utilized in the Twenty-First Amendment. Moreover, S. J. Res. 110 is primarily a structural amendment. It is aimed at correcting a significant realignment in the structure of our constitutional democracy. The first sentence does so by erasing the odious doctrine promulgated by the Supreme Court in Roe v. Wade when it overextended the right of judicial interpretation and improperly intruded in the ongoing democratic process. Since the Court was without "jurisdiction," so to speak, to decide the issue as it did, its decision should not be perpetuated. The second sentence of S. J. Res. 110 specifies the exact allocation of governmental power to deal with the abortion controversy, as between the state and federal governments. It reaffirms the historic power of the states to restrict and prohibit abortion, and so that there will be some national uniformity as to the legal protection for the unborn, it confers concurrent power on Congress to restrict and prohibit abortion. I believe that S. J. Res. 110 is a moderate, cautious and sensible approach to correcting the excesses of Roe v. Wade, and that it harmonizes well with the tone and tenor of the Constitution.

The Rejection of "A Right to Abortion"

Examining S. J. Res. 110 more closely, we see that the proposed Amendment contains two parts, each consisting of one sentence. The first part repeals the doctrine of abortion privacy created by the Supreme Court in Roe v. Wade. The language used is reminiscent of the Twenty-First Amendment. Section One of the Twenty-First Amendment reads: "The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed." That is as clear and direct a repeal of constitutional law as you can get. It would be convenient if we could do the same thing with respect to the Roe decision, that is, if we could propose an amendment that said: "Roe v. Wade is hereby repealed." But that form is not sufficient when the constitutional law that is intended to be repealed was created by a judicial decision. Roe v. Wade held that the Constitution protects a woman's right to abortion. That is, the Court held that a "woman's decision whether or not to terminate her pregnancy" is a fundamental right protected by the Constitution against infringement for any but a "compelling" state interest. The first sentence of S. J. Res. 110 directly repeals that by declaring: "A right to abortion is not secured by this Constitution."

Getting back to the first sentence of S. J. Res. 110, the phrase "right to abortion" is now well known and well understood in constitutional law. This same language, or similar language (i.e., "right to an abortion," or "right of abortion") has been used in 84 federal court decisions since Roe v. Wade and Doe v. Bolton were decided. The phrase "right to abortion" is used as shorthand for the constitutional right created in Roe and its progeny, the right of a woman to choose whether or not to have an abortion free from state restrictions. The article "a" makes the scope of the repeal broader than if the article "the" were used. "The" might be construed as limiting the repealer to "the" particular, detailed doctrine of law that has developed in Roe and its progeny. If just one element of that entire doctrine were changed, it might be argued that it was no longer "the" doctrine repealed. Use of the article "a" makes it clear that not only is that exact doctrine repudiated, but, further, that no other "right to abortion" is sheltered by the Constitution.

It is further important to note that the first sentence of S. J. Res. 110 repeals only the "right to abortion" and not the right of privacy. The use of the carefully limited phrase "right to abortion" in the first sentence of the Amendment makes it clear that the amendment covers and repeals only the abortion decisions. Other extensions of the right of privacy, such as the contraception cases, and the family privacy cases, would not be repealed. Furthermore, other doctrines of constitutional law, such as the equal protection doctrine, privileges and immunities doctrine, and so forth, are not repealed. The first sentence of S. J. Res. 110 would not prohibit a finding that an abortion scheme was unconstitutional if, for instance, it were structured to prohibit black women from getting abortions but not white women. Likewise, the first sentence would not prohibit a court from finding, based on Professor Witherspoon's outstanding scholarship,[33] that the Fourteenth Amendment was intended to protect all humans, including the unborn. The first sentence only says that there is no right to abortion protected by the Constitution.

The phrase "not secured by this Constitution" means just that. The repealer section only disestablishes one theory of constitutional law. It does not establish a new constitutional theory. In essence, the first sentence is saying: "We are not attempting to say what balance between the interests of the unborn and the interests of the pregnant woman is established by the Constitution, if any, but we are sure what is not (i.e., it is not the Roe v. Wade 'right to abortion')."

Some pro-life advocates are uncomfortable with S. J. Res. 110 because it does not establish a substantive rule to replace the one that is rejected by the Amendment. Some argue that the Roe v. Wade rejection of the "personhood" of the unborn must be explicitly overturned. However, I believe that those persons misunderstand the legal significance of the personhood discussion in Roe v. Wade. First, a personhood amendment would not do any more than S. J. Res. 110 does. In fact, it might do less. Personhood was only relevant to the Roe decision insofar as the personhood of the unborn might provide a compelling state interest thus justifying abortion prohibitions. But S. J. Res. 110 directly establishes the power of the states, and of Congress, to prohibit abortion. Moreover, the mere declaration that the unborn are persons would only mean that they are protected against deprivation of their lives without due process. The Fourteenth Amendment does not grant an absolute "right to life" to any "persons." It only provides that before depriving persons of their lives, they must be accorded whatever process is "due." Moreover, it only prohibits state action and most abortions are privately performed. Thus, the establishment of the "personhood" of the unborn would likely do a lot less than most people believe.

Furthermore, once we begin talking about "personhood" we get into a great deal of extraneous debate. I say extraneous, not because I am disinterested. I am very interested in the debate over when life begins, and so forth. But I believe that it is extraneous to the crucial constitutional issues. I just do not think that "personhood" is essential to the abortion controversy. Snail darter fishes are not persons. Neither are historic buildings or wilderness areas. Yet the law protects each of those nonpersons against wanton destruction. Likewise, the law can and should protect the unborn against wanton destruction regardless of whether or not they are persons.

The first sentence of S. J. Res. 110 does not prohibit or compell the adoption of any legislation dealing with abortion. Passage of a statute identical in content to the judicially created "right to abortion" is not precluded by the first sentence. (However, neither does this sentence prohibit a court from finding that such legislation is unconstitutional.)

Finally, the only direct effect of the first sentence will be the overturning of a discrete body of judicial decisions, namely Roe v. Wade and its progeny. However, I would expect this to have a rather dampening effect on the enthusiasm of the federal judiciary for abortion cases, at least for a little while. The federal courts would be more inclined, I believe, to defer to the judgment of legislatures on the matter.

I would like to dwell on the first sentence of S. J. Res. 110 for a moment more. It contains ten words. They are ten wonderful, beautiful, liberating words to one who has spent the better part of four years following the cases that have been spawned by Roe v. Wade. S. J. Res. 110

is worth supporting just to see those ten words become part of the Constitution.

"Concurrent Power"

This leads directly to part two of S. J. Res. 110. It contains two concepts, a "concurrent power" concept and a "more restrictive law" provision. In Roe v. Wade and Doe v. Bolton the "bottom line" question before the Court was whether or not a state could restrict or prohibit abortion (under the common law approach or under the model penal code, respectively). The Court held that the states could not constitutionally restrict abortion before viability (and that even after viability their authority to do so was severely limited). The second sentence of S. J. Res. 110 directly repeals that holding. It specifically declares ~~that~~ states do have the authority to prohibit and restrict abortion. It also confers concurrent authority on Congress to do so. That would give Congress some authority that it did not have, even before Roe v. Wade was decided.

The second sentence of S. J. Res. 110 uses the term "concurrent power." This term is used in only one other place in the Constitution--in the Eighteenth Amendment, which provided that both states and Congress had the "concurrent power" to enforce prohibition.[34] It is, therefore, important to understand how that term was construed under the Eighteenth Amendment. For while the phrase "concurrent power" will be interpreted by the courts in a manner to give effect to the intent of S. J. Res. 110, should it be ratified, nevertheless the existing body of law defining the same term as used in another Amendment to the Constitution will be relevant in ascertaining a constructive intent. And the phrase "concurrent power" had a significantly different meaning under the Eighteenth Amendment than it has had in general usage.

The phrase "concurrent power" was given the following interpretation for purposes of enforcing the Eighteenth Amendment.

1. "The words 'concurrent power'. . .do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the

several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."[35]

2. "The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section. . .and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."[36]

3. "The second section [of the Eighteenth Amendment] means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several states within their territorial limits shall not cease to exist."[37]

4. "Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition."[38]

5. The Eighteenth Amendment was not the source of the power of the states to enforce prohibition laws.

> "To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution,. . .each State possessed that power in full measure prior to the Amendment. . . . In effect the second section of the Eighteenth Amendment put an end to restrictions on the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. . . . Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution."[39]

6. Thus, the phrase "concurrent power" describes a system of dual, coequal and coactive sovereignties.

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interferenance by the other enact laws to secure prohibition. with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each

> government in determining which shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[40]

7. Several significant consequences result from the fact that the powers of the state and the federal government to prohibit abortion derive from different sources. "[M]anufacture of intoxicating liquor for beverage purposes may be denounced as a criminal offense both by the federal law and by the state law; and . . . these laws may not only coexist but be given full operation, each independently of the other."[41]

8. The schemes and approaches adopted by the states and the federal government can differ substantially.[42] "While state legislation cannot give validity to acts prohibited by the Eighteenth Amendment, that legislation may provide additional instruments to make prohibition effective."[43]

9. Penalties provided by state law can differ, and be either stricter or more lenient than those provided in the federal scheme.[44]

> "The second section of the [Eighteenth] Amendment--the one declaring 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'--does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means."[45]

10. Furthermore, separate prosecutions by state and federal authorities for violation of their respective laws, though predicated on the same acts of the defendant, are not constitutionally prohibited.[46]

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[47]

However, Congress or a state legislature could proscribe double prosecution.[48]

11. Some state and lower federal courts in the early years stated, usually by way of dicta, that if a state prohibition law and a federal prohibition law were in direct conflict, the state law would have to yield to the federal law.[49] Other courts indicated that they could find no irreconcible conflict unless one sovereign was attempting to defeat the purpose of the Eighteenth Amendment--that is, the enforcement of

prohibition.[50] But the U.S. Supreme Court rejected the "federal supremacy" construction in favor of the dual sovereignty approach.[51]

12. "The Eighteenth Amendment did not abrogate any other amendment or article of the Constitution of the United States, but the provisions of the Eighteenth Amendment are controlling where they, or any of them, conflict with the provisions of the earlier amendment or article."[52]

(In this respect, it is likely that the second sentence of S. J. Res. 110 would have an effect similar to Section Two of the Twenty-First Amendment, which prohibited the "transportation or importation into any State. . .of intoxicating liquors, in violation of the laws thereof. . . ." That section has been interpreted as altering the balance and allocation of powers between the state and federal governments such that "local, not national, regulation of the liquor traffic is now the general Constitutional policy."[53] To the extent that another constitutional provision, such as the due process clause, the equal protection clause, or the interstate commerce clause, directly conflicted with a substantial and noncollateral state liquor law provision, several Supreme Court decisions have indicated that the Twenty-First Amendment abrogates the former and gives priority to the state law if it is necessary and appropriate under the Twenty-First Amendment.)[54]

It is likely that the phrase "concurrent power" used in S. J. Res. 110 would be interpreted in the same way as it was when it was used in the Eighteenth Amendment. The key concepts in both cases are the notions that the amendment is not the source of the state's coequal authority to regulate in the subject matter of the Amendment (abortion and prohibition, respectively) and that the federal governments "concurrent power" is not superior to state power.[55]

The Proviso

In addition to the creation of "concurrent power," S. J. Res. 110 contains a proviso clause. The proviso clause says that "a law of a State which is more restrictive than a law of Congress shall govern." The use of the word "govern" here creates some ambiguity, for it implies supremacy, superiority, or preeminence, and that assumes a conflict. But there would be no conflict in an Eighteenth Amendment-type of coequal concurrent sovereignties. Reading S. J. Res. 110 as a whole, however, it is apparent that the proviso means that a state law more restrictive of abortion than an Act of Congress "shall not be invalid," or "shall not be superceded." The proviso clause apparently was meant to insure that the supremacy clause of the Constitution[56] would not apply so that if Congress were to enact some modest abortion prohibition scheme it could not be argued that all state laws more restrictive of abortion than the law of Congress, more closely conforming to the values of the community residing within a particular state, were "preempted" or "superceded" by the federal law. It was meant to prevent the invalidation of state laws on the grounds that they were stricter than, and thus inconsistent with, "supreme" federal law.

There is an ambiguity here. Without the proviso, there would be three possible interpretations of the phrase "concurrent power:" (1) the concept of coequal sovereigns which has just been discussed, in which the laws of those two sovereigns could not be said to "conflict" because they are created and enforced separately; (2) the concept that both the states and Congress have the power to prohibit or restrict abortion, but ~~only one sovereign can exercise that power and~~ if both exercise the power and there is a conflict, the stricter law supercedes the more lenient statute; (3) the concept that both the states and Congress have the power to restrict and prohibit abortion, but ~~only one can exercise that power and~~ Article VI applies so that if Congress enacts legislation, it will prevail over any inconsistent state law. This latter meaning is the way the phrase "concurrent power" has traditionally been used in non-Eighteenth Amendment contexts.[57] The "proviso" clause in S. J. Res. 110 clearly negates the third possibility. That leaves two possibilities. I believe that if the Amendment is read as a whole, and in light of the statement of its drafter, it is apparent that the first noted construction is the one that was intended. But the second construction is plausible. Thus, I would advise this Subcommittee to rephrase the second sentence so as to clarify its intent and erase this unnecessary ambiguity.

In the course of doing so, the Committee would be well advised to reconsider carefully which approach it wants to take. The choice, essentially, is between a system whereby there are two applicable, enforceable, and potentially variable substantive rules of law dealing with this subject or just one determined by a "more restrictive" standard, in this case (or by a "state supremacy" standard, as in the Twenty-First Amendment, or a "federal sovereignty" standard, under Article VI). For my part, I believe that either approach is so far superior to the status quo--Roe v. Wade and its progeny--that selecting between the approaches is not dissimilar to trying to decide whether to throw a pink or blue lifesaver to a drowning person. But viewed with an eye toward the future, the approach to be settled upon will have significant ramifications and ought to be carefully considered.[58]

Conclusion

In conclusion, it is my opinion that S.J. Res. 110 is a very moderate and appropriate means of correcting the substantive excesses and structural imbalance promulgated by Roe v. Wade. I firmly believe that this amendment is needed now. And I cannot understand how people who claim they are only interested in protecting a "right to choose" are afraid of letting the citizens of this country choose whether or not abortion on demand should be a constitutional rule of law. S. J. Res. 110 brings this issue before the nation in exactly that posture. It is a modest and sensible way to step out of the mire created by the judicial decisions. I endorse S. J. Res. 110, and urge this committee to do likewise.

FOOTNOTES

1. The author gratefully acknowledges permission he has received from the publishers and copyright holders of his two books, The Abortion Privacy Doctrine (William S. Hein & Co., Inc. 1981) and A Lawyer Looks At Abortion (coauthored by Mary Anne Wood) (B.Y.U. Press, in process) to liberally incorporate materials appearing in those works. The author is greatly indebted to Robert Dinsmoor, Linden Slaugh, Connie Knowles, and Lori Fielding for their tremendous assistance in the preparation of this paper.
2. See generally A. Bickel, The Morality of Consent 27-29 (1975); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973).

3. 5 U.S. (1 Cranch.) 137 (1803).

4. *B. Schwarz, A Basic History of the Supreme Court* 124, 125 (1968).

5. 60 U.S. (19 How.) 393 (1957).

6. *Id.* at 407.

7. *See, e.g.*, Csank, *The Lords and Givers of Life*, 3 *Human Life Rev.*, Spring, 1977, at 75.

8. 410 U.S. 113, 221, 222 (White, J., dissenting).

9. *Id.*

10. *A. Bickel*, *supra* note 2, at 28.

11. Ely, *supra* note 2, at 936-937.

12. *Id.* at 947.

13. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *Sup. Ct. Rev.* 159.

14. United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938).

15. *Roe*, 410 U.S. at 153; Doe v. Bolton, 410 U.S. 179, 192 (1973); Colautti v. Franklin, 439 U.S. 379, 400 (1979).

16. Friendship Medical Center, Ltd. v. Chicago Board of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

17. Doe v. Bolton, 410 U.S. 179 (1973); Arnold v. Sendak, 416 F.2d 22 (S.D.Ind. 1976), *aff'd.*, 429 U.S. 968 (1976).

18. Planned Parenthood Association v. Ashcroft, 483 F. Supp. 679 (W.D.Mo. 1980).

19. Doe v. Bolton, 410 U.S. 179 (1973).

20. Margaret S. v. Edwards, 488 F. Supp. 181, 197 (E.D.La. 1980).

21. 440 F. Supp. 535 (D.S.C. 1977), *vacated*, 440 U.S. 445 (1975).

22. 440 F. Supp. at 538.

23. Colautti v. Franklin, 439 U.S. 379 (1979); Hodgson v. Anderson, 378 F. Supp. 1008 (D.Minn. 1974), *modified*, 542 F.2d 1350 (8th Cir. 1976).

24. Colautti v. Franklin, 439 U.S. 379 (1979).

25. Women's Services, P.C. v. Thone, 636 F.2d 206 (8th Cir. 1980), *vacated and remanded*, ____ U.S. ____, 49 U.S.L.W. 3911 (1981).

26. Leigh v. Olsen, ____ F. Supp. ____, no. A3-79-78, slip op. at 4 (D.N.D. July 9, 1979).

27. *See* *L. Wardle, The Abortion Privacy Doctrine* 113-180 (1981).

28. *But see* H.L. v. Matheson, 450 U.S. ____, 49 U.S.L.W. 4255 (1981).

29. *See*, *L. Wardle*, *supra* note 27.

30. Prepared Statement of Laurence H. Tribe, October 5, 1981, at 12.

31. *See* *L. Wardle and M. Wood, A Lawyer Looks at Abortion*, at Chapter 1 (B.Y.U. Press, in process). Most of these statistics are taken from Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States*, 1978, 13 *Fam. Planning Perspectives* 1 (1981).

32. 9 *Fam. Planning & Population Reporter* 15 (1980).

33. *See* 122 *CONG. REC.* 5104 (1976) (testimony of J. Witherspoon).

34. The word "concurrent" is used several times in the Constitution, but not the phrase "concurrent power." *U.S. CONST.* art. I, §§ 3[6] 5[2[7[1], 7[3]; art. II, § 2[2]. *See* 33 *Harv. L. Rev.* 968, 969 (1920). *See further* note 57 *infra*.

35. National Prohibition Cases, 253 U.S. 350, 387 (1920).

36. *Id.*

37. United States v. Lanza, 260 U.S. 377, 381 (1922).

38. *Id.* at 381.

39. *Id.* at 381-82.

40. *Id.* at 382.

41. Herbert v. Louisiana, 272 U.S. 312, 314 (1926).

42. Vigliotti v. Commonwealth, 258 U.S. 403 (1922).

43. McCormick & Co., v. Brown, 286 U.S. 131, 143, 144 (1932).

44. *Id.* at 144, 145; State v. Moore, 36 Ida. 565, 212 P. 349, *aff'd*, 264 U.S. 564 (1924). *See also*, *A. Blakemore, National Prohibition*, 36 (1927).

45. National Prohibition Cases, 253 U.S. at 387. The Eighteenth Amendment uses the phrase "concurrent power to enforce." S. J. Res. 110 says "concurrent power to restrict and prohibit abortions." Thus, neither a state nor Congress would be authorized to defeat or thwart a restriction or prohibition of abortion enacted by the other. That is, the less restrictive law could not be said to override the more restrictive law.

46. *A. Blakemore*, *supra* note 44, at 46-48.

47. United States v. Lanza, 260 U.S. at 382. *See also* Herbert against Louisiana, 277 U.S. 312 (1926); Abbate v. United States, 359 U.S. 187 (1958).

48. United States v. Lanza, 260 U.S. at 382-84.

49. See, e.g., Commonwealth v. Nickerson, 128 N.E. 273, 236 Mass. 281 (1920); State v. Ceriani, 96 Conn. 130, 113 A.316 (1921); Ex parte Ramsey, 265 F.950 (1920); State v. Fenley, 275 S.W. 36 (Mo.1925); Hall v. Moran, 81 Fla. 706, 89 So. 104 (1921).

50. *See, e.g.*, State v. Gauthier, 121 Me. 522, 118 A. 380 (1922); Jones v. Hicks, 150 Ga. 657, 104 S.E. 771 (1920); *G. Thorpe, National and State Prohibition* 26 (1926).

51. Moore v. State, 264 U.S. 569 (1924), *aff'g*, 36 Ida. 565, 212 P. 349 (1922); McCormick & Co.,Inc. v. Brown, 286 U.S. at 145.

52. *G. Thorpe*, *supra* note 50, at 18; Cornelli v. Moore, 257 U.S. 491 (1922), *aff'g* 267 F. 456 (D. Mo. 1920).

53. Carter v. Virginia, 321 U.S. 131, 138 (1944) (Black, J., concurring).

54. The cases are discussed in an excellent article, Crabb, *State Power Over Liquor Under the Twenty-First Amendment*, 12 *U. Det. L. J.* 11 (1948). *But see* Craig v. Boren, 429 U.S. 190 (1976); *L. Tribe*, *American Constitutional Law* 374-376 (1978).

55. An argument can be made attempting to distinguish S. J. Res. 110 from the Eighteenth Amendment on this ground because before prohibition states had the power to prohibit the sale of alcoholic beverages, whereas before S. J. Res. 110 states did not have, at least they have not had since *Roe*, power to prohibit and restrict abortion. Thus, some might argue that the states' power to restrict and prohibit abortion is a delegation of a federal power. This argument, however, cannot get around the clear analysis of *United States v. Lanza*. *See* note 39 and accompanying text, *supra*. Moreoever, it misconceives the nature of our constitutional structure of government. The states have always had the power to restrict and prohibit abortion to some extent. *Roe v. Wade* said that in assenting to the adoption of the Fourteenth Amendment, the states substantially gave up or agreed to substantially restrict this power to regulate abortion. S. J. Res. 110 removes the restriction that *Roe* found

in the Fourteenth Amendment. If there is a constitutional restriction, it was created in 1973 by the Supreme Court in Roe v. Wade. The purpose of S. J. Res. 110 is to reverse Roe v. Wade and erase that restriction. Accordingly, the second part of S. J. Res. 110, like the second section of the Eighteenth Amendment, would "put an end to restrictions upon the state's power arising out of the Federal Constitution and [leave] her free to enact prohibition [of abortion] laws applying to all transactions within her limits." United States v. Lanza, 260 U.S. at 381.

56. U.S. CONST., art. VI, cl. 2.

57. See 33 Harv. L. Rev. 968-970 (1920). See also e.g., Spokane County v. United States, 279 U.S. 80, 90 (1928); Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 312 (1948); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, [illegible] 200-210 (1824).

58. Excellent and thought-provoking arguments can be made for both approaches. On the one hand, the basic constitutional structure of federalism, vesting specific powers in the federal government and leaving the remainder in the states, and of Article VI, which explicitly establishes an ultimate, prevailing source of law when there is a federal-state conflict, favors a system with one prevailing law. Moreover, the concern over the confusion and conflicts that arise in a dual law system underlies much of the beneficial reform in judicial administration that has taken place in the last 50 years (e.g., adoption of the Federal Rules of Civil Procedure and abandonment of the Conformity Act; the overturning of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), etc.). Justice Harlan articulated the heart of the matter when he wrote in one of the Erie-type cases:

> "[T]here should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to debilitating uncertainty in the planning of everyday affairs. And it is recognized that the scheme of our Constitution envisions an allocation of law-making functions between the state and federal legislative processes. . . ."

Hanna v. Plumer, 380 U.S. 460, 474 (Harlan, J., concurring). This approach would favor a clear rule of supremacy by some standard (such as "the more restrictive law shall govern if there is a direct conflict between state and federal laws restricting abortion."). On the other hand, it is an undeniable reality that presently there *are* overlapping state and federal regulations affecting most activities in the country today. Farmers, truckers, businesses, teachers, taxpayers and bureaucrats all commonly deal with two disparate sets of rules, regulations and legal forms. And, as a practical matter, if both the Congress and the several states could enact and enforce abortion laws, and if the more restrictive law were enforced by the government enacting it, it would effectively "supercede" the less restrictive law, for the permissibility of an act under one scheme would not immunize the actor from prosecution under the other scheme by the other government. Thus, the practical effect of a truly "concurrent" scheme would not be significantly different than the effect of a restrictive law supremacy scheme.

For my part, I would probably favor the Harlan position. If one must err at all, it would be nice to err on the side of the simplified approach. But this is a close question, and I, frankly, have not worked the matter through.

A LAWYER LOOKS AT ABORTION

Lynn D. Wardle and Mary Anne Q. Wood

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Change by Constitutional Amendment: The Process and the Proposals

The surest way to change a Supreme Court interpretation of the Constitution is by constitutional amendment. Even with a constitutional amendment there are problems. They are not problems of the adequacy of the constitutional power to make the change, such as were discussed in the preceding chapter. Rather, they are problems of whether sufficient political support can be mustered to achieve the change, whether the amendment can achieve the desired objective, and whether undesirable side effects can be avoided. Thus, in evaluating the propriety of attempting to amend the Constitution to overturn *Roe v. Wade,* careful consideration must be given to several factors, including (1) the available methods for amending the Constitution, (2) the practical difficulties in obtaining a constitutional amendment, (3) the possibility of convening a constitutional convention to propose an anti-abortion amendment, and (4) the text of the several anti-abortion amendments that have already been proposed in Congress.

Amending the Constitution—The Process

The Constitution provides the means for its own amendment in Article Five.[1] Several combinations of steps to amendment are possible under Article Five, but all involve a two-stage process: proposal and ratification. There are two alternate methods of proposal: (1) proposal by a two-thirds vote of both houses of Congress,[2] and (2) proposal by a convention called by Congress on the application of two-thirds of the state legislatures. The convention method of proposing constitutional amendments has never been used.

While the proposal of a constitutional amendment occurs at the national level, ratification is accomplished at the state level, and requires the concurrence of three-fourths of the states. Again, Article Five provides two methods: (1) by vote of state legislatures, or (2) by vote of ratifying conventions in each state. Article Five grants to Congress the exclusive right to select and declare which of the means of ratification will be used. Only once—in the case of the Twenty-first Amendment repealing prohibiton—has the convention method of ratification been used.

Congress has the power to specify in its proposal the time within which the amendment, to be effective, must be ratified by three-fourths of the states; if Congress does not specify the time for ratification, the proposed amendment lapses unless ratified within a reasonable time.[3] Beginning with the Eighteenth Amendment, and for every amendment since then, except the Nineteenth, Congress has prescribed the ratification time, initially in the body of the amendment, and later (from the Twenty-third on) in the preamble to the joint resolution. Only once, in the case of the proposed Twenty-seventh Amendment, the Equal Rights Amendment, has Congress purported to extend a ratification deadline. Whether Congress really has the power so to extend has not yet been decided by the Supreme Court. Also unresolved is whether a state whose legislature initially votes in favor of ratification can rescind prior to the time that the constitutionally required three-fourths of the states have ratified. (The right of a state to change its vote from "no" to "yes" has been established by the Supreme Court.)[4] However, in December of 1981 a federal district court ruled, in a suit initiated when Congress passed a resolution extending the period of ratification for the Equal Rights Amendment, that states can rescind a prior ratification and that Congress cannot extend a period of ratification, once set.[5]

Amending the Constitution—The Difficulties

The process of amending the Constitution is an intentionally difficult one. The drafters of the Constitution were not sympathetic to the notion that it might be easily revised. For instance, writing in *The Federalist,* James Madison expressed his "serious objection" against the idea of the "frequent" use of an amendment process.[6]

The difficulty of amending the Constitution is borne out by the few times the task has been successfully accomplished, particularly in comparison to the number of times amendments have been attempted. Excluding the original ten amendments (the Bill of Rights), which were added to the Constitution in 1791 to fulfill a commitment made during the campaign to secure ratification of the Constitution,[7] the Constitution has been amended only sixteen times during the 190 years of its existence. That works out to an average of less than once every decade.

By contrast, from 1789 to June 4, 1981, there have been approximately ten thousand attempts to amend the Constitution.[8] The proposed amendments have included such diverse subjects as methods of selecting the president and vice-president,[9] dueling,[10] the right to vote,[11] outlawing war,[12] slavery,[13] and a requirement that the president exercise good sense.[14] In recent years many proposals have focused on school segregation, busing, prayer in public buildings, abortion, and the national debt.[15]

Historically, the major hurdle for constitutional amendments has been approval by two-thirds of the House and Senate. Of the nearly ten thousand proposed amendments to the Constitution that have been introduced in Congress, only 33 (including the first ten amendments) have received the necessary two-thirds vote of both houses of Congress to be passed on to the states for ratification.[16] That means that only one out of about every three hundred proposals to amend the Constitution (or one in four hundred if the first ten amendments are not counted) has been passed by Congress. On the other hand, 26 of the 33 amendments that have been proposed by Congress have been ratified by the necessary three-fourths of the states; only seven of the 33 amendments proposed by Congress have failed to be ratified.

It is apparent then, from a purely statistical point of view, that the "odds" are heavily against any proposed amendment even passing Congress (300 to one), much less ever becoming ratified (400 to one). But if a proposed amendment passes Congress, the chances of success change dramatically. Then there is a three-to-one likelihood that the proposed amendment will be ratified and become part of the Constitution.

The Movement to Convene a Constitutional Convention

Since 1973 opponents of abortion have mobilized both of the constitutionally authorized means for proposing constitutional amendments. Probably the least understood (and perhaps the most intriguing) effort has been the movement to have Congress convene a constitutional convention for the purpose of adopting an amendment to the Constitution prohibiting abortion. Since the Supreme Court decided *Roe v. Wade,* the legislatures of 19 states have petitioned Congress to call a constitutional convention to propose an anti-abortion amendment.[17]

Article Five of the Constitution obligates Congress to call a constitutional convention on the application of the legislatures of two-thirds of the states. It is clear that the applications of two-thirds of the state legislatures triggers a mandatory congressional duty, not just a discretionary right, to convene a convention for the purpose of amending the Constitution. Article Five specifies that "on the Application of the Legislatures of two-thirds of the several States, [Congress] *shall* call a Convention for proposing Amendments . . . ."

If the only method of amending the Constitution were by congressional proposal, the Congress could effectively veto any effort to amend the Constitution. The convention method of proposing amendments to the Constitution was intended to provide a means whereby the people, acting through their own state legislatures, could correct constitutional deficiencies and respond to abuses even if the federal Congress were unwilling to do so.[18]

The impetus for the movement to have states petition Congress to convene a constitutional convention to propose an anti-abortion amendment has been the failure of Congress to propose any such amendment. Since *Roe v. Wade* was decided, proposed right-to-life amendments have been introduced in every Congress. In 1974 and 1975 hearings were conducted by subcommittees in both the Senate and House but none of the proposals gained even subcommittee approval. This provoked a great deal of pessimism in right-to-life circles about the likelihood that two-thirds of both houses of Congress would ever vote in favor of a pro-life constitutional amendment. Thus, some proponents of such an amendment began to encourage resort to the alternative method of proposing amendments to the Constitution. They reasoned that they could obtain a majority vote of the legislatures of two-thirds of the states sooner than they could get two-thirds of both houses of Congress to propose an amendment.[19]

The movement to convene a convention for the purpose of proposing a pro-life amendment has not had the active support of some of the major right-to-life organizations. The primary reason for the lack of support is the uncertainty about the convention method of proposing amendments to the Constitution. A number of important questions concerning the constitutional convention method are not answered by Article Five, and since that method has never yet been used, there has been no judicial resolution of those issues. For instance, it is not clear that Congress would be obligated to call a constitutional convention if 15 more states submitted resolutions calling for a convention to propose an anti-abortion amendment. The reason is that, as shown by Appendix A, while the legislatures of 19 states thus far have petitioned Congress for a convention, their petitions vary in the language used to describe the type of anti-abortion amendment that the convention is to consider. Whether Congress has a duty to call a convention under those circumstances is still a question. Also unresolved is the length of time over which Congress must accept applications calling for a convention before the earliest applications become stale and invalid. This issue is roughly analogous to the question of the length of time for ratification by three-fourths of the states when Congress has not specified the time. The Supreme Court held in *Coleman v. Miller* that whether the expiration of thirteen years since proposal by Congress of the Child Labor Amendment had caused that amendment to lose its validity was a "political question" which only a political branch of government–not the judicial branch–can decide.[20] If the issue of the length of time within which two-thirds of the state legislatures must apply for a constitutional convention is also a political question, it would be resolved by Congress.[21]

Probably the most important unanswered question concerning the convention method of proposing amendments is whether, once convened, the convention would be limited to the purpose for which it was called. For example, could a convention, called by Congress because two-thirds of the state legislatures petitioned for a convention to propose an anti-abortion amendment, also propose amendments dealing with busing, or placing limits on the national debt? The closest thing to a historical precedent is the 1787 Constitutional Convention itself, which, in drafting the Constitution, went well beyond its charge to consider possible changes in the Articles of Confederation.[22] Of course, the radical changes proposed by that convention (i.e., the Constitution) still had to be ratified by the states before becoming effective.

Finally, it should be noted that from time to time the Congress has attempted to address the unanswered questions regarding constitutional amendment conventions. Several bills establishing standard procedures for proposing amendments to the Constitution through constitutional convention have been proposed, but none have passed Congress.[23] One reason for the failure of such proposals is doubt over their binding effect upon any subsequent Congress, or upon any constitutional convention.[24]

Perspectives on Amending the Constitution

There are, in a broad sense, two general positions on the proposal of a constitutional amendment dealing with abortion. One position is that there should be no amendment. This position necessarily assumes that the *Roe v. Wade* statements of constitutional law, both the declaration that states are without authority to prohibit abortion, and that the Constitution guarantees a fundamental right to abortion, should not be disturbed. Three separate arguments are espoused by proponents of this position. First, some people are deeply committed to encouraging abortion, for population control reasons or otherwise. They believe in the substantive good of widespread abortion, and favor the greatest possible legal protection for liberalized abortion. Since *Roe v. Wade* provides constitutional protection for abortion on demand, they strongly support a continuation of *Roe v. Wade* as a rule of constitutional law.

The second argument in favor of perpetuating *Roe v. Wade* as constitutional law is the privacy argument. Proponents of this position believe that the decision whether or not to have an abortion should be left entirely to the pregnant woman. The right to abortion is a very important personal right and extraordinary constitutional protection for a woman's decision to have an abortion is necessary, they argue. *Roe* explicitly recognizes this right, and they believe that it should not be disturbed.

The third argument is essentially an anti-amendment argument. Proponents of this position are willing to concede that *Roe v. Wade* may not be good constitutional law, and might agree that it should be changed, but they caution against politically overreacting and jeopardizing the independence of the courts. They believe that constitutional amendments should be proposed rarely, and they do not believe that the problems of *Roe v. Wade* are so grave as to justify the drastic remedy of a constitutional amendment.

The other general position possible concerning an anti-abortion amendment to the Constitution is that one is necessary. All of the people who take this position agree that *Roe v. Wade* should not be part of the Constitution. But even those who agree on this point do not agree about the form and content of a proposed amendment. The divisions among the supporters of a constitutional amendment are along several lines, but the major areas of disagreement are three.

The first disagreement concerns constitutionalizing a substantive rule of law dealing with abortion. One group of pro-life advocates would not, at least at this time, write into the Constitution a substantive rule of law expressly defining when abortions can be performed. Some believe that abortion should be prohibited, but that the prohibition should be legislative, not constitutional. Others do not believe that there is in the nation at this time enough support for a constitutional declaration of the kind of pro-life substantive rule of law they would like to see adopted. All of these people think *Roe v. Wade* must be reversed to erase the Supreme Court's declaration of a substantive constitutional right to abortion, and to reverse *Roe*'s holding that states are without authority to prohibit abortion. They would use a constitutional amendment to disestablish abortion on demand as substantive law, but would not outlaw abortion by the same means.

Another group of pro-life advocates believes that the Constitution should explicitly prohibit abortion. They believe that the Constitution does, and should, articulate fundamental values, and they are convinced that respect and protection for the life of unborn human beings is, and must be, a fundamental value of society. While many believe that there is general support for this view, they do not all believe that widespread political support is absolutely necessary, in any event. It is the purpose of the Constitution, they argue, to protect basic fundamental rights, such as protection for the unborn, from the abuses of the majority. Thus, they believe that the Constitution should explicitly protect unborn children against abortion as a matter of fundamental right.

A third group of pro-life advocates would go even further. They would articulate in the Constitution not only a fundamental right of protection for the unborn, but a general "right to life." Their goal is not merely to protect the unborn from abortion, but to protect the right of all human beings at all stages of development and in all circumstances or conditions. Some of them would argue that the right to life is a "paramount" constitutional right.[25] These people view the reversal of *Roe v. Wade,* and the prohibition of abortion as only parts of a greater movement to increase respect for human life and to guarantee more completely the right to life of all living human beings.

If the advocates of a right-to-life amendment were split only on this issue, the task of uniting behind one constitutional amendment would be difficult enough. But there are other, equally significant, divisions. The disagreement between the idealists and the realists is one of the most important. Even those who agree as to the kind of constitutional amendment that should be proposed may disagree as to whether to take an all-or-nothing approach, or to compromise and support an amendment that is less than the ideal. The idealists talk about *the* amendment. Some pro-life advocates believe that only one constitutional amendment dealing with abortion will ever be adopted, and they insist that it must be the ideal amendment. Others believe that a two-step amendment approach is feasible, pointing to the fact that it took three civil rights amendments to achieve the goals of the abolitionists.[26] Others argue that if the ethic of abortion on demand continues much longer, the values of society will irreversably be altered in the direction of accepting that ethic. Accordingly, any effective constitutional amendment that would constitute an immediate step in the direction of their ultimate objectives should be supported. Additionally, there are political observers who say that achieving any of the ultimate right-to-life objectives is impossible at the present time. They favor the adoption of a constitutional amendment that goes as far as is possible in the current political environment. While they acknowledge the shortcomings of any less-than-ideal amendment, they believe that it is moral to do as much as possible to protect unborn lives, even if it is less than ultimately desirable, and that it is immoral to do less.

Another point of disagreement among pro-life advocates is how to best achieve agreed-upon objectives. The disagreement basically is over the "ends/means" approach. Some would specifically identify the ultimate objective, and have a constitutional amendment directly state that. If the objective is to prohibit abortion, they would have a constitutional amendment say that abortion is prohibited. Others favor an indirect approach. For instance, they would declare the unborn to be "persons," which could give the states a compelling state interest for abortion prohibition laws, which would lead to the abolition of abortion. The indirect approach, they argue, not only would achieve the ultimate objective but would also establish an underlying principle.

Proposed Amendments to the Constitution

The many unanswered questions about a constitutional convention may explain why some states have called upon Congress to exercise its own Article Five power to propose an anti-abortion amendment, but have not petitioned for a convention.[27] Since the Supreme Court decided ***Roe v. Wade,*** scores of bills and resolutions have been introduced in Congress proposing amendments to the Constitution dealing with the subject of abortion. In 1981 alone, 12 *different* proposed pro-life amendments to the Constitution were introduced in the House of Representatives and Senate.[28]

Two of the current batch of proposed constitutional amendments deserve special attention. The first of these is the principal "Human Life Amendment," currently known as the Garn-Oberstar Amendment (named after its chief sponsors in the Senate and House). Since 1974 it has been the "banner" of the National Right to Life Committee, which is the largest grass roots pro-life organization in the country.[29]

The Garn-Oberstar Amendment provides:

> SECTION 1. With respect to the right to life, the word "person" as used in this article and in the fifth and fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> SECTION 3. The Congress and the several States shall have power to enforce this article by appropriate legislation.

Each of the three sections of this proposed amendment has appeared in one form or another by itself, as a separate constitutional amendment proposal, and also in conjunction with other provisions, in other proposed constitutional amendments. Thus, examining each of these provisions separately provides a general review of the different types of pro-life amendments that have been proposed.

One of the most frequently proposed types of constitutional amendment is the "personhood" amendment. Section One of the Garn-Oberstar Amendment is an example of a personhood constitutional amendment. It provides that all human beings, including the unborn, are "persons" under the Fifth and Fourteenth amendments to the Constitution. The Fifth and Fourteenth amendments forbid the federal government, and the states, respectively, to deprive any person of life without due process of law, or to deny them equal protection of the laws. A personhood amendment would extend those protections to the unborn, and would emphasize that all other human beings are also entitled to those protections. But a personhood amendment might not accomplish all that its sponsors think it would.

There are three potential problems with a personhood amendment. First, it does not by its own terms prohibit abortion. It only extends the protections of the Fifth and Fourteenth amendments to unborn persons. But the Fifth and Fourteenth amendments only prohibit *governmental* action. That is, they only forbid the federal government and the states from depriving persons of their lives without due process of law. Since the decision whether or not to have an abortion is a decision made by private persons, not by the government, and since it is implemented by private persons, not by government agents, defining "persons" to include the unborn might not prohibit private abortions.[10] It would prohibit government sponsored abortions, but that constitutes only a small percentage of the total number of abortions that are performed.

The second problem with a pure "personhood" amendment is that, even overlooking the private action problem, the Fifth and Fourteenth amendments do not absolutely guarantee a "right to life." Rather, they only provide that persons will not be deprived of life without due process of law. Thus, all that would be established by a personhood amendment is that a new right granted specific protection by the Constitution (the right to life of unborn children) would be in conflict with what the Supreme Court previously declared was another fundamental right granted protection by the Constitution (a woman's right to terminate her pregnancy); it would not say which right must prevail. That would be for the Court to measure and determine. And it is possible that the Court could reach the same conclusion after the adoption of a personhood amendment as it did in *Roe v. Wade.* As Professor Laurence Tribe noted:

> [I]f anything is clear about the abortion controversy, it seems to me one thing is. That [is,] no amount of constitutional redefinition of fetuses as persons can alter the biological reality that they are persons of a rather special sort–persons that in the early phase of their development cannot survive without using the body of someone else.
>
> And that, of course, is the source of the entire constitutional controversy surrounding abortion. It was the Court's conclusion that the dependence of the fetus on the woman prior to viability–prior to the time the fetus could survive independently–makes it not only reasonable, but mandatory, that the ultimate choice whether or not to continue the pregnancy should be the woman's. And in no way does that conclusion rest on an argument about the personhood of the fetus.

> That is, one can easily conclude, with these amendments, that the fetus is a human being, a full person from the moment of conception, and still say that to deny such a person protection from the woman's choice until the point of viability is a reasonable policy, entirely consistent with due process and equal protection.[31]

The third problem with the "personhood" amendment is that it invites hyperbolic rhetoric about unintended consequences. That is, to declare that the unborn are persons under the Fifth and Fourteenth amendments does not only impact upon the practice of abortion, it affects the rights of the unborn in all other areas of the law as well. And there are some interesting questions about whether the unborn should be recognized as full "persons" for all purposes of the law. A number of pro-abortion advocates have capitalized upon those questions and propounded sensational "horrible hypotheticals" in their attacks on proposed personhood amendments,[32] most of which are misleading and are made only for their rhetorical impact. For instance, one writer (a lawyer who should know better) suggested that a constitutional amendment defining "person" to include the unborn might be read as conferring full legal citizenship on the unborn.[33] But the Fourteenth Amendment expressly defines citizens not simply as "persons," but as "persons born or naturalized in the United States." There is, in fact, no reasonable likelihood that a personhood amendment would make the unborn "citizens" also. Still, there are a few legitimate and genuine questions about the impact of a personhood amendment on tort law and other areas of the criminal law.

In light of these problems, it is not unreasonable to ask why a definition of personhood is included in so many of the anti-abortion constitutional amendment proposals. If the purpose of the amendment is to prohibit abortion, that can be done directly. (As noted, a personhood provision, by itself, probably would not have the effect of prohibiting abortion.) And if an amendment explicitly contains a prohibition of abortion, why the need to define persons as including the unborn? It would only seem to confuse the matter and invite politically damaging rhetorical attacks.

The reason why personhood provisions are so popular is because an explicit declaration in the Constitution that the unborn (and all other human beings) are "persons" entitled to basic constitutional protections has been one of the rallying cries of the right-to-life movement for a decade. Perhaps the most offensive passage in *Roe v. Wade,* which probably has motivated more people to become involved in right-to-life activities than any other language in that opinion, is the discussion of personhood that culminates in Justice Blackmun's conclusion that unborn human beings are not persons and are not entitled to protection of the Constitution.[34] Explicitly repudiating that premise by declaring in a constitutional amendment the legal personhood of the unborn and of all other living human beings is the kind of simple but meaningful goal that has motivated many right-to-life advocates for years.

Another type of proposed abortion amendment to the Constitution is one that directly prohibits abortion. Section two of the Garn-Oberstar Amendment is an example of this type of amendment. By its own terms it specifically prohibits abortion except when necessary to prevent the death of the mother.

There have been four major objections to an amendment that would directly prohibit abortion. The first objection is that it departs from the basic form of the Constitution, which is concerned with identifying and restricting the powers of government. By contrast, an abortion-prohibition amendment would prohibit private as well as governmental action. But there are historical precedents for a constitutional prohibition of private action—the prohibition of slavery (Thirteenth Amendment) and the prohibition of liquor (Eighteenth Amendment). The Thirteenth Amendment precedent is especially attractive to supporters of an amendment to prohibit abortion because many pro-life advocates compare their cause to the cause of abolition of slavery.

The second problem with the direct prohibition of abortion is that the idea of writing a criminal prohibition directly into the Constitution troubles some people. Again, constitutional law is not easily amended. Matters society is uncertain about, or matters still in the process of being worked out, or matters likely to be changed by developments of technology, should not be frozen into constitutional concrete. (If abortions could be performed without killing the unborn—if the embryo or fetus could be removed from the mother's womb and placed in an artificial womb where it could grow to maturity and be "born" alive—perhaps there would be no need to prohibit abortion.)

A third objection concerns the practical effect of a constitutional prohibition of abortion. If states did not enact laws prohibiting abortion, the constitutional prohibition might be ineffective, for it is not clear that a constitutional prohibition would create a state duty to enforce the prohibition. Furthermore, if an amendment prohibiting abortion were to be adopted, it would become a part of the Constitution, subject to decisive interpretation by the Supreme Court. Thus, an amendment directly prohibiting abortion would be interpreted by the same body that interpreted the Fourteenth Amendment as embodying a right to abortion on demand. Interpretation of such an amendment could therefore be crucial. For instance, if the amendment contained no explicit exception for any abortions, it is highly probable that the Supreme Court, and others courts as well, would read into the amendment some sort of exception—an exception that might go much further than the exception that proponents of the amendment would intend to be permitted. Moreover, any exception or exceptions that are specified in an amendment prohibiting abortion would also be subject to judicial interpretation. Thus, a "health" exception might be construed as justifying abortions to avoid mental or emotional stress (i.e., abortion on demand). And once a constitutional amendment is interpreted by the Supreme Court, its interpretation becomes a part of the Constitution and cannot be changed except by judicial overturning or by subsequent amendment to the Constitution.

The final objection to amendments proposing to directly prohibit abortion is political. It is the problem of striking a consensus. A *proposed* constitutional amendment is not law. It only becomes law when it is passed by two-thirds of both houses of Congress and is ratified by three-fourths of the states. In short, there has to be enormous political support for the substantive rule of law that is proposed. Unquestionably, there is not that kind of support for an amendment that would prohibit all abortions. Neither is there now that kind of nearly unanimous support for one that would prohibit all abortions except those necessary to prevent the death of the mother.[35] That leaves two alternatives for the proponents of a constitutional amendment that directly prohibits all or most abortions. They can wait for the attitude of the country to change, but in the meantime—a period that could stretch on for many years—abortions will continue unabated. Or, they can attempt to draft an amendment that contains enough exceptions that it would be supported by the majority of the citizens of the country, an alternative considered to be unacceptable to many pro-life advocates.

The third type of proposed abortion amendment to the Constitution is a nonsubstantive "state rights" or "right to prohibit" amendment. Section three of the Garn-Oberstar Amendment is an example of this type of provision. It provides that both Congress and the states shall have the power to prohibit abortion. The "bottom line" in *Roe v. Wade* was that Texas constitutionally could not prohibit abortion. Some people believe that the proper way to reestablish protection for the unborn is to restore to the states the authority to prohibit abortion. Some of the proposed amendments to the Constitution would do only that.

There are two potential problems with this approach. The first concerns which level of government—the states or the federal government—should have the authority to prohibit abortion. Historically, only the states, having general police power under the Tenth Amendment, exercised authority to prohibit abortion. (Congress could only prohibit abortion in the course of exercising one of the powers expressly delegated to it under the Constitution, such as the power to control federal lands, the power to control interstate commerce, etc.) The "state rights" approach therefore is to restore to the states the power denied by *Roe v. Wade.* But if that is done, there might be substantial variations among the various state laws, and some states would likely become "abortion havens." Some pro-life advocates argue that if the unborn are entitled to the protection of the law, it ought not to matter where their mothers reside; unborn children in New York should be given just as much protection against arbitrary destruction as unborn children in Utah. Thus, some people favor making abortion a matter of uniform federal law. Still others favor some division of authority to prohibit abortion between the federal government and the states.

The second problem with a "right to prohibit abortion" amendment is political. Such an amendment is disfavored by both the organized right-to-life and right-to-choice movements. Right-to-life organizations oppose a state rights approach because they are afraid of abortion havens developing. Right-to-choice advocates oppose a state rights approach because they are afraid of abortion being prohibited in many parts of the country. Thus, a state rights amendment is unacceptable to both sides. However, a recently proposed modification of the state rights approach, called a "federal rights" amendment, seems to be likely to receive strong pro-life support. It would give Congress and the states power to prohibit abortion on the theory that Congress would pass a national "floor" of legislative protection for the unborn, but the states would be free to enact their own, stricter abortion laws if they wanted to. This approach is embodied in the other currently proposed constitutional amendment that merits attention.

Senate Joint Resolution 110, proposed by Senator Orrin Hatch in 1981, is worth considering here for two reasons. First, it is the type of "compromise" amendment that is likely to pass Congress, if any anti-abortion amendment ever does. It is a moderate approach that reasonable men and women who have different opinions about abortion could support. Second, its primary effect would be to repeal, rather than create, substantive law.

The Hatch Amendment provides as follows:

> A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided,* That [a provision of] a law of a State which is more restrictive than a [conflicting provision of a] law of Congress shall govern.[36]

This language substantially parallels the Twenty-first Amendment's approach to repealing an obnoxious provision of constitutional law. The Twenty-first Amendment was adopted to repeal the Eighteenth Amendment, which did two things. Substantively, it constitutionalized an extreme position on a question of the extent to which the manufacture and sale of alcoholic beverages should be legal (it mandated total prohibition). Procedurally, it severely restricted the authority of the states to resolve for themselves this controversial social issue. The Twenty-first Amendment, likewise, did two things. Substantively, it repealed the Eighteenth Amendment and prohibition. Procedurally, it not only restored to the states their former authority to regulate and authorize the legal use of liquor, but it enhanced state power to deal with the matter.

By analogy, *Roe v. Wade* can be compared to the Eighteenth Amendment. Like that amendment, *Roe* constitutionalized a very extreme position on the substantive issue of whether or not a controversial practice (abortion) should be legal. Procedurally, *Roe* severely restricted the authority of the states to deal with the matter. The Hatch Amendment, like the Twenty-first Amendment, would do two things. Substantively, it would repeal the *Roe v. Wade* ruling that the Constitution mandates legalized abortion on demand. Procedurally, it would restore to the states their previous authority to prohibit abortion, and it would also give Congress concurrent power to prohibit abortion. Thus, the Hatch Amendment follows the Twenty-first Amendment approach to resolving a controversial social issue that has been constitutionalized by deconstitutionalizing the question and remitting it to the legislatures for resolution.

The first sentence of the Hatch Amendment contains only ten words: "A right to abortion is not secured by this Constitution." These words are extremely profound and well considered. They only *disestablish* a substantive rule of law. Unlike the pro-life amendments that attempt to directly prohibit abortion, the first sentence of the Hatch Amendment only attempts to erase a substantive rule of law. It says only that the doctrine of abortion on demand is *not* a constitutional doctrine of law; it does not purport to declare what balance, if any, the Constitution strikes between the rights of a pregnant woman who desires to terminate pregnancy, and the rights of the unborn child. All it says is that the *Roe v. Wade* declaration of what that constitutional balance is (abortion on demand until viability) is not constitutional law.

This "disestablishment" approach is modest, yet it is provocative. On one hand, people who believe that the current abortion controversy should be a legislative concern, not a constitutional one, favor this approach. Many pro-life supporters–even some who favor the ultimate adoption of an explicit constitutional formulation of the right to life–view the Hatch Amendment as an important step toward the achievement of their ultimate goal. Likewise, supporters of liberal abortion laws who believe that *Roe v. Wade* is bad constitutional law, or who believe that the legislature, not the judiciary, should establish public policy regarding abortion would also be attracted to the Hatch Amendment because it erases an embarrassing mistake without replacing it with another mistake.

On the other hand, some pro-life organizations have been reluctant to support the Hatch Amendment because it does not go far enough. Some pro-life idealists, who believe that the Constitution should expressly prohibit abortion and protect human life, consider the Hatch Amendment to be a compromise of their principles.

Of course, the most vigorous opposition comes from pro-choice organizations. They consider the Hatch Amendment to be the most threatening of all the potential anti-abortion amendments because of the way in which it phrases the abortion policy question. It poses the issue in the manner least favorable to them by asking whether the right to abortion (on demand) declared in *Roe v. Wade* really ought to be part of the Constitution. Only a small minority of Americans favor abortion on demand (roughly equivalent to the small minority of Americans who favor the prohibition of all abortion).[37] By proposing only to reject this extreme position, the Hatch Amendment can be supported by people who could not agree on what the constitutional rule of law should be. Thus, by forcing the pro-choice advocates to defend abortion on demand, the Hatch Amendment stands a much greater chance of receiving widespread popular support than other anti-abortion amendments which attempt to articulate a specific substantive rule prohibiting abortion.

The second sentence of the Hatch Amendment specifies the allocation of governmental power to deal with the abortion controversy as being between the states and the federal government. It explicitly reaffirms the historic power of the states to restrict and prohibit abortion. Additionally, so that there will be some national uniformity as to the minimum legal protection for the unborn, the Hatch Amendment confers concurrent power on Congress to prohibit and restrict abortion. Thus, the second sentence of the Hatch Amendment repeals the holdings in *Roe* and *Doe* that states constitutionally may not restrict abortion before viability. This much of the amendment is like the state rights approach discussed previously.

The major objection of some right-to-life groups to a state rights amendment is that some states would become abortion havens. However, the Hatch Amendment confers concurrent power on Congress to prohibit abortion, with a proviso clause that is meant to insure that the supremacy clause of the Constitution will not be applied in such a way that, if Congress enacts only a modest abortion prohibition, state laws more restrictive of abortion than the law of Congress could be superceded and invalid.

The phrase "concurrent power" has only been used in one other place in the Constitution—in the Eighteenth Amendment. It is clear from reading the cases that interpret the meaning of that phrase as used in the Eighteenth Amendment that it describes a system of dual, coequal, and coactive sovereignties.[38] That is, under the Eighteenth Amendment, Congress was authorized to pass laws that were enforced in federal courts by federal authorities and simultaneously the states were permitted to pass laws that were enforced within their jurisdictions by state authorities. The laws did not have to be identical, and, if there was some significant discrepancy or contradiction between both laws, the federal law did not supercede the state law. Rather, both laws could still be enforced. Thus, "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[39]

As a purely structural provision, substantively, the second sentence of the Hatch Amendment does not seem to be very controversial. But there can be questions raised as to the scheme adopted. One objection might be the "federalizing" of abortion. That is, by giving the federal government the right to restrict or prohibit abortion, the states have been deprived of their pre-*Roe* "exclusive" power to deal with the subject. Thus, state rights purists might be dissatisfied. But the benefits of national uniformity, at least establishing minimum protection for the unborn, would outweigh the minor encroachment on exclusive state control of the abortion issue. The other objection might be to the concurrent power approach. Some may disagree that there should be a dual sovereignty in this area. A good argument can be made that there ought to be one prevailing law, and not two laws that, although concurrently effective, might otherwise be conflicting. But the practical effect of a concurrent power approach is that the more restrictive law supercedes the less restrictive law since both are enforceable. (The Subcommittee on the Constitution of the Senate Judiciary Committee, under the chairmanship of Senator Hatch, made a minor revision in the language used in the proviso clause of the second sentence in order to clarify that if there were a conflict between a federal law and a state law, one of them, the more restrictive provision, would control.)[40]

The political problems with the "federal rights" approach are more difficult. Pro-choice organizations strenuously oppose it for it would not only permit states to reenact abortion prohibitions, but Congress could do likewise. And right-to-life idealists oppose a procedural rather than a substantive solution.

In the final analysis, no one can confidently predict whether a constitutional amendment addressing the subject of abortion will ever be proposed by Congress or ratified by at least 38 states. The intended difficulty of the amending process, the history of its rarely successful utilization, and the vigorous opposition of pro-choice groups create cause for pessimism. But the growing controversy over abortion, the political successes of pro-life organizations, and the attractive moderation of such proposals as the Hatch Amendment suggest that the adoption of a constitutional amendment is not unfeasible.

Senator HATCH. Thank you so much, Professor Wardle.

The way I am going to handle this is that we are going to ask questions of all of you as a panel in the end. We are calling on each person now to give their statements.

What I am going to do is give our court reporter a few minutes and take a 5-minute recess; then we will call on Professor Gerety as soon as we come back in; that will give me a chance to make a couple of phone calls and talk to the staff members. In 5 minutes we will reconvene the hearing.

[Recess taken.]

Senator HATCH. We will reconvene the hearing.

I have been particularly pleased to have all of these great young constitutional authorities with us. I think it is good for the public to realize that we have a whole new generation of constitutional authorities who understand these issues and who do an excellent job evaluating them, on both sides of these issues.

I have been particularly pleased to have Professor Wardle here who, of course, represents the school from which I got my undergraduate degree. Now we have Professor Gerety, who represents the school where I got my law degree. We are very happy to have him with us.

Professor Thomas Gerety teaches at the University of Pittsburgh Law School. That law school holds a place near and dear to my heart. I graduated from that school 19 years ago and I have appreciated the education they gave to me then. I want to see if yours is as good.

Where did you graduate from?

Mr. GERETY. I am sorry to say I went to Yale. [Laughter.]

Senator HATCH. We had some Yale graduates in our class, and they were——

Mr. GERETY. They were the stupes, I am sure.

Senator HATCH. They were very superior students, to be honest with you. It put a lot of pressure on us poor BYU people.

STATEMENT OF PROF. THOMAS GERETY, SCHOOL OF LAW, UNIVERSITY OF PITTSBURGH

Mr. GERETY. Let me begin by saying that we take great pride in having you be our one alumnus who is in the Senate. And my dean got down on me the other day when he heard that here, in the one opportunity when an alumnus of ours was about to reframe the Constitution, I was going to stand in the way of saying that we had a Pitt grad who was a Framer.

Senator HATCH. Thank you for your concern. Do not worry about it.

Mr. GERETY. I want to apologize before I begin.

Senator HATCH. All right.

Mr. GERETY. This is a hard subject for all of us. No one I respect can speak gladly or easily of abortion. We have argued back and forth over whether a fetus is a person, and I myself do not know. In one sense you could say I do not care.

"Growth is the only evidence of life," wrote Cardinal Newman in his "Apologia." It is a figure of speech, but it is as good literally as figuratively. The growing fetus is to me as fair evidence as any of the presence of human life.

Abortion destroys that evidence. Is abortion then murder? The word "murder," like the word "person," is a legal, technical term, a sort of definition applied to a portion of reality. A term like "murder" bespeaks a final judgment of law, one that I am not now ready to make.

The only judgment I can make is of my own feelings and convictions about abortion. For me and mine it is wrong, sadly and tragically wrong. It is human life turning against itself.

But the tragedy is much larger than the operation itself, and to stop the operation by an act of law is not likely to end the tragedy; it may well make it worse. Wrongness, in itself, never settles hard questions of law. Law is an imposed morality, all law.

Senator HATCH. I am glad you made that point, because we have so many people posturing that these laws would "impose morality" on America, when all law really does make this determination.

Mr. GERETY. I think all law is an imposition of morality. My counterpoint then would be that it is not the imposition of all morality. There are many wrongs that people do to one another and to themselves that law courts simply cannot prevent. Nor can the law right them once they are done. To my mind, abortion is sadly among these.

I am here as a teacher of constitutional law, and you have asked me to speak as some sort of an expert, but I want to refuse right away to do that. For one thing, you have already heard from better experts than myself. For another thing, I do not put much stock in expertise in these matters; nor should you.

Long, hard, detached study is fine for an observation or generalization, but ultimate moral judgment about life and death is something quite different. Such a judgment is almost necessarily a compound of passion and reason, and the pure smell of the lamp or the pure air of rationality is likely to be fraudulent. What lies behind it, and what must lie behind it, is something much more complex.

You have two sorts of proposed amendments before you. Joint Resolutions 17, 18, and 19 give constitutional protection to the life of the fetus from conception on through viability and birth. Joint Resolution 110 gives no such protection but allows the States and the Federal Government to provide it, with the stronger protection prevailing in cases of conflict between Federal and State law. I am opposed to all these measures.

As to the first three, however, I have nothing to add or subtract.

Senator HATCH. Excuse me, Professor Gerety.

Mr. GERETY. Yes, I will wait.

[Off the record discussion.]

Senator HATCH. Please accept my apologies for the interruption.

Mr. GERETY. I know we did not teach you that long huddle up at Pitt, so I assume you learned it at Brigham Young.

To go back to when we were interrupted, you have two sorts of proposed amendments, of course, before you—Joint Resolutions 17, 18, and 19, which give this constitutional protection to the life of the fetus; and your own, 110, which gives no such protection but allows the States and the Federal Government to provide it, with the stronger protection prevailing, as I was saying, in cases of conflict between Federal and State law. I am opposed to all these measures.

As to the first three, I have nothing really to add or subtract from the many arguments you have already heard. I doubt that these or any other amendments to the Constitution will turn back the social and cultural changes that have made abortion a commonplace of life in all the developed world.

Prohibition will be ugly, it will be hurtful, and it will not work. The moral consensus upon which prohibition might once have worked has broken down, I think, permanently. To intrude so drastically on the lives of women without a moral consensus, and a decisive one, seems to me a legal and constitutional folly.

Senator HATCH. If I could interrupt you on that, I had a call recently from a young woman from the Miami Herald. They did a very extensive poll down in Florida. It was very interesting, and backs up, I believe, what I have been saying.

I would expect Florida to be more pro-abortion than many States in some ways. But the poll backs up what I have been saying—that not many people are caught up in the two extremes—no abortions at all or abortion on demand. It is in the middle that you can get a coalition. Most people want some restraint on abortion if not always a severe restraint.

This woman reporter was astounded. She had pretty well concluded that the vast majority of people would want abortion, or at least that is the way I interpreted her. It is not fair for me to say what she concluded, but that was the way I interpreted her. She was amazed by the poll.

I think the way to get this consensus, and one reason I worked so hard for this amendment, is through this amendment. You do not. In any event, I did not mean to interrupt you, but I think that is pertinent to what you are saying.

Mr. GERETY. I think the polls are pertinent. I think there are legal problems, as I will explain in a second.

Senator HATCH. Go ahead. I am sorry to interrupt.

Mr. GERETY. As to your amendment, my view is that it is really fairly complicated. Although it is a deceptively simple amendment, in fact I think it is a complicated legal operation. The attraction of it, as you were just saying, is that it does almost nothing beyond repealing the Supreme Court decision in *Roe* v. *Wade*. To that extent it is a middle way.

I say "almost nothing," because the amendment does provide for the supremacy, if you will, of the stronger of two competing laws, State or Federal. That provision suggests, moreover, what should be obvious about the operation of such an amendment. It favors resolution of this question by the States only where the resolution in question in fact restricts or prohibits abortion.

Thus, while the procedure of the amendment is novel and interesting on its own terms, it is not in fact a matter of mere procedure, as some have argued. It is a change in the law repealing a major, if much controverted, Supreme Court decision and dispersing the authority to remake that decision on the sole condition that the new-found authority be exercised so as to make good the repeal.

It is true, of course, that if neither the Congress nor a given State pass laws restricting abortion, then it will go unrestricted. But this is not to say that a given State or a given Congress has the authority to leave abortion unrestricted. That authority, unlike the contrary authority to restrict abortion, must be exercised at the two polls of federalism at once in order to be effective.

This amendment does not then restore us to the legal world that fell with *Roe* v. *Wade.* What of the new legal world of the Hatch amendment? It has, to my mind, two flaws, one broadly constitutional or procedural, and the other moral and in every sense substantive.

The procedural difficulty with your amendment is that it changes the rules of constitutional decision while seeming to leave them be. A constitutional amendment takes a constitutional majority. So will this amendment, say its proponents, and indeed it will.

But this amendment will be argued for not so much in terms of abortion as in terms of federalism. "Leave it to the States," people will say, "and not to a handful of Justices." This argument is always a seductive one and almost always for the wrong reasons, but here the argument is a smokescreen. The States will have only the authority to do one thing—to restrict or prohibit abortions. So too with the authority of Congress.

The amendment thus confuses deftly and simply a federalist procedure with a constitutional result. Neither federalism nor the Constitution is well served by this cleverness.

The moral ambiguity of the amendment is perhaps most telling. Since 1973, those who have criticized the decision in *Roe* v. *Wade* have been forced at times to defend themselves against what I call a constitutional piety. That piety holds that once a decision of constitutional right has been made by the Supreme Court of the United States it is beyond decent argument or debate. It is a false piety and one on which Lincoln snared Douglas.

"We do not propose," said Lincoln, "that when Dred Scott has been decided to be slave by the court, we as a mob will decide him to be free. But we nevertheless do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the Members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject."

On more or less this same ground, opposition to *Roe* v. *Wade* has taken up its position. That position holds, roughly, that the Supreme Court's disregard of the moral status of the fetus is like the Supreme Court's disregard of the moral status of the slave. "*Dred Scott* was overturned," they say, "Let us now overturn *Roe* v. *Wade.*"

Although I cannot join in this argument, I find its premise forceful and plain. When a matter of the most fundamental moral significance has been misconstrued by a constitutional court, it remains for the citizenry at large to set that matter straight. For just this reason, our Constitution is amendable by special and sustained majorities at the national and State level.

Your amendment deprives these opponents of abortion of this special moral standing. Rather than take this issue straight as a moral and constitutional question, it turns it into a procedural and political one. Bare majorities will, under this amendment, decide the question in this State and that. Should the opponents of abortion fail to secure a bare majority in the Congress, then the States will go this way and that. This is, to my mind, the Missouri Compromise on abortion.

Senator HATCH. What shall we do? Have a civil war on abortion to resolve the issue?

Mr. GERETY. The Missouri Compromise, as you know, Senator, did not stave off the Civil War.

Senator HATCH. That is right.

Mr. GERETY. You may say in its favor what was said of the original compromise on slavery: "Shall we have a civil war? Let's avert an outright conflict. It allows some room to both sides. By its terms, no one loses."

All of this may be true, but I think it is beside the point—the main point. The debate over abortion is a national debate over the moral content of our national Constitution. If the slavery debate taught us anything, it taught us the imperative of national resolution in matters of our fundamental constitutional morality. This compromise no more settles this question than the Missouri Compromise settled the slavery question.

There is only one way to settle this question once and for all. It is to offer to the Nation the plain moral judgment that abortion must be prohibited. I cannot adhere to that judgment, but at least I can see it plain and fight it plain.

Thank you.

Senator HATCH. You are welcome.

Your comments are very provocative. I would say this: Your analogy to the Civil War leads me to conclude that you would have conceded that dispute to the South. No action is action of a sort.

Mr. GERETY. Yes. As you can see from my views about law and morality, I am not one to deny the logic of a position like "No action is action." I agree. I am not sure who is the South and the North, and we would all see this differently, depending on where we are from.

I do not mean anything invidious when I say "smokescreen." It is a terribly clever and sage amendment, but it does seem to me that it will be argued out on these terms: "Leave it to the States" versus "We are for abortion."

My uncle is in the Catholic hierarchy; I come from a very deeply religious family; I myself am very torn by this issue; I am not one to easily settle it either way, and I could as well, in a sense, have come out on your side as on my own. My hesitations really go to the poll—if you could take a poll of people's consciences—and to a need for a conscientious constitutional majority before we start imposing things on people.

Your amendment, while it is politically tempting, morally, it seems to me, gets us off in an argument in which we are kind of fighting out "Roberts' Rules of Order."

Senator HATCH. Not really. All my amendment does is this: If it passes, then it allows this great debate to take place among the people and their elected representatives.

Mr. GERETY. At the two levels though; is that right?

Senator HATCH.Yes, it is better than a nondebate at no level. I suspect that a consensus will develop, and it is the only way to get a consensus.

Right now, if we take the alternative position you offer, and that is no abortion at all or indiscriminate abortion on demand, which is what we have today, I think there is relatively little support for either of those positions.

The question is: How do we get to that consensus otherwise? My amendment, it seems to me, is the only democratic way to perhaps resolve this issue.

Your statement has been interesting to me, and I commend you for it. But we have, in my opinion, an artificial, false consensus today, with all 50 States dragged kicking and screaming into consensus that they do not agree with. There really is not a consensus, because nobody has given the people of this country the opportunity to arrive at a consensus.

Yes, I agree that this amendment is very clever; I am proud of that.

Mr. GERETY. I assume in saying that you are saying that the guy next to you wrote it and not you. [Laughter.]

Senator HATCH. No, that is not true. It is clever, it is ingenious, and it is right, because it leaves the issue up to the people and their elected representatives. That is a lot more appropriate, in my opinion, than allowing Federal judges to resolve it.

Some people have compared abortion to the slavery issue. They call *Roe* the *Dred Scott* decision of the 20th century, and I agree with them. I think it is a crucial issue. I wish there could be much more severe restraints on abortion than we presently have in our society.

Mr. GERETY. Do not get me wrong.

Senator HATCH. You are not backpeddling on me now?

Mr. GERETY. Pardon me?

Senator HATCH. You are not backpeddling on me?

Mr. GERETY. No, I am not backpeddling; I am front peddling here.

Senator HATCH. But I am not sure in which direction.

Mr. GERETY. All right. Let me tell you. My personal view is that I am absolutely against abortion.

Senator HATCH. You mean for any reason at all?

Mr. GERETY. Virtually, except to save the life of a mother. But I do not think that every personal, every deeply held conviction that I have should be written into law.

Senator HATCH. Neither do I.

Mr. GERETY. And in this case it seems to me that there is a drastic intrusion in the midst of a terribly controversial debate, not just State and Federal, not just a matter of Federal authority versus State authority, but between citizens, one and another, that should not be resolved by the State, at whichever level, unless there is a cultural context in which you have near unanimity on the moral question, as we do on other criminal law questions like murder and manslaughter.

It is only the murderer who will tell you that the murder law is no good. It is not only the abortionist, if you will, who will tell you that this law is no good. I just do not think we have the consensus, and your Miami poll might convince me, but I doubt it.

What I do not like in the result that would come, if you are right about the practical results of your compromise amendment, is that you would obtain a situation in which 50 percent of any given legislature that wanted to prohibit abortion could, even, I suppose, on one reading of your amendment, a city council or a portion of a State, but at least 50 percent of any State legislature.

I think that, in a situation where 51 percent of the legislature is for something so intrusive as this and 49 is against it, you have to throw up your hands and say, "We cannot go ahead; we cannot impose; we cannot coerce something so vitally personal with such a lack of agreement."

Senator HATCH. I am sure you agree with me that *Roe* v. *Wade*, though constitutional law, is not one of the pillars of constitutional jurisprudence.

Mr. GERETY. I think it is a badly written decision.

Senator HATCH. It is based on bad law, based on bad analysis, and based on bad philosophy.

Mr. GERETY. I do not know about that. No, I will stop at the bad law.

Senator HATCH. It is still the law today.

I would prefer—and this is where you and I divide—to have the democratic process work in this instance, since it is such a volatile issue, than allow seven Supreme Court Justices to decide this issue for all 230 million Americans.

Mr. GERETY. But this is a question of individual right, and I would simply adhere to the good old fashioned constitutional view. I know there is an argument, a tragic argument; there are rights on both sides, and there is much truth to that, as you can see. But I think in an argument of palpable individual right, where we are going to be pushing people around, we have got to have more than a simple majority in some State or city legislature.

You say seven Justices, but of course those seven Justices represent a long tradition.

Senator HATCH. Godhood in this life. If somebody had not changed Dred Scott, we would still have that as law today. I do not buy the argument that you can never change a Supreme Court decision.

Mr. GERETY. Neither do I, but I would like to have it out without a Missouri compromise. I would like to have it flat out. Do we, or do we not, have the moral consensus represented by a constitutional majority against abortion? I think we do not. I would argue against it on principle. But if we did, I would bow my head and say, "OK, you have won."

What I am fearful of is a compromise, a Missouri compromise as I call it, in which we disperse this issue hither and yon in such a way that near majorities—one vote in a given State legislature—could make the coercive difference.

Senator HATCH. That is the way democracy works.

I agree, this is a tough, tough issue, and I can see your anguish over it. I hope you continue to work on it, and I will too.

I have enjoyed what Professor Wardle has said here today, and I am going to pay particular attention to the last clause of this constitutional amendment. I was very interested in his remarks because I share some qualms about that.

I am very sorry for having interrupted you so frequently but some of the points you were making were so interesting that I wanted to discuss them, with you. We are really happy to have all of you here today.

Mr. GERETY. Thank you.

Senator HATCH. Our final witness today will be Prof. Richard Stith of the School of Law at Valparaiso University. He is the former director of a developmental program in biomedical ethics at the St. Louis University Medical School and the author of a number of articles on this issue.

We are delighted to have you with us today.

STATEMENT OF PROF. RICHARD STITH, SCHOOL OF LAW, VALPARAISO UNIVERSITY

Mr. STITH. Thank you, Mr. Chairman. I appreciate being here.

Valparaiso University, just to make it clear that I am not a foreign visitor, is in northwest Indiana. I teach family law, criminal law, comparative law, and legal philosophy there. In addition to the J.D., I hold a Ph. D. in ethics, both degrees being from Yale University. From Harvard and Berkeley, I have degrees in political theory. I have also spent time as director of the development program in biomedical ethics at the St. Louis University School of Medicine. I spent last year teaching philosophy in India, where I had some chance to observe the political uses of population control, including abortion.

My publications have focused primarily on ways in which legal and moral concepts can either express or falsify human experience. Those dealing with abortion are appended to my testimony today.

Let me first remark in passing that I am not entirely satisfied with any of the proposed amendments. As someone sympathetic both to the pro-life position and to democratic socialism, I would like to see both the unborn and the born guaranteed a right to life in the full sense—that is, a right not only against public or private violence but also against the evils of poverty, disease, ignorance, class prejudice, and the like.

The right to life ought to include a right to that level of welfare minimally necessary for a decent existence. However, I realize such a right is not under consideration today, so I will go on to matters here at issue.

As you know, the *Roe* v. *Wade* decision grants a constitutional right to abortion throughout pregnancy. More specifically, there is a right to end what the Court called the potential life of the fetus for any reason whatsoever prior to viability and for any reason of maternal health, including familial or psychological well-being, thereafter.[1]

By the way, everyone has talked about the decision's progeny. It is sort of ironic, I suppose, in the circumstances. Anyway, this decision and its progeny turn the early stages of our common human species into absolutely private property, virtually unlimited by public, fetal, or even paternal interests.[2]

As a teacher of comparative law, I find this decision unique in the world. No other modern domestic state or foreign nation has ever, to my knowledge, privatized the value of new human life to this degree. No one, except our Court, has ever left the unborn entirely without public protection for the first 6 months of gestation and with only nominal protection even just before birth.

Moreover, this extremist position has been imposed on our country, not as a matter of temporary legislative experimentation but by practically unchangeable judicial fiat, and this with scarcely any principled basis in the Constitution.[3]

All this, however, is beside my main point. Whatever criticisms may be leveled at the outcome of *Roe* v. *Wade*, far worse in my opinion is its reasoning.

In order to sustain its new right to abortion, the Court pretends not to know whether actual human life exists prior to birth. Indeed, it treats, and requires the States to treat, unborn members of our species as merely the potentiality of human life, even in the last trimester of pregnancy, with the lethal consequences detailed above.

To me, the greatest wrong done the unborn is just this failure to take them into consideration as actual living human beings. The Court has closed its eyes to the reality of abortion and has blindfolded our legislatures.

I am not arguing for absolutism. I can understand, though I disagree with, someone who favors capital punishment as a necessary evil, arguing that the interests of felons are outweighed by the interests of society. But I would be dismayed and dumbfounded by someone who claimed that felons had lost the right to be considered actual human beings whose interests should at all be taken into account.

Similarly, I can respect and live in disagreement with those who admit and regret that abortion destroys a little human being but who honestly believe private freedom to be more important than a young life.[4]

If we have any compassion for what we ourselves once were, or any sense of the intrinsic dignity of life, we ought at least to acknowledge the unborn we cannot or will not save.

Nor is this callousness toward the unborn without its effect on the moral and legal rights of the rest of us. For consider this: The Court is saying that after 8 months of gestation a child in the womb is still only a potential life which can be intentionally destroyed for the sake of familial or psychological well-being, while another 8-month-old fetus born prematurely is an actual human life with full human rights.

But the two beings are developmentally identical, differing only in location, mode of nutrition, and oxygenation. Would an IV and an oxygen tent make someone not alive or not human? Clearly not.

Would someone who really cared about the rights of newborn infants completely ignore identical infants endangered in the womb? I think not. He or she would take them into account to the same degree in or out of the womb,[5] even if other interests—say, privacy—provided a greater counterbalance of value prior to birth.

Therefore—and this is my fundamental point—if we do not take the interests of the unborn as actual living human beings into consideration, we cannot logically claim to really care about the right to life even after birth. If we are willing lethally to ignore someone when he or she is hidden from sight, we cannot care sincerely and in principle about his or her life when it is in full view.

In graphic terms, the nurse who both cares for premature babies and does quasi-elective late-term abortions is involved in a contradiction which cannot be resolved except by either ceasing to do abortions or by becoming equally callous to life after birth.

Put more generally, *Roe* v. *Wade*, by arbitrarily ignoring the actual existence of life prior to birth, commits us to a nominalist or conventionalist view of human rights.[6] If the definition of when a human being exists can be arbitrary, then the human rights which supposedly accompany that existence likewise are recognized arbitrarily. Such rights are subject to rescission at any time.

Of course, as long as we are strong enough or valuable enough, we are no doubt not in personal danger of losing our rights, but the safest as well as the highest path in the defense of civil rights is to patrol the parameters of principle, to close up every single opening. For to affirm a single arbitrary exception to a principle, such as the right to life, means that the whole remaining structure can no longer logically be defended.

Indeed, already, anyone who arbitrarily disregards human life can rightly claim he is only doing what the Court has already done. If he is punished, this can seem to him only an act of power rather than one of equal justice.

There is one further harm done by *Roe* v. *Wade* to civil rights in general. It eliminates reason as a weapon against power. If the fundamental facts on which the law is based are to be finally and arbitrarily defined by the Court to suit its wishes, then no one can even sensibly object to the laws which govern us.

Pro-lifers, for example, argue that certain facts, such as the heartbeat, brainwaves, or physical appearance of the unborn, indicate that abortion kills a human being, and they are frequently met with the response that there is no point in claiming abortion kills since the Court has decided the issue once and for all.

Such a world is an Orwellian nightmare, just as in "1984" one could not sensibly be a pacifist because war was officially defined as peace. If the factual concepts on which legal decisions are based are stipulatively defined in ways which can support only the results reached, the possibility of reasoned public criticism is eliminated.

What can be done to reverse these effects of *Roe* v. *Wade*? To my mind, the simplest and best would be simply to recognize the developing human embryo and fetus to be a constitutional person under the 5th and 14th amendments.

As a person, he or she would have to be taken into consideration in all legislation related to pregnancy and could no longer be declared officially to have only a potential or doubtful existence.

Of course, even persons do not have absolute rights, and equal protection does not mean identical treatment but only nonarbitrary treatment. Calling the unborn legal persons for purposes of the right to life means only that their lives cannot be surrendered without a compelling state interest.

To my mind, the unique conditions of pregnancy, such as privacy, emotional distress, and sexual inequality, together with public concerns, such as the difficulty of enforcing child protective laws, make it reasonable, for example, not to punish the woman criminally at all, and instead to focus on other ways to limit abortion, such as by requiring prior counseling, as was done in West Germany, or by penalizing the abortionist.

Personhood for the unborn, in other words, would not lock us into some kind of rigid policy of treating abortion legally as murder. It would insure only that the unborn's interests are taken into account like anyone else's, that we make a good-faith effort to protect them as part of our community, not that their interests become the whole of our concern.

Even calling the right to life "paramount", as some of the proposals do, or adding the phrase "no unborn person shall be deprived of life by any other person," in my opinion, can express no more than an ideal. It does not mandate the enforcement of this ideal by absolute means which do not take into account the other interests at stake.

Unfortunately however, a personhood-conferring amendment may be politically difficult to pass. This is so, not because such an amendment would be in fact overly rigid, but because it can easily be distorted in the minds of nonlawyers to appear to be absolutist.

By acting as though the word "equal" meant "identical," opponents of fetal personhood are already claiming that passage of a human life amendment would cause every woman having an abortion to be prosecuted for murder and everyone miscarrying to be liable for manslaughter.

We may well regret such scare tactics, which are reminiscent of the equally misleading claims so far used to defeat the ERA, such as the argument that it would require coeducational bathrooms, but these claims are nevertheless real and, in my opinion, make the success of a personhood human life amendment highly doubtful at this time.

It is the great merit of Senate Joint Resolution 110, the "Human Life Federalism Amendment," that it cannot be accused of locking the Nation into any kind of absolutism in either direction. It permits divergent and evolving legislation, the correction of mistakes, and openminded debate by all concerned. And alone among all the proposals before you, it clearly rebukes the Supreme Court for intruding into the realm reserved for legislation.

Does it also overcome the greatest flaw in *Roe* v. *Wade* to which I have pointed: pretending, and requiring the States to pretend, not to know whether actual human life exists prior to birth?

Now, the amendment proposed does not point to the unborn child and say, "Look, there is a person," but it does remove the blindfold fastened on to all of us by *Roe* v. *Wade*. It does permit us to look and see and conceptualize the facts for ourselves. And I am confident that for the most part the unborn will be acknowledged and protected, primarily because, in the absence of religious myth, there is no nonarbitrary way to exclude unborn children from the concept of "human being" without also excluding newborn infants, the latter being an exclusion which is still intuitively unacceptable to most people.

An arbitrary or nominalist definition of who is a human being will thus no longer be required by our Constitution. The precedent for further mandatory dehumanization is excised.

At the same time, reason can again appeal to facts against power. The 1984 axiom that "war is peace" is no longer official policy. Of course, neither is it stated in the amendment that "war is war," but frankly I am satisfied to be able to argue the issue by appealing directly to the facts and concepts at issue.

Under this amendment, we may find ourselves in the minority, but we will not find ourselves excluded from debate by prior stipulated definitions of the beings whose interests are at stake. We may disagree with our fellow citizens, but we will not find ourselves alienated from the fundamental law of our land. And even in disagreement, there is a bond to our neighbors in the hope of persuasion. Political dialog and accommodation become once again worthwhile because local political decisions can and must be made. Free speech itself can again matter because it can be effective speech.[7]

Thank you.

Senator HATCH. Thank you, Professor Stith.

[Notes to Professor Stith's testimony and two articles on abortion and human rights follow:]

Notes to Prof. Stith's Testimony—November 12, 1981

1. *Roe* v. *Wade* 93 S. Ct. 705, 732–33 (1973) and *Doe* v. *Bolton*, 93 S. Ct. 739, 746 (1973). In the recent funding decision, *Harris* v. *McRae*, 100 S. Ct. 2671, 2687–2688 (1980), it was taken for granted by all parties and by the Court that even in the third trimester maternal health broadly defined outweighs the "potential life" of the fetus.

2. See *Planned Parenthood of Central Missouri* v. *Danforth*, 96 S. Ct. 2831 (1976).

3. See the consensus of most academics on this matter well summarized by Senator Orrin Hatch in the *Congressional Record* for September 21, 1981, at S10195.

4. Most of the rest of the world appears to admit that abortion takes a human life, even when the practice is defended. For example, a West German Constitutional Court dissenting opinion supported the decriminalization of abortion in the first trimester, but nonetheless stated: "[T]he life of each individual human being is self-evidently a central value of the legal order. It is *uncontested* [emphasis added] that the constitutional duty to protect this life also includes its preliminary stages prior to birth." "West German Abortion Decision", translated by J. D. Gorby and R. E. Jonas, 9 John Marshall Journal of Practice and Procedure 605, 663 (1976).

5. I am assuming here that neither ignorance nor religious revelation can be invoked here constitutionally to allege that the minor physical differences in and out of the womb are metaphysically major. Other ages may well have been able honestly to draw lines which modern medical knowledge and the secular state prevent us from doing.

6. The conventionalism of *Roe* v. *Wade* is also shown by the fact that Justice Blackmum appeals to the conclusions of past ages and religions to support his position, without inquiring into the validity of the fact and value premises supporting such conclusions. If he wanted to find out a true or right answer regarding abortion, he would obviously have to make such an inquiry. (We would not think it a sufficient argument for the permissibility of slavery that most ages have thought it justified.) Instead, he seems to treat the definition of life as a matter of mere social convention. See *Roe* at 715 ff, 730. *Cf.* footnote 5 *supra*.

7. Before closing, let me comment briefly on the wording of SJR 110. Upon further consideration of the idea of concurrent power, as developed particularly in *U.S.* v. *Lanza*, 43 S. Ct. 141 (1922) I am no longer persuaded of some of the suggestions I previously made in correspondence with the Committee.

I have no disagreement with the substance of SJR 110. However, my considered position is that the cleanest and clearest wording for the amendment is as follows: No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

As you can see, the first sentence has been slightly reworded, in order to make even more clear that absolutely no right to abortion is provided under the Constitution.

In addition, the previous proviso has been eliminated and the underlined words have been added. The sole purpose of these changes is to clarify that the term "concurrent power" has the same meaning here as in the *Lanza* case cited above. This latter clarification is quite important in order to avoid leaving the meaning of the amendment to the federal courts to determine.

As I understand, Prof. Victor Rosenblum will offer additional arguments in favor of these changes in his testimony on November 16, 1981. In addition, I shall be writing the committee as soon as possible myself with regard to the concurrent power-concurrent validity idea, which is the most significant of the re-wording I am suggesting.

For further elaboration of my more theoretical arguments regarding the impact of *Roe* v. *Wade* on human rights in general, see the two appended articles:

R. Stith, "The World as Reality, as Resource, and as Pretense", 20 American Journal of Jurisprudence 141 (1975).

R. Stith, "The Problem of Public Pretense", VIII Indian Philosophical Quarterly 13 (1980).

Indian Philosophical Quarterly Vol VIII, No. 1 (1980)

THE PROBLEM OF PUBLIC PRETENSE

Human rights are proclaimed more often than they are observed. Is this proclamation then a pretense, a mere public lip-service to principles privately ignored? Do our leaders seek to *be* just or only to *appear* just?

One problem in answering these questions is that if the pretense, the appearance, is truly well done it is almost indistinguishable from reality. A good pretender, after all, will conform his conduct to his stated principles whenever he is being watched. Yet I think some progress toward answers can be made. A liar's story is not likely to be as consistent as that of someone telling the truth. By looking carefully at what public figures *say* about human rights, we may be able to discern such obvious arbitrariness that we can dismiss their pretensions as pious hypocrisy. On the other hand, if we uncover no inconsistencies (or if the inconsistencies revealed are later rectified) we then cannot know whether rights rule in their hearts.

This essay has three parts. The first sets forth the general problem of pretense, outlined above, in more detail. Through a game-playing analogy, it is argued that self-interest is likely to result in pretense. We have good reason to be wary of public professions of piety.

The significance of arbitrariness in the recognition of human rights as a proof of pretense is then examined. Unless all arbitrariness in the acknowledgement of human rights is condemned, no human rights, including our own, are secure. However, the irony of this argument is also pointed out. For the public censure of arbitrariness may itself be only a pretense arising from the real dangers which such arbitrariness poses for all, rather than a manifestation of a genuine commitment to subordinate oneself to justice even when one could get away with only appearing just to others.

The final section of this essay considers the U. S. Supreme Court's decision in *Roe V. Wade* as a case study in the problem of pretense. It will be argued that, whatever may be the right answer to the abortion question, the Court's complete disregard of the child before birth is clearly arbitrary and inconsistent with a commitment even to post-natal human rights. Overturning ***Roe***, is this in the interest of all human beings—even of those who think they have non-arbitrary grounds, not mentioned by the Court, for approving of abortion. Yet if *Roe* is opposed only because its non-serious attitude to human rights endangers us personally, then such opposition itself lacks a serious concern for others.

The Danger of Pretense :

Suppose a number of people sitting down to play poker. Would it be difficult for all to agree not to cheat? Of course not. No one would play in the absence of an agreement to abide by the rules. So anyone who wishes the game to be played will promise not to cheat. But are such promises always evidence of a morally serious commitment to the rules? Of course not. Even an amoral and self-interested person would not say openly that he planned to cheat, if he wished to have a chance to cheat. His interest is precisely in saying one thing and doing another, whenever he can get away with it. Therefore, public declarations against cheating are no guarantee of genuine commitment.

In order to focus upon the dignity of the human person, what has just been said should be translated from the language of rules to that of rights: Everyone in a card game would recognize the existence of a right not to be cheated (or more elaborately, a right to gain whatever one can according to the rules). Even someone who planned to cheat secretly would publicly profess to uphold such rights. Moreover, the very motivation, financial gain, which leads him to cheat also leads to his pious talk of rights.

Our would-be cheater knows, of course, that if all acted as he would like to act the game could not go on. But this knowledge cannot motivate him not to cheat when he will not be caught (nor, what amounts to the same thing, when the risks of cheating are outweighed by the benefits to be gained). For what he does secretly will not affect the actions of others.[1] Whether they do or do not cheat is causally entirely unrelated to what he does. Moreover, even if this problem is made public, it is not resolvable. If all the game players are self-interested, they will certainly be able to agree that each must renounce cheating in order for the game to go on, but just as certainly they will be unable to generate a motive for private adherence to the very principle which they all agree to be necessary. Self-interest can discover what rights should be observed, but it cannot motivate observance.[2] As long as one's cheating remains undetected, it cannot affect what others do, and therefore the desire to have others not cheat cannot motivate one not to cheat in secret. Making this dilemma public cannot lead to taking rights seriously in private, but only to the abandonment of the game altogether.

Why, then, does the game go on? One reason may be that secrecy has been entirely eliminated. If everyone's hands and cards can be constantly observed, appearing not to cheat can be achieved only by not cheating in fact. A watched would-be cheater will act no differently than someone honestly committed to the rights of others.

Yet omniscience may be difficult, and we surely hope that it is unnecessary. We all (both cheaters and non-cheaters) hope that we can rely on the commitment of our fellow-players not to cheat. We hope that our neighbours are motivated by more than self-interest, that their protestations of concern for others' rights are not mere pretense. But is our hope justified? How can we know whether or not we are being fooled, taken in by mere pretense?

As we transpose our dilemma from the card table to the social world, these questions take on new force. The same motivation to pretense exists here on a larger scale. That is, rational and amoral self-interest must lead to a public agreement on certain rights (e.g. life, liberty and property) and to a personal desire not to *appear* to violate these rights. But, once again, such self-interest alone can generate no reason to abide by these principles in secret. And to eliminate all pockets of secrecy in society would be far more difficult and far more repugnantly invasive of our privacy than simply to make sure all hands and cards stay on the table.

Morever, we have been assuming that our cheater wishes to keep playing cards with everyone at the table. It is only on this assumption that watching him makes him conform to the rules. But if he is only pretending to subscribe to these rules, he will not only violate them in secret, but will do so publicly if it becomes in his interest to do so. For example, if one card player is exceptionally rich and weak, the rest may in the end put down their cards and simply take his money— if the benefits of such a move outweigh the problems it will pose for future relations with him and with each other.

Therefore, insofar as we wish neither to be secretly cheated nor perhaps even to be openly exploited, we want rationally to hope that our fellow-citizens are not just pretending when they claim to care about human rights. Can we so hope?

Proof of Pretense :

Proving the sincerity of others seems impossible. Practical and political problems aside, one can never prove that a given appearance is backed up by reality, because a really good pretender will appear exactly like a non-pretender, except when he is not watched or is ready to abandon the game.

Proving the *in*sincerity of others may be a little easier. That is, although the fact that someone is never caught cheating does not prove that he adheres to a rule against cheating (or even that he has not been cheating all along), the fact that someone *is* caught cheating would seem at first sight to prove that he does not subscribe to a rule against cheating.

But here we encounter the problem of weakness of will. Even a very sincere opponent of cheating may find himself sometimes succumbing to temptation—say, if his debts are great and so is the pot. Such a person is not a pretender, and is not necessarily an untrustworthy game-player—except when the stakes are high. Of course, if someone is so weak of will that he is tempted by even the smallest pot, then he is no different in behavior from the pretender, who lacks only his qualms.[3] Yet, for the most part, weak-willed people would make reasonably good neighbours if they only now and again gave in to strong temptation.

Weak-willed people, unfortunately, may not only act in violation of their principles, they may try to justify their acts. For the sake of public appearance they may become pretenders in part. Their adherence to principle may be genuine, but the alleged exception allowing their behaviour is a pretense. But there now exists a discrepancy between the attempt to appear virtuous and the attempt to be virtuous, which makes the weak-willed person almost as dangerous as the amoral pretender.

This is so because no authoritative system of ideas (e. g., principles of human rights) can permit arbitrary exceptions. This is a matter of definition. No matter how complete and strict a set of principles may be, if one can carve out arbitrary exceptions, the principles lose all force. To affirm the right to make even one exception without adequate justification is to disaffirm the principle excepted to. Someone who publicly affirms both principle and exception must be only pretending to believe either in the first or the second. Either this person has been all along a mere pretender to principle, or he is committed to principle in his heart but now finds himself dishonestly claiming an exception for his own conduct.

But he has now been "caught in a lie"; that is, he has made claims inconsistent with his prior public principles. What will he do? Will his desire to appear virtuous destory his remaining virtuous, as he is forced by consistency to expand his exception and to allow new ones, to tell more lies in order to cover up the first? Note also that even if the principles he holds retain some force in his own heart, he may have lost all ability critically to respond to another pretender's private or public wrongs. This other pretender can always ask: "How is what I did any different or worse than what you did?", and the weak-willed person will have no answer. That is, he will have no answer unless he somehow summons up the courage to admit that the exception he himself had previously claimed was wrong. But this answer, though possible, seems unlikely in a weak-willed person. Particularly if the original exception was made under relatively non-tempting circumstances, the weak-willed person seems unlikely to recant. We all have some sympathy for the person who does wrong when he has a great deal personally to gain or to lose. But we expect more of a person whose self is little threatened by his decision. If such a person arbitrarily makes exceptions he would mildly prefer, we may rightfully think him so weak as to be no more trustworthy than an amoral pretender.[4]

Therefore, we may conclude that someone is not to trusted who publicly claims to be governed by a set of principles but also claims a right to make one or more exceptions without plausible justification. Either he is a pretender through and through, or he is a weak-willed person who by pretense has boxed himself into a situation where he cannot logically resist the pretensions of others even if he could withstand his own unprincipled desires. In the latter case, particularly if he has been weak in the absence of great temptation or duress, he cannot be relied on in the future to adhere to or to return to principle.

Suppose that your neighbour at the game table whispers to you the suggestion that the two of you work together to take a third for all he has. You ask in return "How do I know you won't cheat me, too?" Would "Oh, I would never do that." convince you? Of course not, because if your neighbour can arbitrarily exclude a third person from his non-cheating pledge, then he can just as easily exclude you. He is a pretender and is not to be trusted. Would "Hey, I'd never try that. I know you'd beat me up, or your friends would." convince you that he did not believe in cheating you? To say that the weak and friendless are cheatable does not seem a principled exception, and someone making such a statement would have to be watched closely. Would something like this then be convincing "Listen, he's a black man; I'd never cheat a lighter-skinned man"? Here the question is more difficult to answer. If the third person is weak and friendless, as well as black, suspicion is certainly justified. But if on the basis of the rest of your neighbour's speech and conduct he seems consistently to make a moral distinction between white and black (or between other universal racial characteristics, if there are any) then perhaps in his mind his promise has a principled basis, and he can be trusted. One could either question him at length, or (as would more likely be in practice) one could decide on the basis of the plausibility of such consistent racism. Such a judgement would no doubt vary with the mores of the times. But what is constant is that someone who affirms arbitrary exceptions to a principle cannot be trusted to abide by the principle in question.

Lest there be some misunderstanding : I am not suggesting that moral integrity requires absolutism, but only that it requires non-arbitrariness. If one believes in given moral principles, one will never simply disregard them. When one acts contrary to them, one will at least have taken them into account before finding them outweighed by other principles. So, for example, a card player is not obviously lying when he whispers that he knows cheating is wrong but that he is going to cheat the other fellow out of revenge for a past insult. Perhaps he sincerely and strongly opposes cheating when no other principle is involved, but simply thinks that a moral demand for retaliation must take priority over a demand not to cheat. In this case he will not claim that the other has no right not to be cheated. He will acknowledge such a right in general, but argue that it is here outweighted by the right or duty of revenge.

Nor am I suggesting that everyone who is arbitrary is acting out of self-interest. Self-interest (which includes the desire for the praise of others) is a likely motive for pretense, as we have seen, but there may be other motives. Or someone may be simply not morally serious—a happy-go-lucky fellow who pays little attention to what he says or does. When someone who claims to believe in human rights willfully violates them arbitrarily, we know only that his claims are not to be relied on. We do not know for sure why he violated his principles, though we may suspect some self-interest.

Yet even with these qualifications, the non-arbitrariness test here enunciated has enormous analytical and political power. For it means that a *single* willful gap in a system of moral or legal rights is enough to undermine the *entire* system.[5] No one who takes human rights seriously will think it right wholly to ignore them on occasion. Therefore, anyone who does think it permisible now and then to ignore human rights must be only pretending to take them seriously. He cannot be trusted when his hands are under the table, certainly. And he really cannot even be trusted to keep up his public pretense if he should wish another exception in the future. If one arbitrary exception is justified, why not another—as long as no one who can effectively oppose him objects.

This test for pretense is surely well-known and widely used. Why else is the charge of hypocrisy so common in politics? Everyone can see real or apparent arbitrariness in his opponent's positions, and he attacks these flaws with glee not only because they reveal the opponent to be an untidy fellow, but because they permit the charge of pretense to be explicitly or implicitly levelled. And this charge, if carried, discredits the opponent not only at the arbitrary margins of his position but through and through. Thus the frequency of such charges does not detract from their seriousness. They are common for the same reason that they are telling: because a single knowingly affirmed instance of arbitrariness means that the affirmer is not really bound by the principles he proclaims, and therefore he cannot be trusted.

Alas, our pretender may be too clever for us. He may finally back off from his attempted arbitrariness (perhaps because of arguments like those made here) and publicly extend his pretense beyond the point which his interests dictate at first sight. So, for example, he may concede the rights of a weak race not because he cares about its members as human beings, but only because he has no plausible rationalizations for discrimination and he does not want people to see through his pretended allegiance to human rights.

Thus our test may succeed only in driving pretense deeper underground, where it cannot be detected as easily. Is there, then, any point to our efforts? I think there is. As long as someone affirms the right to be arbitrary, he cannot be trusted. He is a pretender in whole or in part. Either he is unprincipled or his compromised principles provide no effective protection against further violations of human rights. As long as public arbitrariness reigns, we can have no security in private now, or in public if we should become weak, friendless, or otherwise unable to demand deference. But if pretense is driven underground, at least there remains no public precedent for further violations. And--who knows--perhaps the former pretenders have truly repented. not to increase their own credibility, but because they now have been converted to a belief in human rights. At least we can hope so.

Pretending not to Know Whether Life Exists Before Birth:

The U.S. Supreme Courts' 1973 decision *W Roe v. Wade* provides an exceptionally clear case of the kind of arbitrary dismissal of human rights discussed in the theory developed above. Because it is not compatible with principled consideration of basic rights, it both provides a logical precedent for further rights violations and reveals those who support *Roe's* reasoning (not necessarily those who support abortion itself, as we shall see) to be conscious or unconscious pretenders if they elsewhere affirm life as a human right. Such pretense to principle endangers all human rights and should be opposed even by those who favour abortion on grounds arguably less arbitrary than those advanced by the Court. Let me try to demonstrate these assertions.

Roe v. Wade does not allow the states to protect the fetus except as merely potential human life, even in the last months before birth. In describing the permissible limits of state abortion laws, the Court declares:

> For the stage *subsequent* to viability, the State in promoting its interest in the *potentiality* of human life may, if it chooses, regulate, and even prescribe abortion, except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.[6] [Emphases added]

In reaching its position, the court states that "[T]here has always been strong support for the view that life does not begin until live birth," that "[i] n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth..." and that even a wrongful death action following still birth "..would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life."[7]

The court clearly speaks and acts as though the existence of actual human life prior to birth were at best uncertain. Indeed, so certain is it of its uncertainty that, without explanation, it *allows* the states to permit abortion for *any* reason right up to birth, and *requires* the states to prefer the health (or simply "well-being")[8] of the mother to the life of the child, even just before birth. The court treats, and requires the states to treat, the viable child before birth as though it were not a living human being whose rights may not be violated without serious justification. In other words, a child born at eight months gestation is presumably actual human life in the eyes of the court, whereas a more developed child at nine months in the womb cannot be said to be a living human being.

Is such position arbitrary? Would someone who consistently held legal or moral principles of human rights, applicable to the newborn, wholly ignore the interests of the child about-to-be-born? Note that our question is not whether allowing late-term abortion is itself arbitrary. We could not reach an answer to the latter question without considering more factors than we have here. Rather, our question is only whether it is arbitrary not to recognize a viable fetus as an actual existing human being, and thus at least as one factor going into a difficult decision.[9]

Now, almost the only difference between the premature newborn and the prè-born is one of location (*ex* or *in utero*). Does our moral practice, in regard to rights and to all other matters, permit location *per se* to determine the very existence of living humanity? I think not. True, there is also the fact that its pre-birth location *hides* the unborn child from direct view (though not from touch and hearing). But we usually regard the human tendency to ignore those we do not see (e.g., in dropping bombs) as a regrettable failing to be overcome, not a principle to affirm. No one who really cared about infant life would purposely ignore it when hidden. There are, of course, likewise some biological adaptations to the new location which take place at birth—primarily the shift from placental to pulmonary oxygenation. But these, too, do not seem morally decisive. Artificially filtering a kidney patient's blood does not make him non-living; presumably oxigenating it would be no more morally significant, especially if he were quite capable of functioning on his own as soon as necessary.

The only way, I suggest, that birth could be seen to be the beginning of actual human life would be if one of these physically minor changes mentioned above were taken to be metaphysically major. For example, someone might believe in a new scripture stating that God creates a soul when the child's head first emerges from the womb, or when the child takes its first deep breath of air. Such a believer would certainly not be a pretender when he claimed to be committed to human rights only after birth. But the court does not (and perhaps constitutionally could not) claim to hold any such beliefs which could make its disregard of the child seem less arbitrary.[10]

We must conclude, therefore, that the Supreme Court (or, more exactly, those seven members who joined in the *Roe* opinion) does not take the right to life seriously, even after birth. If someone cared at all seriously about the child after birth, he would at least not ignore, and require others to ignore, the very existence of that same child hidden in the womb. He might favor late abortion, but he would take into account the harm done to the child. But here the Court has denied the living human reality of the unborn child. Thus a commitment to the human rights of infants simply has had no observable weight in the *Roe v. Wade* decision.

Of course, we do not know *why* the Court pretends not to know that human life exists prior to birth. Perhaps its entire commitment to the human rights of the weak and unwanted is a pretense. Or perhaps it is simply weak-willed and gave into peer pressure from those who wanted abortion somehow legitimated. In the latter case, maybe we can still hope that the Court will protect other human rights, as long as its peers do not object. But if the Court's will is this weak, we cannot expcet much. After all, life-tenured judges not subject to review are in about as neutral and untempting a situation as could ever be created. One can easily understand and sympathize with this kind of arbitrary rationalization from a woman who has had a late-term abortion, but not from these neutral males.

Moreover, the precedent of *Roe* has a force of its own which may be stronger than any weak good will remaining in the Court. Since location is not a plausible basis for distinguishing who is or is not alive or human, will there not be a tendency to fasten onto some other criterion to exclude the pre-born from community concern? And who else will fall within this new category? Handicapped newborns? Children below the age of reason? Anyone not intelligent enough to make a reciprocal promise to respect the rights of others? Anyone not strong or wanted enough to matter?[11]

I do not know. But the alternative to one of these additional restrictions on human rights, given *Roe*, is not the protection of everyone, but is the arbitrary protection of some. That is, if *Roe* is not rationalized by expansion, we are in a sense worse off than if it is. As long as we purposely close our eyes to the existence of the child in the womb, while recognizing its existence after birth, we legitimate wholly arbitrary recognition of fundamental human rights. To approve such unjustified arbitrariness is to deny one's commitments to the principle of human dignity everywhere else as well—in secret already and openly whenever self-interest may permit. We thus have good reason to fear that the Court and those who agree with it[12] will not respect even our adult rights to life in private or public if they ever have an interest in violating them. Indeed, anyone who arbitrarily disregards human life can now rightly claim that he is only doing what the Court has done. If he is punished, this can seem to him only an act of power—rather than one of equal justice.

Perhaps, nevertheless, we ourselves will not be harmed. One cannot predict the future based only upon the structure of ideas. But we can know that even if we remain secure,our safety cannot result from the fact that our law takes human rights seriously, for in *Roe v. Wade* fundamental human rights were arbitrarily disregarded.

Let me hasten to reiterate that this necessary opposition to *Roe* need not result in opposition to all abortion. Much of the world allows abortion to some degree. But to my knowledge nowhere except in the U.S. have lawmakers been ordered to ignore the existence of the child as a living human being prior to birth. For example, a West German Constitutional Court justice wrote, in regard to early abortion, that

> " [T]he life of each individual human being is self-evidently a central value of the legal order. It is *uncontested* that the constitutional duty to protect this life also includes its preliminary stages before birth. " [Emphasis added][13]

Yet this same justice went on to argue that a limited decriminalization of abortion for any reason is constitutionally permissible. Such a person is not obviously pretending. He seems honestly to be weighing in the interests of the child, even though his conclusion is surprising. Thus one need not wish to prohibit abortion in order to agree with the argument of this essay. Even those who support abortion should repudiate *Roe*, because it ignored the unborn without an adequate justification for such disregard. Whatever the right way to treat the very young may be,[14] the thoughtlessness of the Court is not something that can be approved.

Lastly, let us hope that *Roe* will not be repudiated only because it discredits our social commitment to human rights and thus may increase mistrust and insecurity. A repudiation for such a reason is still not a commitment to abide by principle,but is only an attempt to improve the public *appearance* of our commitment to rights. Not only a new public statment, but also a change of heart is needed in the Court and in all those who until now have supported it.

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NOTES

1. This statement assumes that neither the particular cheater nor the fact that *anyone* has cheated has been discovered. In a small group, the latter discovery (as a result, e. g., of extra cards found on the floor) would be enough to upset the game, even if the precise culprit could not be located. But in a large group, such as society itself, the individual cheater is harmed only if he personally is caught. The mere fact that one more crime is discovered to have occurred would be most unlikely to affect the interests of the individual criminal.

2. For a solid analysis of the fact that rational sel-interested individuals will *not* act to achieve even unanimously agreed-upon group goals, unless coerced to do so, see Mancour Olson, *The Logic of Collective Action* (Cambridge : Harvard University Press, 1965).

   Many people falsely think that someone who does not act as he would want others to act (or as he himself would like to act as a rule) is irrational, or at least short-sighted. In fact, his failing is often moral rather than narrowly rational--e. g., a violation of the "golden rule." As long as the short and long run consequences of a particular act of cheating are appraised to be of net benefit, a rational self-interested person will cheat. In the absence of a felt moral demand to follow rules, *not* cheating would be irrational.

3. John Farago called my attention to the significance of "neutrality" in realation to weakness of will.

4. There exists, of course, a third possibility besides pretense and adherence to principle : self-deception. The weak-willed person may seem particularly prone to this failing, which might be called "believing whatever one wants to believe." Now, this is logically impossible. How can one knowlngly lie to oneself and be believed? How can one honestly think that some fact or value precedes one's desires and also that it proceeds from one's desires? But such self-trickery obviously often occurs on some literally unthinkable level. A weak-willed person is likely not only to pretend to an exception for himself, but actually to believe in it. However, I have not considered this third possibility in the body of this essay, because it seems to make no behavioral difference. The person who is able sincerely to shape his principles at will is not governed by them anymore than is the pretender without principles.

   In other words, unconscious pretense is just as untrustworthy as is conscious pretense. However, the word "pretense" unpreceded by "unconscious" does imply a purposeful deception of others which I do not wish necessarily to impute to those who are arbitrary in their words or deeds. "Hypocrite" seems better to cover both types of unprincipled person, but it has such a strong connotation or moral condemnation that I have generally avoided it in favor of the milder though perhaps less accurate word "pretender."

   It mignt be noted significantly that, in one way, unconscious pretense or self-deception is much worse than conscious pretense. The person who makes a worthless public excuse for his conduct may be disarmed in the face of the wrongs of others, but he can still seek privately to live up to his principles. But the person who has deceived himself into an arbitrary exception to his principles now finds his own conscience disarmed, because every attempted return to principle is blocked by the precedent of arbitrary exception.

5. That is, as long as various cases involve the application of a single principle, *e. g.* human dignity, to act self-righteously arbitrary in any one is to abandon the principle. However, if someone claims to adhere to a number of separate principles, the fact that he violates one is not obviously a proof of his insincerity in regard to the others. For example, someone who cheats at cards may still be quite sincere and trustworthy in his refusal to molest children.

6. *Roe v. Wade* 93 S. Ct. 705, 732 (1973)

7. Ibid., pp. 730—731. *Roe* calls the fetus variously "potential life" (pp. 725, 727) "prenatal life" (p. 728), "potential human life" (p. 730) "the potentiality of life" (p. 731), "fetal life" (p. 732), and "the potentiality of human life" (pp. 731, 732). It also states " We need not resolve the difficult question of when life begins." (p. 730), but says "....a legitimate state interest need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth" (p. 725). Putting all this together, one gathers that the Court does not know whether "life" (in the sense of "human life") exists prior to birth, but its potentiality does -- in the form of "prenatal" or "fetal" life.

8. See the material quoted in the text *supra* for the "health" of the "mother" rule. At page 733, *Roe* refers the reader to the companion case of *Doe v. Bolton* 93 S. Ct. 739 (1973). *Doe* in turn elaborates on the concept of "health" :

> ".... [T] he medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health." (p. 746).

This broad concept of health reasons for abortion was recently reaffirmed by the Court in *Colautti v. Franklin* 47 LW 4094, 4096—4097 (1979).

9. I am not even arguing here that the *Roe* Court was arbitrary (at pp. 728-730) in denying legel personhood (as opposed to actual existence) to unborn human life. The assignment of legal personhood is a conclusion, not a fact, and it could not be criticized without an extensive analysis of all reasons of policy and principle going into this conclusion--although I think there is a very strong argument that every living human being *ought* to be considered a legal person. Similarly,

past legal treatment of the unborn as not "persons in the whole sense" (*Roe*, p. 731) cannot easily be faulted without discussing, e. g., tort policy and evidentiary matters which may have made it difficult for the law to give the fetus full legal recognition.

However, in *Roe* the Court is purporting to discern and limit not the law itself but the factual basis upon which past and future law is to be based. It is nonsense to claim that a car does not actually exist when it is in a garage, even if for purposes of interpreting a city ordinance requiring parking stickers the car might non-arbitrarily be denied legal recognition.

Nor does a legal fiction denying recongnition to a car or to an infant provide evidence of their actual non-existence, any more than the U. S. Constitution's slavery provisions provide some evidence that blacks are three-fifths as tall as whites. The provisions once provided that slaves were to count as three fifth of free persons, for purposes of allocating state representative strength at the national level.)

A non-arbitrary decision on what is real (as opposed simply to what is legal) requires factual arguments. (Or, perhaps more exactly, it requires concepts designed to organize experience rather than to govern legal treatment.) But the Court did not consider such arguments.

10. Again, it will not do to appeal, as the court does, to the conclusions that various ages and religions have reached regarding abortion. These conclusions may have been based upon illusion; what matters is whether the factual reasons for these conclusions are still acceptable to us today. Indeed, the very making of such a conclusory appeal may betray a lack of serious concern for the status of the fetus, a willingness to go along with arbitrary convention. See *Roe*, pp. 715 ff, 730.

11. Proposals moving in these directions have recently been made; Dr. James Watson has suggested that we wait until three days after birth before declaring a child alive. *The National Observer*, Sept. 1, 1973. For an excellent philosophical argument for the irrelevance of birth and in favour of infanticide, see Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs*, 2 (1972), see also Duff and Campbell, "Moral and Ethical Dilemmas in the Special Care Nursery," *The New England Journal of Medicine*, 289 (1973). John A. Robertson, in a thorough analysis of the problem, has suggested that infanticide of defectives is "rapidly gaining status as 'good medical parctice." See "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review*. 27 (1975), p. 214. As long ago as 1968, Joseph Fletcher pointed out that the only difference between the fetus and the infant is that the infant breathes with its lungs" and that this difference is not morally significant. He went on to claim self-awareness and a conscious relationship to others as requirements of humanness, concluding that a Down's syndrome child "is not a person". "The Right to Die", *Atlantic Monthly* 221 (April, 1968) pp. 63-64. (Fletcher, and the others mentioned below, are obviously not using the word

"person" in the legal sense discussed in note 9, *supra*, but in the sense of the prior moral or factual reality which the law should take into account.)

H. Tristam Engelhardt, Jr., a prominent ethicist now with the Kennedy Institute in Washington, D.C., has presented the argument "that we do not have obligations to fetuses, infants, animals, and the very senile in the way that we do to normal adult humans, for only normal adult humans are persons in the strict sense of being necessarily objects of respect," "On the Bounds of Freedom: from the Treatment of Fetuses to Euthanasia", *Connecticut Medicine*, Vol. 40, June 1976, pp. 51-52. Social utility should determine whether or not legal protection should be extended to the very young, since no human rights are at stake.

I myself consider the only intellectually honest alternative to ascribing a pre-birth origin to the living human person to be the claim (towards which the writers mentioned above seen to be moving) that moral or factual personhood is *only* an appearance or experience, rather than a reality which may or may not manifest itself in experience. In other words, one could deny personhood to the unborn by arguing that a human person exists only when he is perceived to exist by himself and /or by someone else. This position avoids locating personhood in an underlying reality containing the "potentiality" of acting like a person, and thus avoids being forced to recognize a person in the toddler, in the fetus, and ultimately in the conceptus— where this potentiality first becomes complete, active, and autonomous.

Such arguments restricting the human community to unfounded appearances are fascinating (indeed, metaphysically mind-boggling), but I do not yet see how they can end in a coherent, principled, and workable concept of the human person. See, for example, the problem of whether a sleeping hermit is a person. However, unlike the *Roe* court, those arguing something like this position do seem to treat the issue of who possesses human rights as a morally serious matter.

12. Those who agree with the court are relatively few. While polls which ask whether or not one favours "the Supreme Court decision making abortions legal up to three months of pregnancy" (Harris, 1973) may show majority approval, more accurate questions do not. For example, only 25% of men and 16% of women in 1973 thought abortion should be allowed at more than five months of pregnancy. And even these respondents do not necessarily support the *reasoning* of the Court that the existence or actual human life prior to birth is uncertain. Again in 1973, only 19% of men and 8% of women thought life began at birth. A majority of women and a plurality of men thought it began at conception. (No one was reported to have though that life begins at some point after birth.) See Gallup polls as reviewed by Judith Blake, *Population and Development Review*, Volume 3, Nos. 1 and 2. (1977) This article also demonstrates that there has been little change in public opinion since 1973 on these matters.

13. "West German Abortion Decision", translated by J. D. Gorby and R. E. Jonas, 9 *John Marshall Journal of Practic and Procedure* 605, 663 (1976).

14. My own position is that the equal dignity of human beings means that the law in principle should permit abortion (at any stage of pregnancy) only to save the life of the mother. However, I do not think that logic or the Constitution requires us to punish abortion in way we would the homicide of an adult. Equal concern for all permits different treatment in different circumstances, as long as every distinction has a compelling rational basis; and pregnancy is a unique human relationship which may call for a special kind of care. Moreover, and more importantly, I do not regard anyone who truly agonizes over leaving human life unprotected to be a hypocrite, even if his moral conclusion sharply diverges from my own. Unlike the Court, such a person seems to be attempting to be faithful to principles of human dignity, although his judgment may seem mistaken.

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THE WORLD AS REALITY, AS RESOURCE, AND AS PRETENSE

Richard Stith

If one believes any object to have inherent value, then one will attempt to discover when and where this object is really present, in order not accidentally to do it harm. And so to ignore the existence of an object must indicate a disbelief in its inherent value. By ignoring the child prior to the moment it happens to emerge from the womb, the Supreme Court in *Roe v. Wade* has thus indicated that it does not find an inherent value in an infant even *after* birth. This lack of concern for the inherent value and reality of human life is seen by the author to be a last step in the reduction of the entire world from a reality to a resource, even while pretending otherwise.

THERE IS A CURIOUSLY UNREAL air to the abortion debate. Those few engaged in it are concerned almost exclusively with the issue of where to place the beginning of human life, with little or no attention being given to where that line *has been* placed by the Supreme Court of the United States. Indeed, it might fairly be said that the intellectual and moral correctness of saying that life begins at conception has received more attention than has the correctness of drawing a line at birth, even though the former is still no more than a gleam in the eyes of antiabortionists and the latter is the law of the land.[1]

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[1] *Roe v. Wade,* 410 U.S. 113 (1973), does not allow the states to protect the fetus except as merely potential life, even in the last months before birth. In describing the permissible limits of state abortion laws, the Court declares:

> For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at pp. 164-65. Note that the Court here as elsewhere (pp. 163-64) without explanation prohibits the states from preferring the life of the fetus to the health of the mother. If actual rather than potential life were involved, surely some comment would be called for in giving constitutional priority to health over life. In word and deed, the Court apparently considers the fetus, even just before birth, to be only a "potentiality for human life."

In reaching its position, the Court states that "[t]here has always been strong support for the view that life does not begin until live birth," that "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth . . . ," and that even a wrongful death action following stillbirth ". . . would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." *Id.* at pp. 160-62.

Yet at the same time the Court states, "We need not resolve the difficult question of when life begins." *Id.*, p. 159. And indeed the Court never in so many words *says* that life begins at birth; it merely *treats* (and requires the states to treat) the unborn as no more than potential life. Perhaps that Court does not consider actual human life to exist even in the neonate. If so, then it is incorrect to talk of the Court "drawing a line" at birth. Strictly speaking, my argument in regard to the Court will be simply that if it cared much about life immediately after birth, it would not have failed to recognize actual human life prior to birth. Insofar as we are concerned only to criticize the Court, we need not mention the notion of "line-drawing."

Nevertheless, I have here frequently used the line-drawing metaphor (rather than speaking only of the nonrecognition of unborn human life) because given the context of generalized legal recognition of life after birth, the *effect* of the Court's mandated nonrecognition of actual life prior to birth is to compel a public line to be drawn at birth. I speak of a line in order to deal more precisely with the effect the Court's opinion may have on the cogency of public valuing and reasoning.

Perhaps the focus on conception and points intermediate between it and birth is a tribute to the strength of the antiabortion case, an acknowledgment that the Court's position is untenable and thus not worth discussing. Even so, we who are affected by the decision should find its nature and effects worth considering. This essay is a first step toward such consideration; it begins to look at some of the implications of a national decision to say that life commences at birth. It is not an attempt to decide where else life might begin, and it makes no effort to determine how much moral weight human life may have before or after it has begun. Nor am I particularly interested in analyzing the mind of the Court on the abortion question. Rather, I am solely concerned here to extrapolate the logic of the birth line. I argue that not to recognize human life prior to birth is to say that the existence and value of infant life are dependent on how we normally experience it and react to it, and that this approach to reality and to value has long-range consequences for life *after* birth. My contention is that such a line is a pretense and covers a decision to regard even postnatal human life as no more than a useful resource.

I. REALITY AND PRETENSE

Many points between conception and birth could be thought to be the beginning of life. By "could" I mean that some future theorist might come up with a convincing concept of human life such that a particular development were necessary in order for the zygote-embryo-fetus to achieve human life status. Thus as long as there were any[2] developmental progression between two points, the Court could draw a line between them. It would be pointing, after all, to an apparently real difference, and it might hope that future commentators would explain satisfactorily the significance of the difference—why the difference makes a difference.[3]

The Court, however, did not choose to draw the line at any point between conception and birth; it required us to place the beginning of human life *at* birth. But birth cannot be the beginning of life under *any* viable conception of what it takes to be human. For birth does not describe a progressive change in the individual himself, but only a change in his environment and in his adaptation thereto.[4] It is a geographic rather than a developmental change.

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[2] Some might insist that only a sharp discontinuity could qualify as the beginning of human life, rather than, say, the fuzzy but real line which divides a bald man from one with a good head of hair. It seems to me, however, that while many concepts of human life might require such a discontinuity, it would not be necessarily required by every concept of life. There might be concepts with vague outlines, like baldness; a small change in the right direction would take one over the threshold.

[3] About the only people at this time who seem really sure when life begins are those who say it begins at conception, and only they could disagree with certainty with the Court.

These "conceptionists" (as I shall call them) may feel this confident in part because they simply adapt that concept of life which we use elsewhere to the human species. That is, all individual life (not just human life) is distinguishable from inanimate matter (and from other nearby life) primarily in having separate systemic autonomy, a capacity to regulate and direct its own equilibrium rather than being entirely subject to external forces. Since conception is the point at which that autonomous system begins which we are until our deaths, our conceptional origin seems obvious.

For an excellent rendition of approximately this argument, see Finnis, "The Rights and Wrongs of Abortion," *Philosophy & Public Affairs,* 2 (1973), pp. 144-45.

It is the transtemporal or transdevelopmental character of birth which disqualifies it as a logically possible beginning of life. As long as a line were drawn at some point of developmental difference, the law would at least seem to be treating like cases alike. But if birth is our criterion, then we are treating the less developed but prematurely born infant as human life while the overdue baby in the womb does not yet merit this classification.

"Yet," one wants to ask, "if there is no real difference in the child before and after birth, why do we all pay such attention to birth?" The answer must be, I submit, that birth does make a difference, not a "real" difference, but a difference in experience. Although the infant may be the same in and out of the womb, we normally experience him quite differently, as aptly described by

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[4] The changes in the infant as a result of birth are described as "adjustments" in A. Guyton, *Textbook of Medical Physiology* (W. B. Saunders: 1971), p. 993. The shift from placental to pulmonary oxygenation requires certain cardiovascular alterations. *See id.* at pp. 993-96; *see also* L. Hellman and J. Pritchard, *Williams Obstetrics,* 14th ed. (Appleton-Century-Crofts: 1971), pp. 477-89. Neither the Court nor anyone else, to my knowledge, has ever pointed to these postnatal adjustments as the crucial test of the existence of life. Moreover, prior to and at birth the viable fetus is already immediately capable of whatever adaptation he will undertake, and we usually define living entities by what they are capable of doing rather than by what they are doing. By contrast, a developmental change seems a change in capability, not just a change in what an entity actually does.

Conceptionists go further and argue that the undeveloped zygote is just as capable of life outside the womb as is the developed fetus or the newborn infant; all have the capacity *autonomously* (that is, with the environment supplying materials but not organization or activation) to adapt themselves to extrauterine life (and, eventually, to adult human life). The difference, of course, lies in the time required—a very long time in the case of the zygote. This difference is expressed in the different feel of the words "potentiality" and "capability" (or "capacity"), the former seeming most appropriate to long intervals and the latter to more immediate possibilities. Much of the debate about conception as the beginning of life, it seems to me, is about whether this time difference really matters.

Conceptionists have a very good argument here. Unfortunately, they sometimes obscure it by claiming too much. They should argue only that *insofar* as all later human life develops autonomously from the zygote, we cannot exclude the zygote from any possible concept of human life (since potentiality is here as good as capability and capability is as good as its exercise). Instead, conceptionists sometimes argue that *everything* we ever become is genetically determined. See, e.g., Dr. and Mrs. J. Willke, *Handbook on Abortion* (Hiltz Publishing Co.: 1973), pp. 9, 22. The latter argument seems to me an implausible assertion of nature over nurture. Surely, some aspects of what we are are shaped in part from without us rather than from within us (primarily postnatally). We are in part made rather than developed. These aspects would be only externally-to-be-determined *possibilities* at conception, rather than self-developing potentiality-capabilities.

Of course, in making this more extreme claim conceptionists may be relying on a concept of nature more expansive than the one I have so far used. What an entity is (its nature) could include not only what it now appears to be, nor only what it is of itself capable of becoming, but what it would be if completed as designed. Actually, we use such a criterion throughout daily life: a three-legged horse is still classified as a horse even though it is correct to say that horses have four legs (and even though a horse-like animal belonging to a three-legged species would probably not be called a horse). So, again, one could say that the zygote, fetus, and neonate are by nature (and equally) social (that is, are genetically designed for relationships), even if they are neither actually socialized nor capable by themselves of becoming so.

This powerful if debatable concept of what we are should not be necessary unless our conceptionist is arguing with someone who openly supports infanticide or involuntary euthanasia. Against such an opponent, however, a conceptionist could contend that the infant and the defective individual are in their nature already fully human, even while conceding that their humanity is not now and may never be ful-filled.

Even under this more expansive concept of nature, though, the strongest claim of the conceptionists must be rejected. Some elements of what we are still could not be considered part of our nature at conception—for example, the fact that we are English rather than French speakers. We would genetically have neither capability nor predesign for such elements; they would be mere possibilities.

Roger Wertheimer in explanation of why some liberals date hominization from birth:

> At birth the child leaves its own private space and enters the public world. He becomes an active member of the community, a physically separate and distinct individual. He begins to act and behave like a human being, not just move as he did in the womb. And he can be looked at and acted upon and interacted with. He has needs and wants independent from those of his mother. And so on.[5]

In no case do these distinctions refer to changes in the child himself as opposed to changes in the child's relationship to us and to the rest of his environment. For example, the unborn child also had "needs and wants independent from those of his mother," though prior to birth these needs were to some extent *also* the mother's needs, and many of those around the mother probably acted *as if* his needs were her needs. Again, the contrast between "act and behave" and "move" is either a meaningless one (because the motions of the fetus are not unlike those of the neonate), or else it, too, refers only to an effect these motions may have or not have on others.

No one could or should deny the tremendous importance of our experience of the newborn. I would simply not believe an antiabortionist who asserted that he felt the presence of the child as fully before birth as after. Birth makes a difference *to us,* such a difference that our immediate intuition tells us that birth also may denote something new in the child. We start off with a good reason for *looking* for a real and important change at birth.

And some peoples may, no doubt, have discovered what they thought was a real difference. They may have imagined, in ignorance, that birth heralded a physically new development, or they may have supposed a metaphysical or supernatural change, such as the infusion of a soul, to take place at birth. That is, they may have proven to their own satisfaction that their experience of newness was not *mere* experience (i.e., an illusion), but rather corresponded in some way to reality.

But such avenues to us are closed. We cannot pretend to know less about physiology than we do, nor can our courts honestly or constitutionally adopt a religious belief in ensoulment at birth simply because it is convenient.[6] We can in good faith only try our best to find some secular factual support for our intuition that life may begin at birth. If we cannot find such support, we must regard our experience with the newborn as reflecting only a change in our attitudes toward them rather than a change in them.[7]

If, in spite of our inability to find any possibly significant factual difference, we still persist in classifying two cases differently, then we are basing our classification on what we *know* to be an illusion. And if we go further and claim that this illusion should be expressed as a reality, then we are *pretending*. We either dissimulate or abolish the distinction between truth and falsehood. There is a world of difference between the legitimate philosophical assertion that we can never know more than our own experience and the decision to rest content with an experience we know to be illusory. Honesty would compel us to report the results of our deepest probes, even if we never reach or expect to reach bedrock.

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[5] Wertheimer, "Understanding the Abortion Argument," *Philosophy and Public Affairs,* 1 (1971), p. 78.

[6] And it will not do to appeal, as the Court does, to the *conclusions* that various ages and religions have reached regarding abortion. These conclusions may have been based upon illusion; what matters is whether the factual *reasons* for these conclusions are still acceptable to us today. Indeed, the very making of such a conclusory appeal may betray a lack of serious concern for the *real* status of the fetus, an assumption that the issue is entirely one of arbitrary legal and moral convention. See *Roe v. Wade,* 410 U.S. 113, 130, 160-62 (1973).

[7] The same issue, in much more extreme form, is presented by our experience of the zygote. Few, I think, can directly experience the fertilized egg as an individual human life. To say that it is a human being seems to me prima facie absurd. Yet those who date life from con-

The mind surely loses its equilibrium and its power of resistance to falsehood when it is forced to pretend, when an illusion is proclaimed the only public reality. And woe to those who cannot conform. Alas for the doctor performing a late abortion by hysterotomy. He may not notice that at the moment he lifts the fetus from the womb it is transformed into a human life and is neglected at his peril. Alas for the conscientious jury who must look at a picture of a small curly-haired body and decide whether it is a dead fetus or a dead baby based only on *where* it happened to die.

Nevertheless, the law of our land is now that every doctor, every jury, and every legislature *must* behave as though life did not begin until emergence from the womb. Our Constitution now commands: "Out of sight, out of mind—and keep your eyes closed."

II. INHERENT VALUE AND SELF-INTEREST

In the first section of this essay I have argued that to place the beginning of life at birth is pretense, the preferring of a common illusion to reality. In this section I would like to turn to the issue of what the birth line indicates as to how we *value* human life. I shall try to show that just as the Court's line replaces reality with pretense, so, too, it replaces inherent value with self-interest, even *after* birth.

What exactly is wrong with a little self-delusion in regard to life? Why should we *not* close our eyes to that which, if seen, may confuse our experience and interfere with our social goals? Should we be so pedantically factual that we forget the grand scheme?

One response to questions like these has already been suggested: Those people taken in by the grand schemers are in danger of losing one of their strongest weapons with which to resist tyranny—their reason. But an even more obvious response would surely occur to many: Human life has inherent value. *Therefore* it must not be disregarded.[8]

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ception insist that it is the same system with the same potentialities as it is at birth and that therefore it must be considered the same being; only our experiences of it and attitudes toward it are different.

[8] The words "inherent value" may be inadequate to describe fully the deference-demanding qualities perceived in human life. They have been chosen in part for their simplicity. Further reflection might consider: Does the value which inheres in life result from some intrinsic element of life itself or from an imputation of value by an intuited rule or by someone with authority—e.g., by a deity? Or, again: Does the word "value" adequately describe the demands, primarily ones of nonviolation rather than of maximization, which life places on us? Or would not words such as "sanctity," "sacredness," "dignity," or "respect-worthiness" be more appropriate than "value"? Re-specting an entity seems also immediately to include acknowledging its existence; the connection of valuing and acknowledging is perhaps more indirect.

The latter response does not necessarily imply that human life has absolute value, that late abortion is always wrong. I am suggesting only that if we are concerned for any object, even if not absolutely concerned, we would at least wish not to ignore its existence. We might decide after due deliberation to destroy it for the sake of some higher value, but we would at least wish not *accidentally* to destroy it. We would want to know about it wherever it existed.

If we value human life, then, we want to know when it is really present, so that we may not unnecessarily do it harm. Not only, then, should we not disguise the fact of its existence with a misleading label (e.g., "the potentiality of human life"[9]), but we ought actively to search it out. If we believe in the inherent value of human life, we cannot rest content with acknowledging its existence only when that existence makes a strong impression on us. Rather, we must struggle with the question of when human life *really* begins, and (I have argued) we must conclude at least that it does not come into existence at birth.[10]

Given a particular object of inherent value, we must do two things to safeguard other similar objects of value: first, we must seek to conceptualize those characteristics of the object which distinguish it from that which we do not value; and, second, we must search out other objects with these characteristics in the rest of the world. So it is with human life: if we consider *any* human life to have inherent value, we must first conceptualize the specific characteristics of that life, and then look elsewhere for those same characteristics. We cannot rest either with no concept of the life we value (saying "we need not resolve the difficult question of when life begins"[11]), or with an arbitrary ignoring of entities which fit our concept.

A sufficient motivating force for the decision sharply to distinguish illusion from reality is thus the belief in inherent value. Perhaps this belief is even necessary as well as sufficient; perhaps the sole motivating force behind the quest for the real and the true is our desire to adhere honestly to whatever real values we may think exist. Value realism may be the only foundation for fact realism.[12]

Note that the relationship between value and fact which I suggest is quite different from that which the skeptic might suggest. I am not saying that our personal values distort our perceptions. On the contrary, I am arguing that it is precisely our personal commitment to a value which stands "over against" us which requires us to believe in and to search for facts which also are "other" to us. Far from resulting in ideological distortion, value realism is committed necessarily to seeing through every ideological distortion (even those generated by its own beliefs). In simple terms, someone who believes in the reality of value cannot afford to make mistakes of fact.

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[9] *Roe v. Wade*, 410 U.S. 113, 164 (1973).

[10] The *Roe* opinion indicates the Court's awareness of the issues discussed here. An 1859 American Medical Association report (quoted by the Court) in deploring abortion ascribed its "frightful extent" in part to

> The grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors . . . are based, and only based, upon mistaken and exploded medical dogmas.

While this report ascribed the current state of the law only to ignorance, an 1871 A.M.A. report referred also to the matter of honesty on fundamental matters:

> We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.

Id. at pp. 141-42.

[11] *Id.* at p. 159.

[12] But maybe not. Precisely in life (all life, not just human life) do we not encounter ideas independent of our minds at work shaping the world? At the biological moment of "conception" is not an *idea* "conceived"—namely the idea of the adult entity whose development is beginning? Must not our minds to some extent conform to this idea, regardless of what our values may be? If life is self-defining, can we define it in just any way? Daniel Callahan, in ***Abortion: Law, Choice, and Morality*** (Macmillan: 1970), pp. 354-55, has collected some interesting material on this point.

At the same time, I am not here attempting to refute the skeptic; I do not here seek to prove the actual existence of objects of inherent value. I argue only that if one perceives (or otherwise believes in) such value, he will then also refuse to be guided by illusions he knows to be contrary to fact.

The inverted argument must also hold: if we are guided by superficial experience in setting the bounds of human life, then we do not consider that life to have inherent value. Concretely, if we arbitrarily deny the humanity of infants when they are hidden from us in the womb, we cannot really care about them *out* of the womb. We would never apply the "out of sight, out of mind" principle to something we really cared about, because in our blindness we might do it harm.

So it is impossible to say, for example, that we are committed to the sanctity of life, but only from birth. If life has no sanctity before birth, it cannot logically have sanctity after birth. Other statements, too, which imply that all human life after birth has inherent value (such as calling life "sacred," "fundamental," "of intrinsic value," or "an end-in-itself") are in bad faith if they are made by someone who does not acknowledge the existence of life before birth.

Another way to put this same point is to say that in our law now (and in our society, too, to the extent to which it acquiesces in the line the Court has drawn[13]) infanticide is merely *malum prohibitum* rather than *malum in se*. We cannot feel there to be anything *in se* wrong with depriving an infant of his existence after birth if we do not even bother to acknowledge his existence before birth. If we really cared about *him,* we would at least take him into account in our moral and legal deliberations—even if we finally were to decide because of surrounding circumstances to place, say, a more stringent penalty on postnatal as opposed to prenatal infanticide.

It is too late, *post Roe,* for us to be dismayed by proposals for infanticide.[14] Even if our society does not decide openly to legalize infanticide, we as lawmakers can be doing so only out of concern for ourselves rather than for the newborn. We must be concerned not with the objective value of human life, but with the subjective impact that the killing of infants might have on our collective feelings and interests.

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[13] To my knowledge, there has been no politically significant opposition to the Court's decision except by the conceptionists. Apparently those who argued just recently for intermediate points after conception (e.g., quickening) as the beginning of life are now willing to go along with the Court moving the line all the way up to birth, even though by their own tests life exists earlier.

This political evidence would seem to add an interesting *ad hominem* argument in support of the conceptionist position on the commencement of life: If only those who say that life begins at conception care much about it at any prenatal stage, then it follows that anyone who really cares about unborn life will see that it begins at conception.

[14] Dr. James Watson, Nobel laureate, has echoed Dr. Francis Crick in suggesting that we wait until three days after birth before declaring a child alive. *The National Observer,* Sept. 1, 1973. For an excellent philosophical argument favoring infanticide, see Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs,* 2 (1972). *See also* Duff and Campbell, "Moral

Professor Ronald Green, for example, has articulated well the view that infanticide is undesirable solely because we feel sympathy for babies and it hurts *us* to see them suffer, because if we let other people kill their children maybe someone would kill our children, and, finally, because we ourselves might be endangered if people became callous toward beings similar to ourselves.[15] Sissela Bok emphasizes this last point, saying that the most important reason to prohibit infanticide is because of ". . . the brutalization of those participating in the act and the resultant danger for all who are felt to be undesirable by their families or by others."[16]

There is nothing wrong with such self-interested arguments. They could well *accompany* arguments for the inherent value of life: I might argue against taking someone else's life on the ground that if, in spite of another person's inherent value, he can be placed in jeopardy, then in spite of my own such value I might be killed. Rather, my point is that if we say life begins at birth, *only* self-interested arguments remain to prevent infanticide.

Insofar as we believe human life to possess inherent value, I have argued, we conceive of it as a reality. But what term shall we give to human life to which we are related only by self-interest? I suggest that the most appropriate term is "resource." The word "resource" emphasizes both the purely instrumental nature of such life and our disinterest in knowing when it "really" exists. Resources concern us only insofar as they can affect us as consumers of them. Both in and out of the womb the child is regarded by self-interest as "potential," as a resource. But in the womb its resource value may be not very high (unless we, individually or collectively, want more children), while out of the womb its preservation is much more beneficial to us. (Or more exactly, its destruction is much more harmful.)

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and Ethical Dilemmas in the Special Care Nursery," *The New England Journal of Medicine*, 289 (1973). John A. Robertson, in a thorough analysis of the problem, has suggested that infanticide of defectives is "rapidly gaining status as 'good medical practice.' " "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review*, 27 (1975), p. 214.

[15] Green, "Conferred Rights and the Fetus," *Journal of Religious Ethics*, 2 (1973), pp. 55, 65-66. Mr. Green's argument for abortion and against infanticide is the most systematic and persuasive I have encountered; he comes close to demonstrating that there are no self-interested reasons for being against early abortion. But his approach is by no means unique. It is implicit in the whole "social consequences" school of thought on abortion, discussed in D. Callahan, *Abortion: Law, Choice, and Morality* (Macmillan: 1970), pp. 390-94. Mr. Callahan focuses primarily on Glanville Williams and Garrett Hardin.

[16] Bok, "Ethical Problems of Abortion," *Hastings Center Studies*, 2 (1974), pp. 33, 43. The author of this *Hastings* article, unlike Mr. Green, seems not to be concerned *exclusively* with self-interested arguments; while eschewing respect for life as an end-in-itself, she can perhaps be read to recognize an inherent disvalue in the suffering of others, including infants before and after birth. See *id.*, p. 42 *et seq.*

Interestingly, both these writers argue that even enlightened self-interest would dictate placing the beginning of life at some point in pregnancy *prior* to birth. Sissela Bok does so explicitly in order to avoid opening up the possibility of widespread infanticide with its consequent dangers for us all. *See id.* at p. 50.

There is an important gap, however, in the foregoing analysis. It has been argued that, if one begins with a belief in the inherent value of infants, one will insist on knowing about them even prior to birth; one will be concerned about their reality. On the other hand, if one is concerned for infants only insofar as they affect one's self-interest, one will not insist on knowing about their existence when it does not and will not impinge on this self-interest, because one is concerned about them only as a resource. But the first section of this essay drew a contrast between reality and pretense, not reality and resource. If self-interest implies that one views life as a resource, why the pretense? Why insist that life "really" begins at birth if self-interested parties do not care about "reality"?

The most plausible answer, it seems to me, is that it is convenient even for self-interested persons to pretend to a belief in the inherent value of human life. Certainly many Americans would have been shocked had the Court said directly: "Human life will be recognized only when we consider it in the interests of women to do so." By avoiding such a statement, the Court avoided a clear confrontation between the conflicting inherent value and self-interest approaches to infant life.

Moreover, more than a desire to fool other people may dictate pretense. Our own experience of value is often at least *prima facie* an experience of what we think is inherent value. We think that we would be concerned not to harm an infant accidentally, even if we could not see or know about the harm. It takes a philosopher, such as Mr. Green, to come along and tell us that we care only about how it hurts us to see the infant suffer or die.[17] We do experience inherent value, and it would make us uncomfortable, I suggest, to be forced to restructure our reaction to infants in terms of self-conscious self-interest. How much better to pretend that we do care about infants for their own sake, and when we do not care about them to say they are simply not there.

Finally, not to draw a line at birth may make us fearful of our own safety. If self-interest alone stands in the way of infanticide, how can we be sure that more than the self-interest of others stands in the way of the taking of our own lives? Since we are all human beings, it may make us feel insecure to say openly that the lives of human beings must be ignored in our legislation. How much better, we may feel, to pretend that we do value all human life, by drawing an arbitrary line at which we pretend it begins, and then to try our best to keep up the pretense. Our own peace of mind is thus increased.

The problem with this pretense is that it is transparently so, because it lacks a basis in reality. The line we draw is irrational, if we claim that it corresponds to nonsupernatural fact. Therefore, we are caught in a dilemma: We do not want really to believe in infant inherent value (because to do so would sometimes not be in our self-interest); we do not want openly to disbelieve in infant inherent value (because this, too, would not always be in our self-interest); and we cannot in the long run just pretend (because the pretense is obvious).

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[17] By contrast, we have other experiences which are from the start only self-interested. For example, when we squeamishly wince at the sight of blood during a medical operation, we are concerned primarily about ourselves. Once out of sight, we feel that the object of our consciousness *ought* to be out of mind. I submit that we do not naturally feel the same way about hurting infants.

III. THE WORLD AS REALITY, AS RESOURCE, AND AS PRETENSE

In the remaining part of this essay I would like to suggest, but not argue, that the above dilemma is not unique to the abortion issue. I submit that the problem of pretense is a nearly universal one in our age, and that the abortion controversy provides us with perhaps our last clear chance for a solution. My thought is this: We are today faced with a choice between what I call "the world as reality" and "the world as resource." These two have presently coalesced into "the world as pretense," but this synthesis is inevitably unstable.

The world as reality exists for us to the extent to which we believe the world to have inherent value in any part. For if we so believe, we will form concepts to accord with that which is valuable, and the entities of the world will take shape according to these pregiven concepts. Because we did not consciously create the values we perceive or otherwise believe in (for example, through religious authority), we do not regard these entities as arbitrary constructs either. The logic might run like this: If all reality were a construct of our minds, then we could never say that any entity is "out there" before us. But we know that some valuable entities (e.g., human life) are out there before us. Therefore, at least some facts must be other than human constructs, and it is our task to try to separate fact from mistaken fact.

The world as reality is a hard but, therefore, dependable world. Because values and facts are real they cannot be shoved aside. If we seek to do so, we may break upon them. Suffering (such as the suffering accompanying an unwanted pregnancy) is an inevitable part of the world as reality (here because of the givenness of the value and fact of unborn human life). On the other hand, this same hardness makes the world as reality dependable. It can be stood upon, built upon. Above all, it can be looked upon, that is, contemplated—at least in hope. We can already argue and think *about* it, even when it remains hidden.

The world as resource starts only with self-interest. Whatever (if anything) is "out there" is of interest only insofar as it affects me; it is regarded purely as a resource for the satisfaction of my desires. Far from seeking to know what "shape" it may have in itself, I regard this as a meaningless question. All I can know, or at least care to know, is my experience. True, there is the problem of "resistance"—the world does not yet function as an ideal resource for my consumption. It is like oil that has been insufficiently refined. But I hope for the day when all my world, through the efforts of science and technology on the one hand and of political and moral liberation on the other, becomes a homogeneous energy source for my free choices, when it has been entirely converted to gasoline in my car.[18]

With proper resource management, this world is infinitely malleable. Knowledge is solely a means to increased malleability, never a source of limitation. Suffering (especially in the sense of the acceptance of the given) has been or will soon be eliminated, when we have the know-how. Even consistency is nothing upon which we need break, since there are no necessary concepts. Theories of reality become models useful for prediction alone; having no truth content, they need not be consistent one with another. Nothing can be looked at, but I do not much care, because my eyes have twisted inward.

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[18] For a far more profound reflection on a similar point, see "Die Frage nach der Technik" in M. Heidegger, *Die Technik und die Kehre* (Günther Neske: 1962), p. 5. Originally published in *Vorträge und Aufsätze* (1954).

Perhaps the key modern idea instrumental in converting our world to a resource has been *fairness* (epitomized for our law in the concept of "equal protection") as a governing principle. True, the idea of fairness contains a normative limit on our action, but it is not a limit which imputes inherent value to the things of the world. Instead, it annihilates any inherent value in the world. For how can we deal fairly with everyone's interests until all the values of each have been translated into self-interest? We cannot say that one group is treating the rest of us unfairly in imposing its values upon us if we think of them as also sacrificing themselves for their values. We must first insist that such groups are self-interestedly getting the *benefit* of imposing their preferences on society before we can make them cease and desist in the name of fairness. Fairness has no doubt always had an important subordinate role in the allocation of benefits among parties who are in fact self-interested; but its distinctive effect as the prime constituting principle in modern society may be to convert in our minds all pursuit of inherent value to a facade for the pursuit of self-interest. All love is self-love, we are taught to think today.[19]

A conflict exists, however, between the value-annihilating tendency of fairness and its own presupposition: that there is a class of beings to whom one ought to be fair. We used to think that the monarch fairness demanded that nothing *except another human being* be considered an end in itself. But in legalized abortion, at least insofar as the beginning of life has been placed at birth, human beings have finally also been converted into only a resource for our satisfaction—and mandatorily so, as the constituting and constitutional principle of fairness requires.

Will some human lives (perhaps those of rational adults) or at least some "qualities of life" (perhaps those without suffering) still remain inherent values for us in the future? I do not know.[20] But I suspect that if any inherent value once as fundamental as human life can be so quickly eliminated, then nothing else is likely to withstand much pressure. Mr. Green's not atypical individualism, for example, does more than weaken the rights of fetuses and neonates. Nowhere does he appeal to an inherent value in any human being, or even to an independent moral imperative of fairness. Instead, moral and legal rights are granted to other adults in order to gain the "protection" and "usefulness" of their acknowledgment of our rights.[21] So, it would seem, if someone could not propose a "good deal" to us, we would grant him no rights. The weak are recognized only insofar as it is not in our interest to ignore them. Of course, Mr. Green assumes that few if any rational entities will be so weak as to be ignorable; he grants equal rights to "any being with the capacity to pull the trigger of a gun, and to refrain from doing so out of obedience to moral rules. . . ."[22] In an era of strict gun control, Mr. Green's assumption of nearly universal rights for rational individuals might become questionable; but in his system, even when we are acknowledging the rights of others, we are treating them only as resources for our use and protection.

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[19] The reduction of all value conflicts to questions of fairness may have, of course, one great advantage: peace. The common denominator of self-interest seems to make all human problems in theory solvable without resort to violence. But, like other monarchs, fairness may offer peace only at a cost to the spirit.

[20] However, even if some "qualities of life" were to retain inherent value in the future, such valuation would seem to lead to a search for technology and not reality. An ethic which locates value not in what is (life), but rather in what we experience (life's quality), makes insignificant the question of whether particular individuals exist or should exist, and even the question of whether *anything* exists. What is becomes a resource, and what matters becomes the development of techniques to use this resource to produce valued experiences, whether illusory or not.

The world as pretense follows from the world as resource. For, even in a world like Mr. Green's, it may be pleasant and useful to pretend to believe in an inherent value in everyone able to pull the trigger of a gun. *Publicly* one would always disinterestedly declare it terribly wrong and criminal to harm anyone who can pull a trigger, because one would want personally not to be endangered by angry trigger-pullers and also because one might want to be well liked by one's self-interested fellows. One might for the same reasons stoutly defend minority group trigger-pullers and express great shock and concern that they should be treated unfairly. Perhaps one would even attempt to reinforce one's own protection by pretending there to be a difference in kind between those actually able to pull triggers and those only potentially able to do so.

Yet the world as pretense is unstable—because those in it, upon reflection, know it to be a pretense. It is a game that one will play only as long as one gets something out of it. And only the *appearance* of fair play is necessary in order to get the benefits of the game; there is no reason not to cheat in secret even as one denounces cheaters. Mutual and collective self-interest can indeed result in a rebuilding of moral and legal authority, but only as a façade, a sham. Law will survive only to the extent to which it can eliminate privacy because only in public does everyone have to keep up a pretense, under penalty. But even in the public daytime we shall be pious hypocrites. And the night may remain.

Modern man is caught in a dilemma: He wants the benefits of belief without its drawbacks. He wants the personal meaning and security that come from living in the world as reality, but he wants the freedom and control that come from living in the world as resource. He likes belief, but he wants to believe what he wants. But this does not work. Believing what one wants is called pretending, playing at believing. He plays at inherent value, but he cannot ever let himself really believe in it or it would control him rather than he it.

Is there any way out of the world as pretense, other than into the still greater emptiness and danger of the world as resource? I think there is, if we wish to take it. We can decide to *let* ourselves believe. Of course, this alone is not enough; we cannot believe in a value or in a god simply by choice. We have to think that it really stands "out there," that we have found it rather than made it; otherwise, we are still only pretending. But I suggest that self-conscious self-interest is not all that constant a human experience. We (or most of us) are believers in part at least; we just have to let ourselves be *governed* by this part. We do often have the experience of inherent value; it requires a perverse effort (and one in no way demanded by the search for truth) to learn to think we love infants only because they make us feel good. All we have to do is not make the effort. But then we are out of control. . . .

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[21] Green, "Conferred Rights and the Fetus," *Journal of Religious Ethics,* 2 (1973), p. 60. See generally p. 59 *et seq.*

[22] *Id.* at p. 61.

The same solution might be used in the macrocosm of society. After all, there are still substantial portions of our society who really do believe, who are not just pretending. If we do not want to live in the moral and legal world of pretense, we can simply give comfort and *power* to those in our midst who still believe in inherent value, even if we do not. And this means first of all committing our society to that which most believers still most highly value: human life. But then we are out of control. . . .

Senator HATCH. If I could have all of the constitutional experts come to the table, I would like to ask a few questions.

I want to compliment all four of you, because I think each of you has given eloquent, pertinent statements. We are dedicated to trying to look at both sides of the issue and, of course, allow the people in this country to look at both sides of the issue. The best way that we can do that is through public hearings like this.

Today you have not disappointed us in any way, and I commend all of you. Again, I say that we have a new wave of constitutional scholars in this country, and you four are certainly representative of that. We hear all too often from the same elder statesmen in front of the judiciary; we are very happy to have all four of you here today.

Let me focus, if I can, on several questions relating to the Supreme Court's *Roe* v. *Wade* decision. There seems to be a good deal of controversy, particularly among opponents of abortion, about the significance of the "personhood" concept. That has been mentioned here today.

Could each of you explain for me briefly what the Supreme Court had to say about this issue? Is it necessary to confer personhood upon the unborn in order to overturn the *Roe* decision?

Let us start with you, Professor Regan, and then we will go across the table.

Mr. REGAN. The Supreme Court was nothing if not unclear about this question. At one point Justice Blackmun said that it is not necessary to decide whether the fetus is a person. I would say, contrary to that, that in effect the Supreme Court did say in *Roe* v. *Wade* that the fetus is not a person.

I think that is what the Supreme Court said. I do not, of course, given my general argument, think the Supreme Court had to say that in order to reach the conclusion they did. I think they could have reached their result without taking that position.

I suppose your other question was, "Should an amendment which wants to undo *Roe* v. *Wade* address that question directly?" I guess I do think that either the amendment itself or legislative bodies as enabled by the amendment will, in effect, be addressing that question if they prohibit abortion.

Senator HATCH. Professor Stith.

Mr. STITH. There are really two parts in the *Roe* decision, where they are balancing of the rights of the woman and the rights of whatever there is in the womb.

Looking at only the side of the rights in the womb, there are two possible sources of weight on that side that the Court considers. The first element that it considers is whether or not the unborn child is a person. By a very curious kind of jurisprudence which does not rely at all on any kind of concept of "person," they suggest that because the unborn were not specifically in mind when the framers passed the 14th amendment, they are not persons.

I find a lot of problems with that, because it seems to me you have to look at whether any kind of concept that could make sense of what the framers meant would not have to include the unborn.

Anyway, they said that there is no personhood. They reached that decision prior to the time that they considered whether or not the unborn child is a human being. What they are saying is that the unborn child is not a person, even if it is a human being, which is kind of shocking in light of what the purpose of the 14th amendment was, which was, I think, to guarantee every human being personhood.

Then they go on and say that even if the unborn child is not a person, if it is an actual human being, this might be a compelling State interest, but they say, "We doubt that it is an actual human being, and we will act as though it is only a potential human being and weigh it only that much--as much as potential life is to be weighed, not as much as actual life is to be weighed." But they do not argue biological evidence or any kind of reason why it is not an actual human being. They do not conceptualize human life any more than they conceptualize personhood.

The thrust of my testimony was that, at the very least, we have to permit people to be able to look to those facts—legislatures and the citizenry—to see whether there is a human life being taken and to respond to that. That is a kind of minimum reversal of *Roe* that is needed.

I also must say that I regret that the result may be that many States find that they are human beings who are not legal persons, and that is also a dangerous precedent, but it is one that I do not think, for the reasons I stated in my testimony, can be overturned immediately. Eventually I would like to see a situation where every human being is a person again, but I do not see that in the cards immediately.

Senator HATCH. Professor Gerety.

Mr. GERETY. Justice Blackmun says in the opinion that the unborn have never been recognized as persons in the whole sense. "In view of all this, we do not agree that by adopting one theory of life Texas may override the rights of the pregnant woman that are at stake."

I think the opinion is evasive on the question. I think it is fair to say that.

Dr. Regan over here has actually written an article which bears on this. Let me paraphrase the title. It is, "What I Would Have Written Had I Been Siting on the Supreme Court."

Mr. REGAN. That is a paraphrase.

Mr. **Gerety**. I would have had to concur in the result, I would not have dissented. It is a committee over there like there is a committee here—except that over there everybody shows up. [Laughter.]

It is hard to get opinions written that have a sort of crystalline conviction of holy writ and do not get any dissent. I would say that. But my view of it is this—the one thing that I am sure of about this constitutional controversy is this: Women were getting pushed around. I use that as a flip phrase. They were getting coerced by criminal laws. We could be sure that their liberty, in that prima facie sense, was being infringed. On the other hand, Texas argued, we were pushing them around for a very good reason: We were trying to protect life.

What is before you now is the terrible controversy about this as a conscientious and constitutional matter. That is to say, there is a liberty interest at stake. It has been said that privacy is not in the Constitution, but liberty sure as heck is.

There is a liberty interest at stake, and the argument goes that that liberty interest must be balanced against life. I personally, just as a matter of my private morality, agree. But as a matter of constitutional morality, it seems to me that the one great inhibition on the powers of States and the authority of Government is that it must command consent. When it is going to make massive coercive efforts, as I think it does in the criminal law, in intruding on individual liberty, it should have a powerful, massive majority behind it.

In my view, *Roe* v. *Wade* really is rightly decided. It is a kind of Solomonic decision. It is an unprecedented decision. It is an easily criticized decision. Sure. But they were faced with a darned tough question. On the one hand, we know that the woman's liberty is at stake. On the other hand, maybe personally I feel that a fetus is entitled to the full respect of a human being, but a whole lot of Americans do not.

We can all oppose murder. We can all oppose manslaughter, as I said. We cannot all oppose abortion. In that tragic situation, it seems to me we cannot drastically prohibit it, much as it does not make me happier about the state of human culture or the state of American culture.

That is my view of *Roe* v. *Wade,* and that is my view of the decision. I do not think it is a nicely turned out decision. I think the one sentence I could agree with is this adopting one theory of life. Can a State adopt a theory of life and thereby coerce the liberty, which we know to be there, of a woman? I would say no, not until that theory of life is massively supported by, let us say, three-fourths of the citizens or two-thirds of the citizens, to use the constitutional majority, in that given State or in the Nation. As you know, I consider it a national issue at this point, partly due to *Roe* v. *Wade*.

Senator **Hatch**. Professor Wardle.

Mr. **Wardle**. The two quotes that were just read came from two different parts of the opinion.

The Court first in *Roe* v. *Wade* established the standard of judicial review. First it said that the right of a woman to decide whether or not to have an abortion is a fundamental right. "Fundamental" is a term of art. It means that it is very, very special and can only be restricted, or if State laws infringe upon it, those State laws can only be upheld if there is a compelling State interest and the laws are narrowly drafted to effectuate those interests.

Having established the standard of judicial review, it then went looking for a compelling State interest, and it considered three of them.

The first was whether the unborn was a person, and it said no, they are not persons in the constitutional sense, because essentially it went to a textual analysis and said, "Well, they use 'persons' in the Constitution to describe the people who can be the President of the United States. Obviously, the unborn cannot be President of the United States. Therefore, the unborn are not persons." That is essentially the analysis they went through.

Thus, having rejected personhood as a compelling State interest, it went on to consider whether the interest in maternal health was compelling State interest, and, finally, whether the interest in protecting the life of the unborn, even if the unborn are not persons, was a compelling State interest. It rejected all three of them. Then it constructed its trimester scheme.

It was at the third point that the Court said, "We don't need to decide the issue, and the State cannot by adopting one theory of when life begins." That was rejecting life as a compelling State interest. Back to personhood, it said, "No, it is not a person, and therefore there is no compelling State interest to protect the life of these nonpersons."

Changing personhood would probably, in my opinion, change the result of *Roe* v. *Wade,* although that is not sure, as I indicate in my prepared statement.

Your question was of a little different nature, and that was, "Do you have to change personhood to overturn the doctrine of abortion privacy created by *Roe*?" The answer clearly is no. In fact, you do it a lot more directly if you do as is done in Senate Joint Resolution 110—if you simply say the States do have the right to prohibit and restrict abortion. That is directly answering the question whether the Texas abortion laws or the Georgia abortion laws—Georgia adopted, of course, the Model Penal Code, and it was struck down—can do what they did. That is the question the Court was considering.

No, you do not need to establish personhood in any sense. I think that by doing what Senate Joint Resolution 110 does in the first 10 words, which I think are the most beautiful and well crafted words of the whole proposed amendment—"A right to abortion is not secured by this Constitution"—you essentially overturn 63 pages of *dicta* in *Roe* v. *Wade* or 63 pages of all sorts of highly criticized ruminations. So the declaration of nonpersonhood is one of the things that I think would go by the wayside.

Senator HATCH. If a woman is determined to have an abortion, are there any effective legal or constitutional barriers to her having such an abortion at any time during her pregnancy? In particular, could you share with me your views concerning legal barriers to abortion during the third trimester?

We will start again with you, Professor Regan.

Mr. REGAN. The last time you asked a question, I construed it narrowly and everbody else made a speech. I have a feeling they probably actually did a better job of giving you what you want.

There has been a lot of criticism of the effects of *Roe*, and the criticism has concentrated on the third trimester. I agree that that is a serious problem. Certainly the prospect of abortion for essentially capricious reasons in the third trimester is not at all an appealing prospect.

It does seem to me, however, that if this is what we are really worried about—if what we want to do is to forbid late abortions intended to preserve the woman's psychological and familial interests, much referred to, as opposed to her life or health—there are better ways of going about it than any of the proposed amendments currently before this committee.

One obvious possibility is a more limited amendment. We could have an amendment which would make it clear, altering those first beautiful 10 words, that there was no right to abortion in the third trimester or no right to abortion in the third trimester specifically for psychological and familial reasons. I do not have specific language to offer to you, but if the problem we are worried about is late abortions for particular reasons, let the amendment address that problem.

Senator HATCH. That is certainly one of the problems that I am worried about.

Mr. REGAN. That is the one you asked me to address in this particular point.

Senator HATCH. Is there any effective legal or constitutional barrier to an abortion at any time during pregnancy under *Roe* v. *Wade*?

Mr. REGAN. I was just coming to that. People frequently say there are no barriers. I think that is an over-generalization. The fact of the matter is that there has been, relatively speaking, very little litigation about what happens in the third trimester, if we are talking about especially the Supreme Court level.

My guess is that the Court could surely be persuaded to elaborate on the little bit that it said about the third trimester. I think that the Court might well be persuaded to reject some of the extreme claims that other people have made about what they said in the third trimester. They might make it clear that they did not mean all that they have been claimed to mean. Or indeed they might even be persuaded to change their minds.

Senator HATCH. They have not changed their minds on the fetal protection statutes, for example. There is no obligation on the part of a doctor if a baby is born alive.

Mr. REGAN. I am sorry; I did not hear that, Senator.

Senator HATCH. The Court has ruled on the unconstitutionality of fetal protection statutes and the obligation or nonobligation of a doctor if a fetus is born alive.

Mr. REGAN. I think those statutes have been litigated. They present particular issues. They do not address precisely the question of whether abortion is permitted in the first place in the third trimester and under what circumstances. Those are the issues I am saying have been relatively unelaborated and where I think there is actually a chance of getting the Supreme Court to make clear that it adopts a decision perhaps closer to your own than what many people claim the Supreme Court has said.

Senator HATCH. Professor Stith.

Mr. STITH. As I understand the Court's opinion, there are no barriers to abortion in the first two trimesters in the sense that a woman can have an abortion for any reason. I think this is what people mean when they say there is abortion on demand. Of course, she cannot demand it in the drugstore. There are restrictions as to where the abortion can take place or procedures in the midtrimester.

Senator HATCH. I might add that during the first trimester, there is question whether she can demand an abortion in a drugstore, a barber shop, or wherever else. The fact is that there is nothing preventing her from demanding it, I presume.

Mr. STITH. You are absolutely right. The State cannot even protect the mother's health, much less the child's.

Senator HATCH. That is an important statement. Under *Roe* v. *Wade* and the accompanying decisions, the State cannot even protect the mother's health, let alone the child's during the first trimester. A lot of people do not understand that.

Mr. STITH. In my opinion, the first trimester rule is so absurd that I must say I agree with my colleague, Professor Regan, that the Court would rethink it. I think the justices made it up for political reasons, to make it look as though there was only abortion on demand only for the first trimester and then limited abortion the next trimester and no abortion the third trimester. That is the way a lot of newspapers read it at first. I think it was a political decision. They cannot possibly have meant that States cannot protect women's health in the first trimester. I think we will see a reversal on that.

Senator HATCH. As a practical matter—I do not mean to be facetious—from what I have seen of some abortion clinics, a woman, would probably be better off with a good doctor in a drugstore anyway because there she has some access to drugs and materials and equipment that might be more protective of her than some of the abortion mills that are doing this under color of law today.

Mr. STITH. I admit that the Court is taking its time in making it clear that it did not mean that portion of its decision.

As far as the third trimester is concerned, it seems to me that the Court has shown no signs of retreating there. In the *Harris* v. *McRae* case, an argument was made in favor of funding. The argument used the third trimester as a premise to argue that health is more important than life and therefore it is irrational for the States to prefer fetal life to maternal health, and therefore they must fund abortion for health reasons.

The plaintiffs said, "Look, even in the third trimester a woman's health, broadly defined, is more important than the viable child's life, and therefore you should require funding." The Court did not disagree with that premise. The Court just said, "Well, not funding is not coercing, and so regardless of which is more important, we are not bound by *Roe* here."

But no one in that decision, not the plaintiffs, nor the defendants, nor the Court, disagreed with the premise of that argument, that a viable child's life is constitutionally subject to maternal health in the broad senses that it had been previously defined. I think it is quite clear the Court means that third trimester rule to stand.

I want to reiterate one point I made in my testimony. Even if somehow we were to change that third trimester rule—let us say by an amendment here only addressed the third trimester—it would not go to the fundamental problem of *Roe* v. *Wade*, which I think is this problem of callousness—the sense that one is not even really treating the unborn seriously, as though this were sort of a problem of morality or social convention. People making these arguments are not trying to find a concept of life that is really adequate.

The inadequacy of *Roe's* concept of life is shown most clearly when the Justices treat an identical child in and out of the womb differently. There cannot be any concept that does not treat A identical to A. That is a fundamental rule of logic. The attitude behind it, though, is what worries me the most, and that attitude still prevails, even if you have abortion only up to 6 months.

We have got to restore a legal situation where we can take seriously the demands of the human beings in front of us, where people can respond to their emotional senses of caring, preserving life, and not have to become callous. We do not want to build that kind of a Nation.

Senator HATCH. Professor Gerety.

Mr. GERETY. The burden of your question, I take it, goes to what legislative measures, short of a constitutional amendment, or what restrictive measures, short of a constitutional amendment, might obtain in the area of abortion. Is that right? Is that a fair interpretation of what you are getting at?

Senator HATCH. What I am really interested in is if there are any effective legal or constitutional barriers to a woman having an abortion at any time during her pregnancy, particularly during the third trimester.

Mr. GERETY. Viability should be a good concept. I say that mindful of *Colautti* and some of these other decisions of the Supreme Court and lower courts. They tend to make very little of it.

It seems to me that it is a fundamental notion that when the State can say to a woman, "Look, this fetus is far enough along so that we will take it off your hands, and it will be alive," that is viability. "Just give birth; we will take it. You do not have to have anything to do with it; just give it to us."

At that point, it seems to me, the demand that you not abort is a fair one. The main problems that the Supreme Court has thrown in the way in *Colautti* and some of these other cases of that sort of legislation have been technical, legal ones, a warning to the doctor, and so on. I think they have been a little overstated. I think there has been some real fear that if they give way on viability perhaps they will be in a terrible mess, worse even than the one they are in.

My own view would be that legislation on viability, sensitive, careful legislation, as well as medical efforts on bringing viability back down, would be likely to have some success.

One of the points that I think ought to be made here is this—You made it very well, I think—a debate like this is likely to isolate positions and push people into corners. I think it is not unfair to say that that may have happened a little bit to the Supreme Court. But the Supreme Court, as we know, is evolving and changing in its personnel. I would expect that without a constitutional amendment there would be a somewhat more permissive attitude on some of these questions in the future.

I think viability is the key concept—once you get viability. I think that ought to be taken seriously as a medical matter. Viability is no longer just in the third trimester.

The most classically criticized aspect of this case is, of course, its legislative tone in laying down the first trimester, second trimester, and third trimester. Any first-year law student will say, "Hey, that is not judicial function. You are not supposed to be defining it that way."

Senator **Hatch**. You call that "legislative tone"?

Mr. **Gerety**. It is legislative effort or result. I think it is; on that that they are a little overrigid.

I would say that viability is the key concept there. If we can push a little on that, to be more protective of viable fetuses, we will obtain results that are a kind of genuine compromise between your views and those of some of those in the audience who are in favor of the freedom to have an abortion.

Senator **Hatch**. Professor Wardle, you covered this extensively in your testimony and in your statement, but would you care to add anything further?

Mr. **Wardle**. Briefly, if that is possible. If you have a little button there, you can ring the bell.

Senator **Hatch**. I know better. I have been around law school professors before.

Mr. **Wardle**. Mr. Chairman, the answer to that question depends, in my opinion, on whether you read Supreme Court opinions only and only parts of them and do not pay attention to the judgments in the cases, or whether you pay attention to the judgments that have been rendered by the Supreme Court, and if you also look at the lower court decisions and what the lower courts are in fact doing.

If you pay attention only to the language that is tossed about in some of the opinions, *Roe* v. *Wade* and *Doe* v. *Bolton* have a lot of comforting language, a moral victory, if you will, for postviability regulation. If you look at it, a moral victory is not very comforting when you have *Colautti* v. *Franklin* and the Court strikes down postviability regulations, part of it on a theory of vagueness, part of it on a *Roe* v. *Wade* theory.

In effect, yes, there is language there that says that after viability the States can regulate. There is also language that says, however, except if a woman's health is endangered. Then there is language in *Doe* as well as in *Roe* defining "health" to mean essentially that if the woman wants the abortion then it is in her health interest to have it.

But there is language that would seem to suggest that after viability regulations can occur and would be upheld. The problem is, if you look at the lower court decisions, that is not what happens.

The abortion decisions are so poorly reasoned that I think the lower courts have been unable to identify a principled basis for applying the doctrine of law, and therefore they simply are result oriented. "This is an abortion regulation. The Supreme Court is hostile to abortion. Ergo, this law is unconstitutional." That is about the way it goes.

No, viability, as a practical matter, has not yet in the law marked a significant point. It ought to under the Court's language, but it has not yet.

That brings one final question relating to viability to mind. That is, "Why viability?" The Court tried to give the reason, and in doing so, it did as John Hart Ely said, confused a definition of a syllogism. No one has explained why.

In his concurring opinion, Justice Dougles in *Roe* and *Doe* said quickening was the point at which the State's interest would predominate. Why should it be one over the other? The Court has never attempted to justify that. We can make arguments, but ought not that to be left to the legislatures to decide rather than to law professors or to the Supreme Court to decide?

Senator HATCH. *Roe* v. *Wade* has received a great deal of criticism from a number of legal and constitutional scholars who are not opposed to its substantive policy outcome. Professor Wardle, you quoted, for example, Prof. John Hart Ely, Prof. Alexander Bickel, Prof. Archibald Cox, and Prof. Harry Wellington as a few of the more prominent critics.

I would like to know what is your own perspective on the *Roe* decision from a purely jurisprudential perspective. Would you agree with these criticisms apart from your own views on the abortion issue?

I would like you to think about that for a minute and give me just a couple of minutes. I will be right back.

[Recess taken.]

Senator HATCH. Professor Wardle, let us start with you first on this and go back the other way.

Mr. WARDLE. Yes, I agree with Professor Bickel. Yes, I agree with Prof. John Hart Ely. Yes, I agree with Archibald Cox. Yes, I agree with Richard Epstein and the others who have said this was not a matter for judicial resolution. Bickel put it best when he said, "Why should this be taken from the State legislatures where there can be room for disagreement, where there can be room for experimentation?"

There had been change. Between 1967 and 1972, 18 States had changed their abortion laws, all liberalizing them. Previously, the 19th century abortion laws prohibited all abortions except where necessary to save the life or health of the mother, and those were intact until 1967.

Let me make one quick point here and then conclude. The problem with *Roe* v. *Wade* is, I believe, the same problem with the 19th century laws in the last half of the 20th century, as a jurisprudential matter. That is, both of them refused to acknowledge in law moral dilemmas.

The 19th century said, "If a woman's life is not in danger, there is no moral dilemma; no abortion." *Roe* v. *Wade* said, "If a woman wants an abortion, there is no moral dilemma; she should be able to get an abortion." It refuses to acknowledge the legitimacy of the moral dilemmas that fall in between those two areas.

When States are allowed to regulate abortion, the States can accommodate those moral dilemmas and say, "We think that economic circumstances are a good reason for abortion in State A. In State B, we will say we think the age of the fetus is the most crucial factor, and so we will regulate on that basis." State C will say, "We think that the health interest of the mother is most important." Under the present structure of the law, that is not possible.

Senator HATCH. Professor Gerety.

Mr. GERETY. I said a little while ago I did not think you should listen to me as an expert. I guess now I should say that I do not think you should listen to me as a rationalist, because there is a good portion of the rationalist in me that is unwilling to stake anything on any systematic set of premises and deductions.

You take a decision like *Brown* v. *Board of Education* and say, "What is its textual basis?" Well, slim. That was one of the most heavily criticized decisions academically and politically, too, of course, that we have had.

Roe v. *Wade*, of course, is just the same thing, a little more so. If it is anywhere, I hate to say the left wing, but it is on one of the wings or the margins of the constitutional text. That is to say that the Supreme Court is out on a promontory. It has been out on a lot of promontories. But they are out on one there, and I will not deny it.

The thing I would emphasize is this: This question of the good old federalism argument about the States as laboratories—which is of course what Lynn is saying so strongly and I think you are too—is at stake in your amendment. In the area of individual rights, we have been resistant, especially in the 20th century, and I think happily resistant, to making the States individual laboratories for, let us say, first amendment freedoms or any other fundamental freedoms.

Senator HATCH. I think you argued that in your original remarks.

Mr. GERETY. It is a tough one. I do not want to claim any authority. I do not want to claim any expertise. The way I see it, it is individual freedom on one side that we are sure of and that we are sure that we are going to have to limit, versus a terribly important, tragically important, and yet terribly controversial and difficult to resolve moral matter, which might also suggest the individual freedom of the fetus, and I do not deny that.

In that posture, I think the Supreme Court was right to play out a little Solomon's role and say, "All right. We are just going to take this one, and we are going to resolve it in favor of individual freedom, in favor of a Federal resolution." As I said, it is out on the promontory, out on the margin, but that is where I stand. I will not footnote that one, except to disavow any expertise.

Senator HATCH. Professor Stith.

Mr. STITH. The question is, Do I think that *Roe* v. *Wade* is good jurisprudence, apart from its outcome? I suppose I could respond to that on three levels.

On one level, is it well reasoned? It seems to me that no one could suggest or hardly anyone could suggest that it is well reasoned. That is to say, the three crucial concepts in the decision are not ever articulated—the concept of privacy, the concept of person, and the concept of actual life.

The Court simply asserts that abortion is part of privacy. It does not explain what the concept of privacy is. Why is this concept of privacy so obsessed with things to do with procreation? It seems to have nothing to do, for example, with private consensual sex.

I do not really understand what such a concept of privacy can be. The Justices do not articulate what that concept is. They just assert that it includes abortion. They do not articulate a concept of person. They just say it does not include the unborn. They do not articulate a concept of actual life which could possibly exclude the unborn. So it is very poorly reasoned. It is unprincipled; it is just a matter of assertion.

Another question, though, would be, "Can it be supported?" Even if the Court did a bad job, could the outcome or roughly the same outcome, perhaps not the exact trimester outcome but roughly the same outcome, be supported? That I am not quite as sure of. I do not think it can be supported on the question of actual life. That is, I do not see how any definition of "life" can say that life does not exist prior to birth.

On personhood, it seems to me the question is a little more difficult. It could be that there are reasons for saying that not all human beings are constitutional persons. Although I do not like that, I would have to think more before I could say that that would really be an invalid legal conclusion.

On privacy, I think maybe one can develop a right of privacy which, if other human lives were not involved, would include abortion, but I have not been able to figure it out exactly, but I see some potential there.

Lastly, one could ask, "Should it be supported?" That is to say, should the Court make such a decision, even if they could make a good decision? There I would say no, because I do not think that the appointment of philosopher kings to resolve these difficult issues is the way the Constitution should go.

Even if we can argue that an interpretation is plausibly in the Constitution by means of a very complicated interpretive scheme, I do not think judges should be involved in that kind of tenuous, difficult reasoning. They should stick more to the clear cases.

Senator HATCH. Especially philosopher kings who have not undergone the range of experience and education required of philosopher kings.

Mr. STITH. They do not have the advantages that real philosopher kings have had. They are not in touch with the forms.

Senator HATCH. Plato might feel that you had taken great liberties with his concept when you compared the Supreme Court to philosopher kings.

Mr. STITH. I think that is true. But that last criticism of the Court is kind of a political preference of my own which would require some elaborate argumentation. It goes beyond the question of interpretation to the question of how power should be allocated between legislature and judiciary.

Senator HATCH. Professor Regan.

Mr. REGAN. I agree with Professor Stith that if we are going to talk about criticisms of the Court we should distinguish between different kinds of criticism. One claim that is frequently made is that in *Roe* they wrote a lousy opinion. Another claim is that they went beyond their judicial role. As to the first point, I would agree at least that they did not write a terribly good opinion.

Senator HATCH. Would you agree it is miserable?

Mr. REGAN. I would prefer not to go that far. I think one problem is that the courts do not write ideal opinions. Courts are burdened, they are busy, and none of us is perfect. If courts did write perfect opinions, there would be less for law professors to do, and that would be awful. I think they could have written a much better opinion.

I think Professors Heymann and Barzelay have written an article describing how they could have written a much better opinion along essentially the same lines they did follow—that is to say, explaining why abortion does fall under the right to privacy. And, as Professor Gerety points out, I myself have written an article attempting to describe how they could have written a better opinion taking, really, quite a different approach.

The other claim is the claim that they went beyond their judicial role, and that I think is simply mistaken. The fact is that it has always been an essential part of the Court's role to interpret the Constitution and to protect individual rights. That means sometimes making controversial decisions about what individual rights are. We do not say, and we have never said, that every question should be left to ordinary legislative processes.

The fact of the matter is that *Roe* has been a controversial decision and has made lots of changes in State laws. I do not think, on the whole, that it made greater incursions on State laws than, say, *Brown* v. *Board of Education* or than, say, *Reynolds* v. *Sims*, and I could go on.

The real question, which we should not try to avoid, is, given that the Court was operating within their role, were they right? I think they were.

Senator HATCH. We may want to submit written questions, and we will leave the record open for our colleagues on the Constitution Subcommittee or anyone on the Judiciary Committee, as far as I am concerned, to submit written questions.

Let me ask several questions about the proposed human life federalism amendment, Senate Joint Resolution 110, the one I have offered. I have argued that one of its virtues is that it allows these very difficult issues relating to abortion to be resolved by legislative consensus rather than by solutions imposed upon everyone kicking and screaming by the Supreme Court itself.

I have been criticized, however, for leaving a question of basic individual rights up to a democratic vote, something that is generally inconsistent with the Constitution. In return, I have suggested that Senate Joint Resolution 110 is nevertheless an appropriate constitutional solution because of the deep division over what precisely these individual rights in fact are—the rights of a pregnant woman or rights of the unborn child.

Could you offer some comments on this whole issue of leaving an issue such as abortion to a democratic representative process rather than to unelected jurists?

We will start with you again, Professor Regan.

Mr. REGAN. That is essentially the question I spoke to in my previous comments. I would repeat that we have never said that all questions should be left to the ordinary political processes. In particular, questions about rights should not.

You are absolutely right that the claim can be made that there are rights on both sides of this issue. The same could be said, for example, about the issue of race discrimination. It was claimed in favor of those who wanted to discriminate that there were rights of association. There are usually ways to find rights on both sides.

The mere fact that this is a controversial question about which there is great division in our Nation, which nobody can fail to see, is not by itself an argument for giving it back to the States or taking it away from the Court. The Court has made decisions, decisions that almost everybody would now approve of, on many highly divisive issues, as divisive as abortion.

Senator HATCH. Professor Stith.

Mr. STITH. I would want to first point out that the issue of individual rights is not entirely on one side or the other. To my mind, one of the very most important individual rights is the right to be a political person—that is to say, to participate in the democratic process—the right, in collaboration with my fellow citizens, to talk about the ways we should live together. That is a very important right.

I do not see rights as fundamentally just private spheres of autonomy for individuals but also the right to participate in jointly governing the community that we live in.

If the right to abortion is guaranteed as an absolute, it is true that in one sense individual rights are protected—individual rights to autonomy—but the individual right to participate as a citizen, the political right to political speech, is lost. I really see that as a great loss.

For my part, the only types of individual rights that I think should be guaranteed in the Constitution are those which make political communities possible—that is to say, rights protecting minorities against invidious discrimination, minorities which are isolated and discreet; and free speech, freedom of religion, rights which basically subserve the democratic process and which insure that everyone has a free and equal opportunity to participate in the democratic process.

Beyond that, I see a further resolving of issues on the level of rights to be as much a loss as a gain for us as members of the community. In this case, I do not see how the right to abortion insures women more ability to participate in the political process. I see it as a loss for everyone, and so I think it is appropriate to return it to the legislative sphere.

Senator HATCH. Professor Gerety.

Mr. GERETY. Well, you have a compromise solution. The trouble with compromises a lot of the time, especially when they are a piece of law that somebody has put before you, or a procedure in a committee meeting, or something, is that you sometimes do not see it plain.

My main argument here about your resolution is that it seems to me that it is going to falsify the argument at the constitutional level. We must have an argument at the constitutional level, and I am willing to have one, as a citizen. But I do not think that the argument at the constitutional level should be turned into an argument about, "Do we leave it to the States with the proviso"—the double whammy, as I call it—"that they had better restrict or else the Congress can restrict or not?"

It seems to me the argument at the national level—the argument at the constitutional level—ought to be this:

> Is abortion so offensive to a large majority of our citizens that we can impose the morality that is the basis of that offense upon individuals who claim it is a matter of individual right that they have the freedom to abort?

And I really say this in all honesty; I am not trying to be some political tactician from the minority, Senator. I just think that your amendment is going to cloud up that question and that we are going to have an argument in which one side will be saying, "All we are saying is leave it to the States." Then the other side will be saying, "Well, you are not quite saying that." That is a false argument as far as I am concerned.

The argument is: "Is abortion so wrong that we can impose a prohibition on it as a matter of constitutional morality on individuals?" You know my answers on a number of these things. I just think that your amendment gets us off on the wrong track as a matter of national debate.

Senator HATCH. Let me just say this to you. You would seem to prefer to couch the argument in terms of all or nothing. To me, that is precisely the prescription for continuing division and controversy on this issue. That is where we are now, where there are two sides to this issue that are shrill almost all the time. What we are trying to do is get it to where a consensus can form.

Mr. GERETY. Let us take it on your own ground. Why would you not get rid of the latter proviso? Why would you not say, "The right to abortion is not guaranteed by this Constitution, and the States have the authority to legislate in this regard," so that you would at least get a fair fight? And you know I disagree with that, because I think it gives the 51 percent majorities the power to impose on individuals. I do not see why you stack it, in a sense, in the direction you do.

If you want a pure procedural switch, I say lay it out as a pure procedural switch, but you know as well as I do that it is a little more than that, and you wrote it. As such, I just would prefer the clean, the horrible but clean, moral fight: "Is it or is it not so offensive that we must prohibit it?" You know my personal answer and my political answer diverge.

It is not that this is an insignificant issue. A lot of people have said, "Don't amend the Constitution on abortion. That is a trivial thing to stick in the Constitution." As far as I am concerned, the people who say that have never read the Constitution. It is full of triviality. What is more, abortion is not trivial. I think you have got every right to bring it forward for a national debate on the constitutional amendment. I would like that to focus on the underlying question.

Senator HATCH. One reason we have the last clause in, of course, is that we do not want a token State law to preempt a serious national abortion measure.

Mr. GERETY. But there you have got a bare majority.

Senator HATCH. If I interpret you correctly—and I do not want to misinterpret you because I have enjoyed your being here today—you display a great deal of anguish over this issue; you are not really sure what is the best approach. You do not feel that any of the proposed amendments before this committee constitute a desirable approach. I presume, knowing the University of Pittsburgh, and having made a value judgment about you, that you will keep an open mind on it and see what really does happen.

I believe that you are going to find that I am correct when the polls are taken. You are going to find very little support for NARAL's viewpoint.

Mr. GERETY. For whose viewpoint?

Senator HATCH. NARAL's—the National Abortion Rights Action League. And they know it. That is why they are so upset about this amendment. They will be on the defensive, arguing the most extreme abortion-on-demand position. They are going to have to defend themselves against "Why not a parental consent law? Why not a spousal consent law? Why not a fetal protection law?"

I might also add this: Those on the other extreme who say "We don't want any abortions" do not like it either. They know that this amendment will lead to a consensus and a consensus may very well not be pleasing to either of the extremes.

Mr. GERETY. I assumed that you would hate to think that your amendment to the Constitution would be passed on a confused view of the question. I am fearful that it might be passed on the notion, "All that we are doing is leaving it to the States." As you know, that is not what your amendment does.

Senator HATCH. No, that is not what my amendment does. I will say this: Much as I give the impression that this is a moderate—amendment—I have no doubt in my mind that when the final dust clears, should this amendment pass and be ratified by three-quarters of the States, there will be restrictions placed on abortion all over this country. I do not have any doubt about it. I believe that that consensus will be much easier to argue for than the abortion on demand so-called position that we are putting up with now.

I agree with Professor Wardle. Why is NARAL so concerned about this? They have been arguing for years that the vast majority of people support their position. Why are they not willing to let the people decide then?

Professor Wardle.

Mr. WARDLE. Mr. Chairman, as Professor Regan has said, I think you can find individual rights on both sides of an issue. So you can characterize anything, I think, as a matter of individual rights.

I do not think the labeling is the answer to what social problems are appropriate for judicial resolution as opposed to legislative resolution if you just put the label of individual rights on it. After all, slavery could have been characterized as a matter of individual rights. At least the slave-owning individuals of the South would have argued that.

John Hart Ely wrote an article that was the foreword to the review of the Supreme Court's term a couple of years ago in which he analyzed substantive due process and asked essentially: "What is the justification for the judiciary intervening in the democratic processes and taking issues away from the people and their elected representatives?" And he went through about 15 different theories and not only made good arguments for them all but also made good arguments for rebutting them all. It is a troubling dilemma. Substantive due process always has been.

A couple of the favorite arguments are: "Well, if the legislative or the political processes are frozen, then we have got to get the judiciary involved, because then the political processes are not working and democratic theory is being thwarted." That simply is not the case with the abortion decisions.

In the 6 years before *Roe* v. *Wade*, as I said, 17 or 18 States had changed their abortion laws. It was in the midst of political change, and those who favored liberalizing abortion had proven their success and been able to influence with success State legislatures.

Another theory was religious entanglement. Professor Tribe articulated this in his "Law Review" article originally defending *Roe* v. *Wade*, but to his credit he later reconsidered and abandoned that and said it was ill-conceived and ill-considered in his "Constitutional Law Book." He said that because of the religious overtones legislators were afraid to act. Again, that was another beautiful theory, but it was brutalized by a vicious gang of facts. The history before *Roe* v. *Wade* shows that legislatures were not afraid to liberalize abortion.

The final theory that I want to mention is the discrete and insular minority theory. That is, if legislation is prejudicial to a group that is not capable of protecting its rights in the democratic system in the legislature, then perhaps the State ought to intervene to protect them from legislative tyranny, legislative discrimination.

How does the discrete and insular minority theory stand up to justify *Roe* v. *Wade?* Well, it simply does not. It is a double paradox there. Not only did the Supreme Court itself refuse to intervene to protect the discrete and insular minority. In the abortion context, clearly it is the unborn. They are the ones least capable of having their interests protected in the democratic process in the legislature.

Not only did the Supreme Court not intervene to protect them against legislative attack, but the Supreme Court withdrew all protection and said to the legislature, "You cannot protect them." So the *Roe* decision violation just is not sustainable under that theory of judicial activism or judicial intrusion in the democratic processes.

I think that if the matter belongs in the Constitution there is a way in which it could be gotten in the Constitution. That is article 5. I do not think that it should be slipped in under the ruse of saying, "Well, it is written in the 14th amendment somewhere there in invisible ink."

Finally, I do think that Senate Joint Resolution 110 does present a clear issue on the substantive point. It is not saying, "We know what the right resolution is." It is saying, "We know what the wrong resolution was—that is, abortion on demand is the wrong substantive position. Now we are going to put it to the country to let them decide whether that is or is not true. Does the country want abortion on demand as the constitutional rule of law?" That is a very clear and plain issue, and I think that people ought to be able to exercise their right to choose whether or not that should be a part of our Constitution.

Senator HATCH. Thank you.

Professor Stith.

Mr. STITH. Senator Hatch, I suppose you are trying to close now, but there is one point that I think was brought up in Professor Regan's testimony—which I think Professor Tribe also brought up in the conversation after his testimony, I gather, because I did not see in the testimony—which I think is really a crucial argument here. I wonder if it would be appropriate for each person here to comment on that point.

Senator HATCH. Of course.

Mr. STITH. That is the point that even if we concede that the child is a person, we should not have affirmative duties to take care of the child, and the mother in particular should not have affirmative duties.

This is really a frequent argument, a kind of libertarian argument, that is brought up in the philosophical literature and legal literature. I think it is really significant. It is one which troubles me and which I think about a lot. I would just like to give you my thoughts on it, and I imagine my colleagues would also want to express their thoughts.

The question is, first of all, "Is this an act or omission?'" If it is an omission, is there a duty to do an act such that the omission can be culpable? Professor Regan argued, I think very interestingly, that there are some bases for saying that there is a duty to protect the child. It seems to me that his argument that there is no duty could be taken really to undermine all parental support obligations, at least in the case of an unplanned pregnancy. He seems to argue that you cannot be forced to support a child when you did not intend somehow to bring it into existence.

But the basis for duties to others is not limited to conscious intent or even to what is reasonably foreseeable. We have, for example, the situation of a creation of peril. If you even accidentally put someone else into peril, where they need help, you have got to take care of them until you can get them to someone else who can give them help. That is on the basis of an accident. Most pregnancies at least are not accidental; they were to some degree foreseeable. We know that is what happens sometimes as a result of intercourse, even if they were not desired.

The second question is whether or not abortion is an act. Even if somehow there should be no duty to act so that an omission would be culpable, is abortion an act? It seems to me that it is an act.

It may be that if someone is freezing outside you do not have to open your door and let him in, although some arguments go to the contrary. You can let him freeze in the winter outside. Still, if you leave your door open and he walks in, you cannot throw him back out if you know he is going to die. There is a duty to not act, even in a case where you did not originally mean to take on that person to begin with. Of course, here the child did not really walk in the door; the child was sort of thrust in there by an act of the mother, even though she did not wish that result.

The key criticism I would like to make of Professor Regan's whole argumentation is that it is not true that the great majority of abortions, at least as portrayed by *Roe* v. *Wade,* are done simply with the intention of becoming unpregnant. They are done with the intention of being not a mother. That is to say, they are done with the intention of the termination of life. The burdens that Justice Blackmun talks about that women suffer are not just the burdens of 9 months of pregnancy, but they are the burdens of being a mother.

These burdens could be removed simply by putting the child up for adoption. But that apparently is not enough. One can go through the abortion with the intention of not being a mother, with the intention of not having to face that issue of whether or not to put up a child for adoption—in other words, with the intention of having the child die in order to escape that dilemma.

I would argue that in no circumstance does our law ever permit us actively to do something to someone else with the knowledge that this will cause the person's death and with the intention to cause the person's death. Even if there were no prior duty and even if this were a bare minimal act, still, when that act was intended to cause death, it would not be permitted by our law.

I do want to concede to Professor Regan that if we are talking about a situation of rape, where it is even less than an accident—it is something forced on the woman—and if there were no intent to kill, just an intent to become unpregnant, then I think he has a good argument that the law should not prohibit abortion in those circumstances.

Still, I would not want to write that very subtle moral reasoning into the Constitution, but I would leave that up to the legislatures, and I have no doubt that the great, great majority, if not every legislature, is going to have a rape exception anyway in the final compromise that is reached.

Senator HATCH. Would anyone else care to comment?

Mr. REGAN. Under the circumstances, I might just say a few words.

Senator HATCH. We will make you our last witness here today.

Mr. REGAN. I have already given the subcommittee substantial testimony, which I will not repeat. I have already written a much longer article, which I commend to Professor Stith's attention and which I think answers many of his points.

I would just repeat that, if we look at how pregnancy really affects the woman, we should regard having an abortion as the equivalent of a traditional omission. It is clearly a general principle of our law that people should not be compelled to give aid. That is the question—not whether people should give aid but whether people should be compelled. We value the freedom to choose one's responsibilities.

Finally I would repeat what I have said before: Nowhere else do we impose duties to aid which involve physical invasion and physical burdens remotely comparable to those of pregnancy.

Senator HATCH. Thank you.

Our next hearing on this very important subject will be on Monday, November 16. It will be here in the afternoon at 1:30. We will also hold another meeting of the Constitution Subcommittee at 2 o'clock in this same room on the Freedom of Information Act.

I want to compliment all four of you gentlemen. You certainly have, I think, made your points with skill and clarity. It means a lot to us to be able to preside over hearings like this where we can listen to a wide variety of points of view, even though we may have some measure of disagreement from time to time. Thank you so much.

With that, we will recess this until the next committee meeting.

[Whereupon, at 12:30 p.m., the hearing was recessed, subject to the call of the Chair.]

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

MONDAY, NOVEMBER 16, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 1:40 p.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Stephen Markman, chief counsel; Marci Anderson, clerk; Terry Morris, staff assistant; Julie Holland, counsel, Subcommittee on Agency Administration; John Podesta, minority counsel, Committee on the Judiciary; and Ben Scotch, minority counsel, Committee on the Judiciary.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. This is the seventh in a series of hearings by the Subcommittee on the Constitution on proposed constitutional amendments relating to abortion. Today we will hear testimony from five of the Nation's leading legal and constitutional authorities on abortion, as well as testimony from the author of one of the most thought-provoking books on the moral issues involved in the abortion controversy.

Before we begin this afternoon's hearings, I would once again like to place these in their proper historical perspective. This is in response to those who argue that the Supreme Court has spoken on this issue and that it is somehow violative of our constitutional structure to attempt to overturn their pronouncements in this area.

The Supreme Court, however, as with the other political institutions within our constitutional system, is subject to certain checks and balances. It is elementary, I realize, to say this but there seems to be a great deal of misunderstanding on this basic matter. One of those checks involves the authority of Congress or the States to initiate the constitutional amending process under article 5.

This process can be initiated in response to what are perceived to be erroneous decisions by the Court, or it can be initiated in response to what are perceived to be correct decisions but decisions which nevertheless maintain or establish policies disapproved by the people. Most emphatically, it can be initiated when—as is perceived by many to have been the case in the *Roe* and *Doe* decisions—the Supreme Court itself has been engaged in amending traditional understandings of the Constitution. The Supreme Court possesses no authority to conduct itself as a continuing constitutional convention.

On four occasions in the history of our Republic, the Constitution has been successfully amended in direct response to Supreme Court decisions. First, in 1795 the 11th amendment to the Constitution was ratified in order to overcome the decision of the Supreme Court in *Chisolm* v. *Georgia* that permitted the Federal courts to hear cases in which citizens of one State sued another State. The 11th amendment expressly prohibited the Federal judiciary from hearing such cases.

Next, in 1868 under circumstances not entirely dissimilar to the present circumstances, the 14th amendment was ratified in order to overturn the Supreme Court's *Dred Scott* decision holding that black individuals were nonpersons under the Constitution.

In 1913 the 16th amendment was ratified in order to allow Congress to impose a national income tax upon individuals. This amendment was necessary in order to overturn the High Court's decision in *Pollock* v. *Farmer's Loan & Trust Co.* that a tax that was not apportioned among the States was in violation of the Constitution.

Finally, only 10 years ago the 26th amendment to the Constitution was ratified in order to overturn the holding of the Supreme Court in *Oregon* v. *Mitchell* in 1970, that Congress lacked the authority to impose an 18-year-old vote requirement upon State and local elections.

In addition to these successful amendment efforts, other serious efforts at constitutional revision were made in response to Court decisions on the subject of child labor laws: See, for instance, *Hammer* v. *Dagenhart,* a 1918 case; and State legislative apportionment requirements, *Baker* v. *Carr,* a 1962 case. Indeed, it is debatable whether or not the proposed equal rights amendments effort would have continued to this day had the Court not rejected interpretations of the 14th amendment urged upon it by ERA proponents, such as in the case of *Frontiero* v. *Richardson* in 1973.

In summary, I believe that it ought to be made clear that, should this subcommittee endorse a constitutional proposal, it would be nothing radical. It would be entirely consistent with the text, the spirit, and the history of the Constitution.

What to my mind is radical is the idea of a Supreme Court which looks upon itself as possessing continuing responsibilities to right what they perceive to be wrongs in the Constitution. That is not their authority. They possess no better judgment and no greater wisdom on these matters than any other random group of nine individuals in the country. Their sole responsibility is to interpret the Constitution and laws of the United States as given to them.

I very much look forward to the testimony of our expert witnesses with us this afternoon. We very much appreciate the benefit of their views on these and other matters relating to the abortion issue.

Our first witness this afternoon will be Dennis Horan, who is a partner in the Chicago law firm of Hinshaw, Culbertson, Moelmann, Horan & Fuller. He is a lecturer in medical law at the University of Chicago, a former chairman of the medicine and law committee of the American Bar Association, and an editor of an outstanding recent work on the abortion issue entitled, "New Perspectives on Human Abortion."

Mr. Horan, we will take your testimony at this time.

I would like to request a special favor from our witnesses today. I have to manage the floor fight for Dr. Koop starting this afternoon and I would like to limit witnesses to 10 minutes each, putting their full written statements in the record as though fully delivered. I would like you to summarize as much as you can so that we will have a little more time for questions here today.

Since I understand you will not be here for questions, Mr. Horan, we will give you a few extra minutes if you need them. Go ahead.

STATEMENT OF DENNIS HORAN, OF HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, CHICAGO, ILL.

Mr. HORAN. Thank you very much, Senator, and thank you for accommodating me first because of the problems I have with scheduling.

I am chairman of Americans United for Life, which is a litigation group that has been active in the pro-life movement for the last 10 years, and I myself have been active in litigation in the pro-life movement for about 13 years.

Prof. Victor Rosenblum will offer testimony later today that includes a specific analysis of and suggestions with regard to one of the proposed amendments before you, Senate Joint Resolution 110, introduced by Senator Hatch. I and those attorneys with whom I am most closely associated in the pro-life cause concur with the substance of Professor Rosenblum's testimony.

The United States Supreme Court, in *Roe* v. *Wade*, declared abortion to be a fundamental right under our Constitution and human beings before birth to be legally unprotectable entities in the face of this alleged right, except under narrow, practically meaningless circumstances. In essence, this decision shifted decisively the decisionmaking authority on abortion away from the public forum to the pregnant woman and her physician, encapsulating them both within an alleged constitutionally protected zone of privacy.

Whether or not an unborn child should live or die thus became a matter without public scrutiny or control. The value of each unborn child came to depend solely on the views of the woman who bears the child. Not even the child's father can prevent a unilateral decision to cause the death of their offspring. As a matter of its fundamental law, therefore, our society has adopted an inverted version of a system of reproductive decisionmaking.

It is absurd to argue that such a system of procreative decisionmaking can be adduced from any principles mandated by our Constitution. *Roe* v. *Wade* has been the object of universal criticism by almost all those members of my profession who believe in the Constitution as a document that exists in time and space, rather than as an excuse for flights of fantasy in pursuit of preferred social policies. I shall not repeat their criticisms here.

This subcommittee is concerned with redirecting a public policy created by a misdirected Court, and it is my intent to indicate why and how this might be done. To summarize the paper that I have before me, it is my position that the issue of abortion should be returned to public policy by the passage of Senate Joint Resolution 110.

The present gap in our law that deems destruction of fellow human beings to be a private matter without public interest must be closed, and it is the obligation of this subcommittee to initiate that process. In this regard I must first indicate that I and those with whom I am most closely associated are finally committed to the pro-life cause for one reason: to eliminate the killing. We recognize the law as one social mechanism, perhaps the most important mechanism in our culture, through which this end may be served, and know that the law encompasses the power of Government to tax and to redistribute wealth to serve its ends, in addition to the power to punish conduct as criminal.

However, we also recognize the limitations of law. A criminal law of abortion that is on the books but is unenforced or unenforceable may soothe the conscience but will save few lives. A system of law that punishes those who perform abortions but does nothing to assist the pregnant woman facing social oppression or economic difficulties to carry her child to term, penalizes the result without recognizing its possible cause.

From this practical point of view, a constitutional amendment dealing with abortion must be, above all, an effective means to end the altering of our public policy, to permit the protection of human life before birth through efficient use of all the normal machinery of Government. Constitutional amendments are not self-executing.

Abortion would not magically disappear, nor would it be automatically proscribed, should any of the amendments dealing with abortion that have so far been proposed become part of our Constitution tomorrow. A constitutional amendment in our system of law has mere symbolic import unless it is implemented by one of our independent branches of Government—the State and Federal legislatures, the judiciary, or the executive must act as the amendment requires or permits before it obtains any practical legal effect.

Regulation of abortion practices under any of the proposed amendments would necessarily be an almost exclusively legislative matter. Even those proposed amendments that rely heavily on the judicial branch to coerce in some manner legislatures to enact abortion laws acknowledge this by inference. Courts do not create criminal penalties or appropriate funds in the system of our Government.

The first and most important prerequisite of any amendment dealing with abortion is, therefore, that it effectively empower legislatures to act without the untoward judicial interference that has paralyzed them and distorted the public policy debate on abortion for the past decade.

Of the amendments seriously under consideration by this committee, that recently introduced by Senator Hatch, Senate Joint Resolution 110, deals directly with this consideration by breaking the judicial chains created by the Supreme Court's creation of a fundamental right to abort, by acknowledging the plenary power of the legislature in this area and by providing for a potential national policy through an act of Congress. Under the approach taken by Senator Hatch, abortion would become once again a legislative matter that is subject to usual democratic processes rather than judicial fiat.

Other amendments before this committee have taken a different approach than that proposed by Senator Hatch. By asserting that the unborn are persons under the 5th and 14th amendments to the Constitution for purposes of the right to life acknowledged in those amendments, and by including a specific prohibition on the performance of abortions except under stated circumstances, amendments of this type operate by affirming the existence of an important governmental interest in the unborn as members of the human family and treating them in accord with the principles of justice that currently apply to all.

Rather than do away with any special restraint on the power of Government to proscribe abortion contained in the Constitution, as Senator Hatch's amendment proposes to do, these amendments acknowledge the power of Government to honor the rights and interests of the unborn under the Constitution. The importance of the legal symbolism involved in this approach is hard to overestimate. In the process of legislative action on such an amendment, the public and legislators would be required to consider the subject at the heart of the abortion controversy: the biologically human nature of the unborn child. Moreover, this approach seems most consistent with the ethos of those of us who wish to reestablish some social control over conduct intended to cause the death of some of our fellow humans.

Senate Joint Resolution 110, on the other hand, avoids legal symbolism in favor of legal practicality. It recognizes that no constitutional amendment in this area will have a significant, substantive effect in the absence of legislative action, and therefore forthrightly grants to legislatures the power to act. It provides the potential for development of a national policy on abortion and under what circumstances, if any, it should be permitted, by way of normal democratic processes rather than through the extraordinary process of the constitutional amendment. It relegates consideration of hard cases to the statutory debate, rather than raising them in the context of a debate on the nature of our fundamental law.

I repeat, the fundamental task before this subcommittee as I perceive it is to issue an amendment to the Constitution that will effectively loose the judicial bonds that presently prevent any form of significant collective action to protect the lives of human beings from private conduct intended to cause their death. An individual choice to destroy any member of the human family must not deem to be outside the purview of our system of justice. Put another way, the death of any of our fellow humans cannot be a private matter subject only to the values or lack of them of the one who seeks or causes his or her death. This subcommittee should initiate the process by which this principle is enshrined in our basic law.

As I have said, my involvement in the pro-life cause is motivated by a desire to prevent, through whatever means are practical and available, intentional destruction of the unborn and others potentially subject to the same kind of radical discrimination based on biologic or eugenic criteria.

As a practicing lawyer, I have come to the conclusion that legal symbolism should not stand in the way of any practical step that would permit the law to be effectively employed as a means to this end. In my view Senate Joint Resolution 110 would be, on balance, as effective as any means so far proposed in assuring potential use of the law to protect the youngest members of the human family. I therefore strongly endorse the concept that Senate Joint Resolution 110 represents and urge this subcommittee's favorable action with regard to it.

Thank you.

Senator HATCH. Thank you, Mr. Horan. Thank you for the continuing legal assistance you have offered this subcommittee. We look forward to continuing to work with you and your colleagues, Tom Marzen, Pat Truman, and others.

Let me ask you one question. Some opponents of abortion have criticized Senate Joint Resolution 110, the so-called human life federalism amendment, for implictly reading abortion into the Constitution. How would you respond to this criticism? Are we really doing that in Senate Joint Resolution 110?

Mr. HORAN. On the contrary, Senate Joint Resolution 110 removes abortion because it is already in the Constitution as a result of *Roe* v. *Wade*. Therefore, I would take a very different position. I do not think this puts abortion into the Constitution. Abortion is already there as a part of the right of privacy under *Roe* v. *Wade*.

Senator HATCH. I see. Assume that a constitutional amendment purporting to limit or prohibit abortion was ratified something that Senate Joint Resolution 110 does not attempt to do. What would be the likely scenario that would follow? What would happen if there were a State that refused to adopt prohibitory legislation? Could this be challenged in the courts? Could the courts require a State legislature to act?

Mr. HORAN. Not under Senate Joint Resolution 110. Senate Joint Resolution 110 leaves it up to the State and the Federal Government. If the Federal Government were to pass a statute on abortion, that would be effective everywhere, but if the State were not to enact such a statute it is possible there may not be a section of the criminal code henceforth dealing with the subject matter of abortion. That is a possibility under 110.

Senator HATCH. Why do you think that the people who are the promulgators of abortion on demand are so concerned by Senate Joint Resolution 110, which would leave public policy decisions on abortion to the democratic processes in this country, to elected representatives rather than unelected judges. Why, in your opinion, are they so concerned of that?

Mr. HORAN. They may be afraid of losing as far as the ultimate result is concerned but if, as they say, they are pro-choice people, you would think they should leave it up to the choice of the people.

Senator HATCH. In other words, right now the people have no choice in it at all and public policy in this matter has been made solely by seven unelected Justices on the Supreme Court.

Mr. HORAN. Well, it is probably far worse than that. When the Court creates an opinion, it has an explosive effect on the lower

Federal courts, and the doctrine that is created by the Supreme Court is pushed to its ultimate lengths by the trial courts. Consequently, not only did abortion become legal but many other fundamental rights that individuals thought they had became overridden as a result of lower court rulings which have not been changed by the U.S. Supreme Court. The father's right in the issue is one good example of that.

Well, thank you, Mr. Horan. We appreciate your being with us and all the help that you have given this subcommittee.

Mr. HORAN. Thank you very much.

Senator HATCH. Thank you.

[The prepared statement and magazine article submitted by Mr. Horan follow:]

PREPARED STATEMENT OF DENNIS J. HORAN, ESQ.

My name is Dennis J. Horan. I am Chairman of Americans United for Life. I have come before this Subcommittee to testify on what I perceive to be the fundamental legal considerations in formulating a new national policy on abortion through an Amendment to the United States Constitution.

Professor Victor Rosenblum will offer testimony later today that includes specific analysis of and suggestions with regard to one of the proposed Amendments before you, Senate Joint Resolution 110, introduced by Senator Hatch. I, and those attorneys with whom I am most closely associated in the profile cause, concur with the substance of Professor Rosenblum's testimony.

The United States Supreme Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), declared abortion to be a fundamental "right" under our Constitution and human beings before birth to be legally unprotectable entities in the face of this alleged "right" except under narrow, practically meaningless, circumstances.

In essence, this decision shifted decisively the decisionmaking authority on abortion away from the public forum to the pregnant woman and her physician, encapsuling them both within an alleged constitutionally protected "zone of privacy." Whether or not an unborn child should live or die thus became a matter without public scrutiny or control. The value of each unborn child came to depend solely on the views—however misinformed, erroneous, arbitrary, or capricious—of the woman who bears him or her. Not even the child's father, who is equally responsible for his or her existence, can prevent a unilateral decision to cause the death of his offspring. As a matter of its fundamental law, therefore, our society has adapted an inverted version of a system of reproductive decisionmaking that prevailed in many ancient societies.

It is absurd to argue that such a system of procreative decisionmaking can be adduced from any principles mandated by our Constitution. There certainly is no doubt that the Framers of the Fourteenth Amendment, from which the Court extrapolated the right to abortion, would have regarded the public policy that Supreme Court attributed to them by inference as perverse. Removal of a class of human beings from the purview of the law on the basis of their biological age and development was hardly among the purposes of the post-Civil War Congress that intended to extend full protection of law to another class of human beings that had been previously denied protection on the basis of racial status.

Roe v. *Wade* has been the object of universal criticism by almost all those members of my profession who believe the Constitution as a document that exists in time and space, rather than as an excuse for flights of fantasy in pursuit of preferred social policies. I shall not repeat their criticisms here. This Subcommittee is concerned with redirecting a public policy created by a misdirected Court, and it is my intent to indicate why and how this might be done.

There is simply no doubt that abortion entails conduct intended to cause the death of humans. Unborn children of human parentage are, indisputably, as much individual organisms of the species homo sapiens as are the Members of this Subcommittee. From this perspective, the central outrage of *Roe* v. *Wade* was to deny to the people the right to fulfill their obligation to provide some measure of actual protection to these unborn members of the human family.

By virtue of this decision, a fissure has been created in American jurisprudence that not only permits the members of this class of our species to be destroyed at will, but positively forbids those of us whose human sensibilities are outraged by the treatment accorded them to employ normal legislative mechanisms to secure justice for them. Instead, we are told we must stand idly by—that the Constitution dictates that we must play Pilate, washing our hands in the face of the death of these beings with whom we all share a common humanity and history of growth and development.

The Constitution of the United States commands no such thing and if those presently charged with the authority to interpret our fundamental law say that it does, then they should and must stand corrected through an Amendment to the Constitution.

The sheer number of human deaths that will continue to occur with the blessing of our legal system and the outrage of a significant portion of our population over its impotence to find some practical means to protect the unborn within our political order are the matters that should immediately concern this Committee. It must be emphasized, however, that reestablishing the power of the people to assert an interest in private conduct that affects human beings in the early stages of development is also necessary in order to effectively control and prevent genetic manipulation of the human species. Children are now routinely aborted for alleged genetic deficiencies. Physicians may be sued in several states for failing to inform pregnant mothers of their "abortion option" when they are at risk of carrying a handicapped child. The unborn are aborted because they are the "wrong sex." In sum, as a consequence of unchecked abortion, we are developing a silent intra-uterine eugenics program, with the assistance of our civil law, a program designed to sort out for destruction those deemed unwanted, unfit, or undesirable.

In the future we will be able, with the assistance of technology, to manipulate the genetic constitution of the human species. Are not experimentation on and manipulation of human beings at early stages of development, cloning, and even the creation of new species or races with special human characteristics or combined animal and human characteristics envisioned by some matters of profound collective concern and proper subjects for legislative control? Yet on what ground can it be said, when children can be aborted for no reason at all as under present law, that they should not be aborted when their sex or eye color are deemed undesirable. When unborn children can be killed at will, why should they not also be subject to experimentation or genetic manipulation? The most profound irony implicit in the Supreme Court's decision in *Roe* is that it deems abortion to be a "private" matter and the unborn of our species to be legal ciphers just as technology has opened the world of the unborn to public scrutiny. It is today clearer than ever that the future integrity of our species may depend on public recognition of some legal status for our youngest members.

It is apparent that those infants born with handicaps who manage to escape the eugenic net that is being laid for them before birth are now increasingly viewed as errors that must be erased, rather than human beings who deserve empathy and attention. As the present Surgeon General nominee, Dr. C. Everett Koop, who has spent his professional career in the care of infants born with handicaps, has pointed out, death by neglect is fast becoming a standard "treatment regimen" in the United States for children who are less than physically or mentally perfect. A recent report from England, with a longer history of abortion on demand, underscores what we in the United States can certainly anticipate if our present legal ethos, which deems some members of the human family to be devoid of legal value and worthy of life if and only if they are valued by those charged with their care, remains unchallenged. According to an Associated Press article published in the Chicago Tribune (Nov. 10, 1981), a recent poll of British pediatricians, was conducted in the wake of a trial of a physician for denying useful medical care to a Down's syndrome child. Seventy percent of the physicians who responded to the poll said they thought a child born with spina bifida rejected by his parents was better off dead. Seventeen percent of the doctors said they would drug the baby so she would be unlikely to demand food and would eventually die. Fifty-seven percent of the doctors said they would not recommend life-saving surgery for a Down's syndrome baby rejected by his parents. A mother was quoted on a B.B.C. television program on which the poll was reported as saying she was "horrified" when a pediatrician told her, just after the birth of her Down's child: "We can just gradually let them sleep themselves away. If they are very restless we can give them a small injection, and they just gradually sleep themselves to death."

What else can be expected when infants born with handicaps are born alive, when perfectly normal human beings are aborted by the millions, when the medical profession has come to regard the destruction of embryonic or fetal life as a normal "treatment option" for human pregnancy, when the lack of social or personal value of some members of our species to others is deemed a sufficient reason in itself to warrant a decision to cause their deaths? Who is more "valuable", whose life more "meaningful": the late-term human fetus who is perfectly normal or the infant born with a debilitating handicap? On what logically consistent ground may one be slain at will, but the other receive full legal protection, when a culture and its legal order have already determined that some members of the human family have lives so intrinsically value less that they can be taken for no reason at all?

The present gap in our law that deems destruction of fellow human beings to be a private matter without public interest must be closed, and it is the obligation of this Subcommittee to initiate that process.

In this regard, I must first indicate that I and those with whom I am most closely associated are finally committed to the prolife cause for one reason: to stop the killing. We recognize the law as one social mechanism—perhaps the most important mechanism in our culture—through which this end may be served, and know that the law encompasses the power of government to tax and to redistribute wealth to serve its ends in addition to the power to punish conduct as criminal. But we also recognize the limitations of law. A criminal law of abortion that is on the books, but is unenforced or unenforceable, may soothe the conscience but will save few lives. A system of law that punishes those who perform abortions, but does noting to assist the pregnant woman facing social oppression or economic difficulties to carry her child to term, penalizes the result without recognizing its possible cause. From this practical point of view, a constitutional Amendment dealing with abortion must be, above all, an effective means to the end of altering our public policy to permit the protection of human life before birth through efficient use of all the normal machinery of government.

Constitutional amendments are not self-executing—abortion would not magically disappear, nor would it be automatically proscribed, should any of the Amendments dealing with abortion that have so far been proposed become part of our Constitution tomorrow. A constitutional Amendment in our system of law has mere symbolic import unless it is implemented by one of our independent branches of government: the state and federal legislatures, the judiciary, or the executive must act as the Amendment requires or permits before it obtains any practical legal effect.

Regulation of abortion practices under any of the proposed Amendments would necessarily be an almost exclusively legislature matter. Even those proposed Amendments that rely heavily on the judicial branch to coerce, in some manner, legislatures to enact abortion laws acknowledge this by inference. Courts do not create criminal penalties or appropriate funds in our system of government.

The first and most important prerequisite of any Amendment dealing with abortion is, therefore, that it effectively empower legislatures to act without the untoward judicial interference that has paralyzed them and distorted the public policy debate on abortion for the past decade.

Of the Amendments seriously under consideration by this Committee, that recently introduced by Senator Hatch, S.J. 110, deals directly with this consideration by breaking the judicial chains created by the Supreme Court's creation of a fundamental right to abort, by acknowledging the plenary power of the legislature in this area, and by providing for a potential national abortion policy through an Act of Congress. Under the approach taken by Senator Hatch, abortion would become once again a legislative matter that is subject to usual democratic processes rather than to judicial fiat.

Other Amendments before this Committee have taken a different approach than that proposed by Senator Hatch. By asserting that the unborn are persons under the Fifth and Fourteenth Amendments to the Constitution for purposes of the right to life acknowledged in those Amendments, and by including a specific prohibition on the performance of abortions except under stated circumstances, Amendments of this type operate by affirming the existence of an important governmental interst in the unborn as members of the human family and in treating them in accord with the principles of justice that currently apply to all. Rather than do away with any special restraint on the power of government to proscribe abortion contained in the Constitution, as Senator Hatch's Amendment proposes to do, these Amendments acknowledge the power of government to honor the rights and interests of the unborn under the Constitution.

The importance of the legal symbolism involved in this approach is hard to overestimate. In the process of legislative action on such an Amendment the public and legislators would be required to consider the subject at the heart of the abortion controversy: the biologically human nature of the unborn child. Moreover, this approach seems most consistent with the ethos of those of us who wish to reestablish some social control over conduct intended to cause the death of some of our fellow humans.

S.J. 110, on the other hand, avoids legal symbolism is favor of legal practicality. It recognizes that no constitutional Amendment in this area will have a significant substantive effect in the absence of legislative action and, therefore, forthrightly grants to legislatures the power to act. It provides the potential for development of a national policy on abortion and under what circumstances, if any, it should be permitted by way of normal democratic process rather than through the extraordinary process of a constitutional Amendment. It relegates consideration of "hard cases" to the statutory debate rather than raising them in the context of a debate on the nature of our fundamental law.

I repeat, the fundamental task before this Subcommittee, as I perceive it, is to issue an Amendment to the Constitution that will effectively loose the judicial bonds that presently prevent any form of significant collective action to protect the lives of human beings from private conduct intended to cause their death. An individual choice to destroy any member of the human family must not deemed to the outside the purview of our system of justice. Put anothe way, the death of any of our fellow humans cannot be a "private" matter subject only to the values, or lack of them, of the one who seeks or causes his or her death. This Subcommittee should initiate the process by which this principle is enshrined in our basic law.

As I have said, my involvement in the prolife cause is motivated by a desire to prevent, through whatever means are practical and available, intentional destruction of the unborn and others potentially subject to the same kind of radical discrimination based on biologic or eugenic criteria. As a practicing lawyer, I have come to the conclusion that legal symbolism should not stand in the way of any practical step that would permit the law to be effectively employed as means to this end. In my view, S.J. 110 would be, on balance, as effective as any means so far proposed in assuring potential use of the law to protect the youngest members of the human family. I therefore strongly endorse the concept that S.J. 110 represents and urge this Subcommittee's favorable action with regard to it.

Human Life "Federalism" Amendment: Its Language, Effects

DENNIS J. HORAN, JD

On Sept. 21, 1981, Sen. Orrin G. Hatch, R-UT, introduced into the United States Senate SJ Res. 110, to which he referred in his introductory remarks as a "human life federalism amendment."

The proposed Human Life Amendment (Hatch HLA) reads:

> *A right to abortion is not secured by this Constitution. The Congress and the several states shall have the concurrent power to restrict and prohibit abortions: Provided, that a law of a state which is more restrictive than a law of Congress shall govern.*

The following legal analysis seeks to answer two questions: (1) What is the legal effect of the language proposed in the Hatch HLA and (2) What will be the effect of that language on the performance of abortions in the United States?

To determine the legal meaning of any amendment, the guides must be its plain language, common sense, the stated intent of its sponsor, and legal precedent. Any constitutional amendment needs state and federal legislative support. This is so because the federal Constitution, even when it contains provisions that restrict private conduct such as are found in the Thirteenth Amendment, is not a criminal code or a regulatory statute. Even when the provision is seemingly self-executing, the Constitution prohibits but does not punish and therefore does not compel. The Hatch HLA does not create a duty to act but allows for the creation of duties at both the state and federal levels.

The Constitution is also not written to be the equivalent of a narrowly drawn criminal statute or federal agency regulation; the Constitution contains statements of the broad principles that its framers intended to be the foundation upon which this nation would be built. It assumes that legislation will be enacted that will be consistent with those principles and carry out their intended effect. It expects both legislative bodies and the courts to act in conformity with those principles. Amendments should be written in that same spirit. Sometimes, however, the capacity of legal language limps, or people lack the ability that is required to translate conceptual legal intent into adequate constitutional language. In those circumstances courts may be called upon to determine the effect of the language. They will be guided by the intent of the framers of the amendment; thus the legislative history provided by those who introduce and support the amendment is important.

Opinion Forum

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Common sense tells us that the Constitution cannot be unconstitutional; even the courts are bound by its terms. When those terms are expressed in plain and simple English, which clearly contains the broad principles intended to be given effect, then even the courts must follow that intent.

Courts, however, cannot compel the adoption of legislation that will coerce conduct by providing punishment. Only legislatures can do that. Courts cannot create the funds necessary for programs that provide meaningful help for the woman who deems her pregnancy a problem. Only legislatures can do that. Courts cannot provide the means whereby educational programs about unborn life can be created that may ultimately help in changing people's hearts so that the violence of abortion may be understood and voluntarily removed from American life. Only legislatures can do that.

Will amendment stop abortion?

Without the necessary state or federal legislation, the broad public policy that the Constitution announces may remain simply that—a hortatory expression of goals to be achieved. The primary question to be asked in assessing the impact of a human life amendment, therefore, must be, What will it enable legislatures to do that will effectively stop abortion?

The first sentence of the Hatch HLA provides that "a right to abortion is not secured by this Constitution." By this language, the Hatch HLA reverses *Roe v. Wade* and its companion case, *Doe v. Bolton*, the 1973 Supreme Court decisions that legalized abortion throughout America. The right of privacy under the Fourteenth Amendment would no longer include protection of a woman's decision to terminate her pregnancy. Nor would any other section of the Constitution include such protection. No court could find a right to an abortion under the Constitution. Those who seek a right would have to propose and ratify another constitutional amendment. The explicit legislative intent announced by the sponsor establishes that the amendment eliminates this right, however formulated.

The words "right to an abortion" are used in their broadest sense and therefore include all lesser legal concepts. Since that right would no longer exist under the Constitution, any lesser formulation would likewise no longer exist under the Constitution. For example, later clarifications by the Court about what its *Roe* and *Doe* decisions meant would also no longer be secured by the Constitution and would also fall. Thus, even if the woman's right is conceived as only a right against interference by the government when she makes a decision to abort, even that right would no longer be secured by the Constitution. This is true, in addition, because of the plenary power granted to state and federal legislatures by the Hatch HLA.

> **"Without the necessary state or federal legislation, the broad public policy that the Constitution announces may remain simply that—a hortatory expression of goals. . . . The primary question . . . must be, What will [a human life amendment] enable legislatures to do that will effectively stop abortion?"**

The Hatch HLA is modeled on the Thirteenth Amendment in the sense that it applies to abortion as an institution, just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents. Thus *any* purported constitutional right that is conceived to place obstacles in the way of the legal prohibition of abortion is intended to be no longer secured under the Constitution.

The Hatch HLA would not prohibit or affect contraceptive practices because it does not affect those cases in which the Court has found a fundamental right under the Constitution to practice contraception. It would authorize state or federal legislatures to control abortifacients. Such legislation, however, could regulate only those practices which result in the killing of unborn children and would have to be carefully drawn to avoid impinging on the fundamental right to use contraceptives.

Adoption of the Hatch HLA would reverse not only *Roe* and *Doe*, but also all those cases which depend for their authority on the right to abortion as enunciated in *Roe*. Thus, *Planned Parenthood of Missouri v. Danforth*, including its holdings rejecting spousal and parental consent requirements, its invalidation of the ban on saline abortions, and its refusal to allow the imposition of a standard of care to preserve the life and health of the fetus, would be reversed. *Colautti v. Franklin*, striking another standard-of-care provision, and *Planned Parenthood v. Bellotti II*, which held unconstitutional a parental/judicial consent law and which set forth rigid rules for determining the constitutionality of such laws, would also be reversed. In addition, to the extent that the abortion funding cases (*Maher v. Roe* and *Harris v. McRae*), the public hospital case (*Poelker v. Doe*), and the parental notice case (*H.L. v. Matheson*) contain reaffirmations of the tenets of *Roe*, *Doe*, *Danforth*, *Colautti*, and *Bellotti*, the reaffirmations would be vacated. Any cases decided between now and the Hatch HLA's ratification would be reversed to the extent they relied upon or expanded the holdings in these cases. In addition, any other cases that cite or otherwise rely upon such holdings would stand only to the extent that they could retain vitality independent of the support drawn from reliance on those authorities. The numerous lower court cases dependent upon any of the Supreme Court's abortion holdings would also fall.

Statutes on the books that have not been repealed by the legislature but whose enforcement is prevented because they are incompatible with the constitutional abortion right may automatically be reinstated to their full force and effect immediately upon the ratification of the Hatch HLA. This outcome depends on state law interpretation.

Other legislation against abortion could be enacted under the authority of the second sentence of the Hatch HLA: "The Congress and the several states shall have the concurrent power to restrict and prohibit abortions: Provided, that a law of a state which is more restrictive than a law of Congress shall govern."

This language is a grant of plenary power to two sovereigns, federal and state, to legislate on the subject matter of the amendment—abortion—which includes all that can be rationally related to its restriction and prohibition. It is not merely an enforcement clause, although it implicitly contains enforcement power; it allows the Congress and the states power and authority to pass whatever legislation is deemed appropriate to restrict and to prohibit abortions. This allowance includes a grant of any lesser power, such as that of regulating abortions.

States would receive plenary power

By granting the states this plenary power in the federal Constitution, which is the supreme law of the land, the Hatch HLA would free states to legislatively overcome the effect of any prior finding by their courts of an abortional privacy right under the state constitution.

So, for example, after the ratification of the Hatch HLA, the Califor-

"This language is a grant of plenary power to two sovereigns . . . to legislate on the subject matter of the amendment—abortion—which includes all that can be rationally related to its restriction and prohibition."

nia, Massachusetts, and New Jersey state legislatures could override the effects of rulings by their highest state courts, which found a right to abortion in each of their state constitutions. This result is so because the Hatch HLA, as a part of the Constitution itself, is a grant of *plenary* power and is not a mere enforcement provision, although it contains the power to enforce.

To emphasize, the second sentence of the Hatch HLA is a grant by the people of a new plenary power to the two sovereigns. To interpret this grant of plenary power as not containing the legislative power to deal with the subject matter of the amendment itself, thereby frustrating the people's amendment to the Constitution, would be to make the federal Constitution subservient to a state constitution. Legal precedent and the federal Constitution itself clearly indicate that this cannot be so. The federal Constitution is the supreme law of the land. The states, through their constitutions, can grant other or greater rights than those granted in the federal Constitution. The states can never lessen or take away from the people the minimum rights embodied in the Constitution. Under the Hatch HLA state legislatures could go further than Congress in restricting or prohibiting abortion. They could never effect less restrictive state regulation of abortion since, in the case of a less restrictive state law and a more restrictive federal law, the more restrictive federal law can be the source of enforcement.

This interpretation is also consistent with the fact that the Hatch HLA is intended to authorize legislation that reaches private action. To grant plenary power to so legislate, and, at the same time, to say that a previously existing state court opinion prohibits the exercise of such plenary power, would be absurd. It would be the same as saying that the Constitution cannot be amended by the people.

The words "concurrent power" mean that each sovereign, the national government and each state government, has a coequal power to legislate on the subject matter of abortion; in other words, the Congress and each state legislature have a separate and independent power to legislate.

What would happen if a state were to pass no legislation restricting or prohibiting abortion? If the federal government has legislation restricting or prohibiting abortion, then federal law would apply to that state. Thus, the standards set by Congress will be extremely important, since they will control enforcement in those states where no restrictive laws are passed.

What happens when a state passes legislation prohibiting classes of abortion not prohibited by the federal law? The amendment provides that the state law shall govern.

Under the system of federalism embodied in the Constitution, a statutory hierarchy exists shaped primarily by the "preemption doctrine." Generally, the preemption doctrine is invoked under the supremacy clause of Article VI to nullify state legislation in conflict with federal legislation or to oust state authority from a field that Congress intended to occupy exclusively.

The preemption question does not arise in areas where constitutional grants of power are either delegated exclusively to Congress or reserved exclusively to the states. Traditionally, the question arises where Congress and the states enjoy concurrent legislative power and, in the exercise of their concurrent power, enact laws that result in an irreconcilable enforcement conflict. The preemption doctrine, invoked to resolve such conflicts, often results in voiding the state law if the two laws cannot act in harmony.

In his introductory statement, Sen. Hatch indicated that he intended that the preemption doctrine be inapplicable to the subject of abortion, and to all legislation reasonably related to its prohibition and restriction. Instead, federal and state laws are to coexist. This condition is consistent with a grant of plenary legislative power to two sovereigns.

Thus, both federal and state law would be enforceable within each state, even where they are duplicative. Sen. Hatch intends that only when an irreconcilable conflict exists—when the law of one requires what the other forbids—should one law be invalidated by the other. Such a circumstance might occur if one legislature required agencies receiving government funds to refer for abortions prohibited by the other legislature. In such a case, the law more restrictive or prohibitive of abortion, whether federal or state, would have force, and the law in conflict with it, whether federal or state, would be unenforceable. The more restrictive law would govern.

The possible forms that legislation implementing the Hatch HLA on a federal level could take appear to be almost unlimited. It is clear that the amendment allows Congress to reach and to prohibit, as well as to restrict, private action constituting or facilitating abortion. Congress could pass a Federal Abortion Act, which would make the performance of abortions criminal throughout all 50 states. Thus, performance of abortions would be punished even in states that refuse to legislate against abortion. ★

Senator **Hatch**. We are very pleased today to have with us Congressman Joel Pritchard. Joel is one of my dear friends, and I am happy we are able to get his viewpoint.

STATEMENT OF HON. JOEL PRITCHARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. **Pritchard**. Mr. Chairman, I appreciate having this opportunity to appear before the Subcommittee on the Constitution to offer my views on Senate Joint Resolution 110.

Many witnesses have already appeared before you to speak on various aspects and expected effects of this legislation. You have heard from legal and constitutional scholars, respected and renowned physicians, and a representative group of religious leaders. Each has provided important insights based upon his or her own personal and professional experience.

I have studied this issue for many years, listened to the views of many constituents, and have reviewed the testimony which has preceded my appearance. At this juncture I can only conclude that there is no more of a consensus on the question of when a fetus becomes a person and on the issue of abortion than there was in 1973 when the Supreme Court addressed this issue in *Roe* v. *Wade.*

Many pieces of legislation concerning abortion have been introduced this year. They range from constitutional amendments outlawing abortions, to statutes defining a fetus to be a person, to Senate Joint Resolution 110, a constitutional amendment which calls for concurrent Federal and State statutes with the States' laws governing only where they are more restrictive.

Each and every measure has one common result: To deny women the right to choose to obtain a safe and legal abortion. Due to the lack of any concrete consensus on this issue, and upon our historical tradition of individual freedom and self-determination over our own well-being, I must firmly reject every effort to usurp a woman's right to choose whether or not she should continue her pregnancy.

Although I did not come here to talk about the specifics of any of the amendment proposals before this subcommittee, I am aware that Senate Joint Resolution 110 purports to leave the question up to Congress and the States. I believe very much in Government at the grass roots and in majority rule, and even though the overwhelming majority of Americans favor freedom of choice for women, questions of individual rights are not ones for majority rule.

I do not want the Congress or my State legislature prescribing my personal rights. They are already prescribed in the Constitution. Consequently, I must oppose Senate Joint Resolution 110 and other proposals without distinction. Ultimately they will all have the same result, and that result is not good for women, for families, or for the Constitution.

One of the most fundamental rights we as Americans value and share is the right to determine the course we want to pursue in our lives. Public policy must be flexible enough to permit all of us to act in ways which reflect our own personal convictions and conscience, where the moral judgment of society is not violated. Issues involving our health and our desire to raise a family in our own way are by their nature of the most private kind and should be free from governmental interference.

In 1970 as a Washington State senator I sponsored an abortion law reform measure which had the support of our residents, who ratified the measure on a State referendum. The majority of the people of Washington State, as do the majority of citizens of the United States, do not want to see us revert to the time when abortion was illegal, a time when abortions were being performed in unsanitary conditions by unqualified practitioners or even by the woman herself at great risk to her future reproductive ability, her health, and her life.

There are a lot of myths and half-truths frequently expounded when discussing this issue. Let's look at some facts: The number of maternal deaths arising from abortion has dropped precipitously since 1973. Ever since abortions were legalized, women have been obtaining abortions earlier in pregnancy when the health risk and costs of the procedure are lowest. In fact, in 1978, the last year that statistics are available, 50 percent of all abortions were performed before the ninth week of pregnancy; 90 percent were performed during the first 12 weeks; and less than 1 percent were performed after 20 weeks.

Four out of every ten abortions were to women for whom the health and social consequences of unintended childbearing are the greatest: women over the age of 35 and teenagers. Thousands of young teenagers have avoided the burdens of premature parenthood and the resulting social, economic, and health hazards of trying to raise a child while still only a child themselves. Victims of rape and incest have not had to bear a child conceived in a painful, tragic, and often brutal encounter. For many women abortion has provided a means of avoiding a situation which would impact negatively upon them for the rest of their lives.

In conclusion, let us remember that a decision to have an abortion is not one a woman makes easily. Many factors must be carefully considered and weighed. In each instance the pertinent factors involving a woman's decision whether or not to seek an abortion are unique. Each human being has a different background and set of values and beliefs, which we draw upon in facing and solving any problem. That is why it is imperative that each woman have the opportunity to make the decision herself, based upon her own criteria and conscience.

Senator HATCH. Thank you, Joel. We appreciate having your testimony in front of the committee here today. I am sorry you are not supporting my amendment but——

Mr. PRITCHARD. Well, I would say, Senator, that when I first saw it I was intrigued with it. I am sure that it will have appeal for many people, some who would like to get this issue behind us, people in the political and governmental field to whom this is a burden. As I say, having sponsored a piece of legislation in my State legislature in 1970, I have had this issue with me, on me, on top of me——

Senator HATCH. Ever since.

Mr. PRITCHARD. For a number of years. However, my basic feeling is that this changes the decision from a two-thirds majority to a simple majority, and in terms of constitutional questions, I think that we should stay with the two-thirds majority.

Senator HATCH. Of course, if this passes it would take a two-thirds majority to reach that simple majority.

Mr. PRITCHARD. I realized that at first instance. As I say, this will be attractive to a number of people but I think when the issue is debated each time it should be debated, on that two-thirds basis. For that reason, despite my first reaction to it, I have come to the conclusion that I cannot support it.

Senator HATCH. You see, one of the reasons we formulated this amendment was because we do not think that there is a lot of support for either of the extremes—abortion on demand or no abortion at all. This amendment allows the people to make the choice through elected representatives. That is why it does have a certain appeal to people who have characteristically voted against the Human Life Amendment, or similar approaches toward the abortion issue.

However, we have appreciated having your testimony and I enjoy our friendship regardless of our difference here.

Mr. PRITCHARD. Absolutely.

Senator HATCH. Thank you so much.

Mr. PRITCHARD. Thank you, Senator.

Senator HATCH. Our next witness will be Ms. Herma Hill Kay, who is a professor of law at the University of California Law School. We were privileged to have had one of her colleagues, Prof. John Noonan, at our opening hearing.

I might add that Professor Kay is the author of a casebook on sex discrimination. That is another subject that I am very much interested in as chairman of the Labor and Human Resources Committee. If possible we may want to listen to your viewpoint with regard to sex discrimination at a later date in front of that committee.

Ms. KAY. I would be happy to give you any help I can, Senator Hatch.

Senator HATCH. Thank you. We are delighted to have you here today. I understand that you have only so much time with us, so if you could limit yourself to 10 minutes if it is possible, we would appreciate it. We will take your testimony at this time.

STATEMENT OF HERMA HILL KAY, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA BERKELEY

Ms. KAY. Thank you very much.

In deference to your schedule and to my own need to get a plane back to California, I will summarize my prepared statement and I know that it will all go into the record.

What I wanted to do before you today was essentially to make two points. First, I wanted to give you the benefit of my experience from California since I have been involved in the move to reform abortion laws in that State since 1961, as I think they bear on what you are trying to do here. Then I wanted to make a line-by-line analysis of your proposal, Senate Joint Resolution 110. My prepared statement also contains a line-by-line analysis of the other amendments that are pending which I will not go into at this time.

Senator HATCH. That will be fine. Your full statement will be made a part of the record.

Ms. KAY. Thank you.

When the therapeutic abortion laws were first enacted, and California was one of the first three States in 1967 to enact a law of this kind, the primary motivation underlying those bills was a concern for maternal health and an effort to give direction to physicians who needed to know how far they could legally go in counseling their patients.

The abortion law reform movement in California was led, as it was initially in many other States, not by members of the women's movement but by physicians, attorneys, and public health experts. Once the bills that became law were enacted so that it became clear what the specific indications were that could justify abortion, medical practice improved, the maternal death rate went down, and medical practice was again made available to all women.

If any of the amendments which are presently pending before this committee are enacted, we will have, in the vast majority of States in this country, rolled the clock back 20 years. We will once again be faced with public health problems of large magnitude. Women will again be forced either to go to back-alley abortionists or, if they are able to pay, to go to countries that do provide safe medical care, to have abortions outside the country.

The second thing that will happen is that by forcing the vast majority of pregnant women to give birth, we will have increased the number of children who are unwanted and who may be abused by their parents. As Garrett Hardin noted, between 1963 and 1967—which was the period immediately preceding enactment of the therapeutic abortion laws—the infant homicide rate rose by 28 percent while infant mortality from all other causes fell.

Finally, and I think most significantly with respect to your own approach, I believe that the people of California and other States will be deprived in large measure by these amendments of deciding for themselves what their own abortion laws should be. From 1961 to 1981 the people of California, speaking consistently through their legislature and their courts, and reaffirmed in public opinion polls, have indicated that in certain specific instances they prefer to protect maternal life to fetal continuation. These amendments, I believe, will prevent California people from continuing to make that choice.

To tell you why I think that is so, I want to look briefly at the terms of Senate Joint Resolution 110. My comments begin with the first sentence. This sentence expressly refers to this Constitution, not the constitution of the several States, as my colleague John Noonan suggested that it should originally include. I think you were wise not to follow that piece of advice because by the wording that you have chosen you have made clear that it is only the Federal Constitution that is here being amended.

The second sentence of your proposal, however, takes back in large measure what has been conferred by the first sentence. The second sentence confers upon the Congress a power it has not had before. It confers a power to restrict and prohibit abortions. If Congress then acts under that power to prohibit abortions except where necessary to prevent the death of the mother, as two of the proposals before you would require, the normal operation of the supremacy clause will of course make that Federal law binding in all the States, overriding contrary State law including State constitutional law.

Now there are three issues, I think, that are raised by the language of the second sentence, exclusive of the proviso. First, as noted above, this sentence confers a grant of power to Congress to restrict and prohibit abortions. It does not expressly confer the power to permit abortions, and yet in the testimony that you gave when that amendment was introduced to the floor you suggested, and I quote, "that the proposed amendment would only provide authority to the State legislatures and the Congress to act on the issue of abortion, without dictating particular legislative outcomes or policies." You listed 10 illustrations of proposed action that the States could take.

That is accurate if and only if the Congress does not itself act. If the Congress acts, then of course anything the State does that is more protective of the pregnant woman will be superseded by the supremacy clause.

Senator HATCH. That may be, but the very fact that we already have abortion as a legal activity would not be interfered with under this amendment, should it be passed by a two-thirds vote and be ratified by three-quarters of the States. Nothing automatically would change.

Ms. KAY. Well, but the first sentence of your amendment will repeal that.

Senator HATCH. No. All that does is repeal the *Roe* v. *Wade* and *Doe* v. *Bolton* cases. It does repeal those; it does do away with those cases. It still does not, however, result automatically in abortion being in violation of the law. No such law would exist.

Ms. KAY. However, we have abortion on demand in our society primarily because *Roe* v. *Wade* overrode contrary State laws, for example, like California's law. California's therapeutic abortion law did not permit abortion on demand.

Senator HATCH. I don't believe that those laws would automatically be reinstated by my amendment if they have already been pronounced as unconstitutional by *Roe* and other decisions. States could, however, put new restrictions upon abortion.

The amendment itself, although it would allow restraints, does not interfere with the present law as it exists.

Ms. KAY. Well, what I hope then that you will do, since I take it that you are agreeing with my comment on this point, is to amend that second sentence so that it would read: "The Congress and the several States have the concurrent power to permit, restrict, or prohibit abortions." That would make clear that unless the Congress acted a State could, if it chose to, go beyond *Roe* v. *Wade.* It would be up to the individual States acting, as you say, through their democratic representatives.

Senator HATCH. However, you do not need to do that because States unlike the Federal Government are permitted to do anything they want to in the absence of specific restraints.

Ms. KAY. No, I do not agree, and the reason I do not agree is the way in which your amendment phrases the grant of concurrent authority to the Congress and the States. As you say, at the moment the States have the authority to act. That authority to act was interfered with, limited, perhaps rendered nugatory, by *Roe* v. *Wade.*

One way of interpreting the language that you have drafted, and I think probably the one you intend, is that the State power will be restored to where it was prior to *Roe* v. *Wade*——

Senator HATCH. Right.

Ms. KAY [continuing]. But that is not the only possible interpretation of that language. It seems to me that you could also read that language as saying, Congress by proposing a constitutional amendment has determined that Federal law shall occupy this field, and the States may act only so far as the amendment itself gives back to them the power to act. The only power it gives back is the power to restrict or prohibit.

Senator HATCH. Well, you and I would differ on that interpretation. The States do not need a grant of authority to do nothing. I would consider that an extreme interpretation, very unlikely to be adopted by any court. However, we will clarify that in the report on this amendment. I think the clarification will aid a great deal in exactly what we do mean. You have raised an interesting point, nevertheless.

Ms. KAY. Yes. I would urge you to consider the inclusion of the word "permit" in that second sentence.

Now, finally, it seems to me that that part of the third sentence following the proviso seems to limit the normal federalist assumption that the States cannot——

Senator HATCH. Go ahead. We have a rollcall vote but we want to finish your testimony so you can catch your plane.

Ms. KAY. Thank you very much for your indulgence.

It seems to reverse the normal federalist assumption that States cannot prohibit what Congress permits. If Congress were to enact legislation in the wake of this amendment that prohibited abortions except to preserve the life or health of the pregnant woman, it would be open to a State to prohibit all abortions except those necessary to prevent her death. This would, in effect, allow the Constitution to say to the States, "You may nullify within your borders a provision that we have seen mandatory."

It appears to me that this is a compromise that embodies the worst of two alternatives: It neither permits the States to arrive at their own, locally acceptable solutions to the abortion question, nor does it establish a uniform Federal standard that all States must respect.

The rest of my testimony concerns the other amendments, and I will not go into those.

Senator HATCH. Thank you so much. We will put it all into the record. Thank you. We appreciate having you here.

[The prepared statement of Ms. Kay follows:]

PREPARED STATEMENT OF HERMA HILL KAY

Mr. Chairman and Members of the Subcommittee: I am grateful for the opportunity to comment on the legal implications of the proposed constitutional amendments relating to abortion, in particular S.J. Res. 110, submitted by Senator Hatch. Before turning to a line-by-line analysis of those proposals, however, I would like to make a few general observations about abortion law reform drawn from the experience in California.

I. Introduction: California, A Case Study. Twenty years ago, in 1961, the first bill designed to conform California abortion law to existing medical practice was introduced into the California legislature. 1/ At that time, California, in common with 41 other states, permitted abortion only to "preserve" the "life" of the mother. But an influential law review article published in 1959 2/ had demonstrated that the law in practice differed from the law on the books. The authors surveyed 26 hospitals in San Francisco and Los Angeles, using a questionnaire that included a list of eleven hypothetical cases in which a patient sought hospital approval for the performance of an abortion. These cases presented a variety of maternal, fetal, and psychiatric indications for abortion, and the hospitals were asked to indicate whether the abortion would be approved. Among the eleven hypothetical cases were the following:

> A woman with a history of rheumatic fever and resulting heart damage whose medical work-up indicated that her risk of death during or immediately following pregnancy was 30 times greater than if she were not pregnant;
>
> A fifteen-year-old girl, the daughter of a

> minister, who was raped and impregnated by an escaped inmate of a hospital for mental defectives; and
>
> A married woman with five children below the age of thirteen who was forced by her husband's illness to become the primary breadwinner for the family.

In only two of these eleven cases was the abortion clearly legal in California in 1959; in two others, the procedure would probably have been legal; while in the remaining seven, an abortion would have been illegal. The results obtained were startling. At least one of the 24 responding hospitals indicated that the abortion could be performed there in all eleven cases; 18 of the hospitals thought their practices were probably not in conformity with the law; and only 6 hospitals believed themselves in strict compliance with legal requirements. In the hypothetical rape case, 15 hospitals would have authorized an abortion that violated legal, but not medical, standards.

The conclusion drawn by the authors was not that existing California law should be rigidly enforced, nor even that the then-prevalent policy of prosecutorial neglect be continued. Rather, they argued that the law should be changed to reflect reputable medical practice. They proposed that legal abortion should become a matter for medical judgment, and suggested a statute that would confer immunity from criminal prosecution upon all persons involved in the performance of a therapeutic abortion that had been approved by the hospital's Therapeutic Abortion Committee.

Partly as a result of the influence of this article, the movement for abortion law reform in California was led, not by members of the women's movement, but by doctors, lawyers, and public health experts. In 1967, California became one of three states to enact the nation's first therapeutic abortion laws. [3] The California bill, authored by then-State Senator Anthony Beilenson, was shaped more closely to the American Law Institute's Model Penal Code [4] than to the 1959 proposal. It permitted therapeutic abortions when a hospital committee found that there was "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother", or that "the pregnancy resulted from rape or incest." [5] The dominant themes sounded in the legislative hearings were the need to protect maternal health and to provide guidance for medical practitioners who needed to know the limits within which their medical judgment could legally be exercised.

Mandated reports of practice under the new law were provided by the Department of Health to the California Legislature first on an annual, then a biennial, basis. [6] These reports indicate that the therapeutic abortion law was successful in lowering the number of abortion-related maternal deaths. The 1971 Report indicated that in 1966 and 1967, 35 maternal deaths in California were due to illegal abortion, but that number had declined to 21 such deaths in 1968 and 1969. [7] The number of maternal deaths attributable to therapeutic abortions went from 4 in 1970 to 6 in 1972, but the rate per 100,000 therapeutic abortions during the same period declined from 6.1 in 1970 to 4.3 in 1972, due to the increase in the number of abortions performed. [8] These figures are consistent with national statistics reported in 1977 by Tietze and Lewit, [9] who noted that the mortality rate for all types of abortions (legal, illegal, and spontaneous) had declined from 5.7 abortion-related maternal deaths per year per million women from 15 to 44 years of age between 1963-1967 to 1 death per million in 1974.

In 1973, California's therapeutic abortion law was superseded by the United States Supreme Court's decision in Roe v. Wade. [10] The Court's timetable approach was reflected in the statistics. By 1974, 80% of reported abortions performed in California occurred during the first trimester,[11] and 89% employed the medically-approved early abortion techniques of vacuum aspiration, dilatation and curettage, or a combination of the two.[12]

The proportion of abortions funded in California by Medi-Cal had been reduced from a peak of 38% in 1971 to about one-third of the caseload in 1973.[13] The United States Supreme Court's 1980 decision in Harris v. McRae,[14] which limited Medicaid funding for medically necessary abortions to those specified in the Hyde amendment, was never implemented in California. Instead, the California Supreme Court, interpreting the California constitution's specific guarantee of privacy, held that the state must fund abortions if it continued to fund childbirth.[15] The Supreme Judicial Court of Massachusetts had adopted a similar construction of its state constitution a month earlier,[16] and three state lower courts have also enjoined state officials from funding abortion more restrictively than childbirth.[17] Other states, acting without judicial compulsion, have continued to fund most abortions after federal participation was withdrawn.[18]

I have sketched out the California experience with abortion law reform in order to make several observations. First, for women who are dependent on public support for all their health care needs, we have come full circle in many states from 1961 to 1981. Abortions for these women are available only when their own lives are at stake. The concern for maternal health that motivated the early therapeutic abortion statutes has been supplanted in the minds of a majority of the Congress by funding restrictions suggesting a greater concern for fetal development. Only in the states noted above, including California, and only as a matter of state law, are all women provided with the necessary means to exercise their constitutional right to choose whether and when to give birth.

Second, if the more restrictive of the amendments before you are ratified, we will have recreated the public health problems that existed twenty years ago. Once again, pregnant women will be forced to seek out back-alley abortionists or, if they are able to pay, to travel to distant nations to obtain safe and legal medical care. Once more, we can expect abortion-related maternal deaths to increase, even as fetal deaths decrease. Yet again, physicians will be left to guess at what medical judgments the law permits.

Third, by forcing the vast majority of pregnant women to give birth, we will have increased the number of unwanted children, and, sadly, the number of infants who are brutally abused and even killed by their parents.[19/] As Garrett Hardin has noted,[20/] between 1963 and 1967, the period immediately preceding enactment of the first Therapeutic Abortion laws, the rate of infant homicide rose by 28% while infant mortality from all other causes fell.

Finally, the people of California and of other states will be deprived in large measure by these amendments of their power to decide for themselves what their own abortion laws should be. From 1961 to 1981, through their legislature and their courts, the people of California have consistently taken the view that maternal health should be protected even at the expense of fetal development.[21/] As I read the amendments now before you, that power would be severely restricted, if not eliminated entirely. To show how I arrive at this conclusion, I will now turn to a line-by-line analysis of the proposed measures.

II. Analysis of the Meaning and Legal Significance of the Proposed Abortion Amendments

A. S.J. Res. 110. Four proposed amendments are pending before this Subcommittee. S.J. Res. 110, proposed by Senator Hatch, reads as follows:

> "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern."

My comments begin with an examination of the first sentence. I note that this sentence refers expressly only to "this" Constitution, i.e., the Constitution of the United States. It does not purport in explicit terms to control the content or interpretation of State Constitutions, as my colleague Professor John Noonan, urged in his testimony supporting Senator Helms's proposed "Human Life Bill" on May 21, 1981. He there advocated the adoption of a constitutional amendment designed to overturn Roe v. Wade, and suggested language appropriate to the task: "Nothing in this Constitution or the Constitution of any State shall be construed to confer on any person the right to an abortion." 22/ This proposal would have placed the Congress in the untenable position of seeking to alter the Constitutions of the Several States through a procedure designed only to amend the United States Constitution. Without regard for the independent processes set up to amend state constitutions, state legislatures in determining whether to ratify a federal amendment would also be agreeing to alter their own constitutions as well as supporting the alteration of those of sister states. I infer that Senator Hatch chose not to follow my colleague's advice because he deemed such action inappropriate for the Congress to take.

But what the first sentence of S.J. Res. 110, read in light of the second sentence, would accomplish is not substantively different from what Professor Noonan proposed. If S.J. Res. 110 becomes part of the United States Constitution, its second sentence will confer upon the Congress the power to restrict and prohibit abortions: a power it has not held before.

If the Congress then acts to prohibit the performance of abortions except where necessary to "prevent the death of the mother", as two proposals before you would require, the normal operation of the Supremacy Clause of the United States Constitution would make that statute paramount over all conflicting state law -- including state constitutional law. S.J. Res. 110, then, permits Congress to do indirectly what Senator Hatch did not choose to ask it to do directly: namely, to limit the capacity of the people of the several states, acting through the content or interpretation of their State Constitutions, to recognize a right in pregnant women to choose whether and when to give birth.

I see at least three issues that are raised by the language of the second sentence of S.J. Res. 110, exclusive of the proviso. First, as noted above, this sentence confers a new grant of power upon the Congress: the power to "restrict and prohibit" abortions. Prior to the Supreme Court's decision in Roe v. Wade in 1973, there were no federal laws regulating abortion on a national scale. [23] Without this amendment, there would be no constitutional power to enact any such laws today. [24] Such a grant of authority to Congress is not required to overturn Roe v. Wade; that result is accomplished by the first sentence of S.J. Res. 110. The alternative would be a true "state's rights" bill, one that would permit the states to resume legislative consideration, interrupted by Roe v. Wade, of the abortion question. It is unnecessary to correct what the supporters of this measure see as an unjustified exercise of power by one arm of the federal government -- the Courts -- to confer upon another arm of that government -- the Congress -- a power traditionally exercised by the states. This action goes far beyond overturning Roe v. Wade: it diminishes the authority of the states over local affairs, and thereby damages the very fabric of federalism.

Second, this sentence confers "concurrent power" to deal with abortions upon Congress and the several States. The meaning of this dual delegation is unclear. As we have seen, the states have continuously exercised power to regulate medical procedures, including abortions, since the founding of this nation. That power was not removed by the decision in Roe v. Wade; its exercise was curtailed in order to give a limited constitutional protection to the privacy of the pregnant woman to choose, in consultation with her physician, whether to give birth. What is the significance of a Constitutional amendment which confers a power upon the states that they already have? There are, it seems to me, at least two possible interpretations of this language. One is that the amendment, by virtue of its place as part of the United States Constitution, has occupied the field as far as the legal regulation of abortion is concerned, and the power it confers upon both the Congress and the states is only the power to "restrict and prohibit", but not to "permit", abortions. I will return to this point in a moment. The second possible interpretation of the language is that the power now possessed by the states to regulate abortion is not diminished by this amendment at all: rather, that power is restored to what it was prior to the decision in Roe v. Wade. This interpretation is subject to a major exception: it applies only so long as Congress chooses not to exercise its own power, newly conferred by this Amendment, to control abortions. Once Congress acts, the Supremacy Clause will automatically implement that action in every state. But in the absence of Congressional action, this second possible interpretation (apart from the words "restrict and prohibit") would arguably allow the states to permit abortion at the pregnant woman's request: that is, to go beyond Roe v. Wade.

Third, the power that is conferred upon the Congress and the states is the power to "restrict and prohibit" abortions. In his remarks when S.J. Res. 110 was introduced, Senator Hatch stated that it was not his intention to control the substance of state action. He noted that "[t]he proposed amendment would only provide authority to the State legislatures and Congress to act on the issue of abortion -- without dictating particular legislative outcomes or policies -- . . .". 25/ He went on to list ten illustrations of possible courses that states might consider adopting that would impose minimal restrictions on the availability of abortions. 26/ I do not think the language chosen accurately reflects Senator Hatch's intent. His goal to "'deconstitutionalize' the issue of abortion" 27/ as well as to refrain from controlling substantive outcomes at the state level would be clearly captured in language such as the following:

> "The Congress and the several States have the concurrent power to permit, restrict, or prohibit abortions."

Finally, that part of the third sentence following the Proviso seems to reverse the normal federalist assumption that states cannot prohibit what Congress permits. Yet if Congress were to enact legislation in the wake of this amendment that prohibits abortions except to preserve the life or health of the pregnant woman, it would be open to a state to prohibit all abortions except those necessary to prevent her death. The constitution would thus permit individual states to nullify within their borders rights conferred by federal statute. The constitution would not, however, recognize state action that gave greater protection to the pregnant woman than Congress had afforded. This solution embodies the worst of two alternatives: it neither permits the states to arrive at their own, locally acceptable, solutions to the abortion question, nor does it establish a uniform federal standard that all states must respect. Instead, it represents a compromise that may prove workable in achieving a two-thirds vote of the present Congress, but which may not hold together when subjected to the necessity of obtaining ratification by three-fourths of the states.

B. S.J. Res. 17 and S.J. Res. 18.

Since the wording of these measures is identical except for the phrase "within their respective jurisdictions" at the end of section 3 in S.J. Res. 17, I will discuss them together.

S.J. Res. 17 reads as follows:

> Section 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

As noted above, the phrase "within their respective jurisdictions" is omitted from S.J. Res. 18.

Both these proposals would seek to overturn Roe v. Wade by conferring legal personality upon the fetus. S.J. Res. 17 embodies the text proposed by the National Right to Life Committee. 28/ Its aim is to regulate abortions substantively by granting identical constitutional protection to the fetus and to the pregnant woman. Section 2 creates a right to life in the fetus, and permits -- but does not require -- a statutory exception designed to "prevent the death of the mother." Section 3 grants power to Congress and the States to enforce the provisions of the first two sections. The phrase "within their respective jurisdictions" seems to suggest a reservoir of state power that allows local implementation under the supervision of the Congress. Thus, a state would be enabled by section 3 to "enforce" sections 1 and 2 by making abortion murder.

Several ambiguities lurk in this language. What, for example, is the meaning of the phrase "irrespective of age, health, function, or condition of dependency" in section 1? The phrase appears to qualify the noun "human beings", not "unborn offspring", since the word "their" preceding "unborn offspring" refers to "human beings". Is the phrase intended to control euthanasia as well as abortion? Would it require the use of affirmative medical procedures to sustain and prolong life in the case of, for example, Karen Quinlan? 29/

The wording of the proviso in Section 2 is also curious. Is the "medical procedure" referred to an abortion, or does it include as well direct life-sustaining procedures? If the former, is it the assumption of the drafters that abortions "required to prevent the death of the mother" will be performed less frequently than abortions necessary to preserve her life? It appears that the drafters intend by this language to draw the exception as narrowly as possible, eschewing any positive connotations that may flow from the concept of preserving the pregnant woman's life. If this interpretation is correct, are states that choose to make this exception available limited to using these exact words? If so, how immediate must the threat of death be to trigger the exception? If not, could a state permit abortions deemed necessary to prevent the pregnant woman from taking her own life? It is unclear whether suicide is covered in the phrase "to prevent death".

S.J. Res. 19, proposed by Senator Helms, provides that:

> "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency."

This measure also would confer legal personality upon the fetus and would give the unborn the same constitutional status as the living. Unlike S.J. Res. 17 and 18, S.J. Res. 19 contains no trace of concern for protection of the pregnant woman's life. It does not expressly direct that either life is to be preferred if both are in danger. Indirectly, however, by ruling out considerations of age, health, or condition of dependency, and by commencing its protection with the "moment of fertilization", it permits the protection of a non-viable fetus that may be defective or doomed to early death through an inherited disease at the expense of the mother's life. A common interpretation of S.J. Res. 19 is that it makes abortion murder. But it does not so state directly; nor does it expressly confer either upon Congress or the states any power of implementation.

Nonetheless, it seems to be intended that a state law, enacted in the wake of this amendment, that made abortion murder, would be upheld as constitutional. But what of the pregnant woman's right of self-defense? In a case where medical opinion is clear that the woman could not survive the pregnancy, would she be permitted to defend her life through an abortion?

In such cases, S.J. Res. 19 contains no guidance either for physicians or for law-enforcement officers. Its meaning must be picked out on a case-by-case basis by the courts, or clarified through further state or federal legislation. Because of the ambiguity of its language, such legislation may itself be intrusive of family privacy. Here, I would offer one final illustration from California experience, not with respect to abortion, but drawn from a newly-enacted law regarding reports of suspected instances of child abuse.

In an effort to strengthen the laws requiring physicians and other child care personnel to report suspected child abuse promptly, the 1980 Legislature broadened the definition of child abuse to include "sexual assault", which in turn was defined to include statutory rape.[30/] Physicians treating minors suspected of volunatry sexual activity would have been required to report that fact to a child protection agency.[31/] This action was perceived as intrusive both by groups interested in the privacy of minors and by the California Medical Association. A suit was filed challenging the new provision,[32/] but before it came to trial, the California Legislature modified its prior action by removing statutory rape from the definition of sexual assault.[33/] The Legislature saw that in its initial effort to achieve one desired end -- the protection of children from abuse -- it had offended another valued goal -- the right of privacy in sexual activity. Efforts to implement S.J..Res. 19 may also lead to unintentional damage to societal values.

III. Conclusion

Mr. Chairman, Members of the Subcommittee, let me now conclude. If you have gathered from my testimony that I do not favor the proposals you are considering, you are correct. I sympathize with those who believe that the fetus is a human being, but I do not agree with their view. That being so, my own concerns are directed toward protecting the fabric of the law. As Professor Laurence Tribe testified before you, these attempts to dislodge the Supreme Court's decision in Roe v. Wade from our constitutional horizon will be ultimately more detrimental to the fabric of the law than any other course. I prefer to safeguard the pregnant woman in the limited right of choice afforded to her by that decision. In that way, we will at least insure that more children will be born to families eager to assume their care, instruction, and upbringing.

FOOTNOTES

1. Cal. A.B. 2614, Reg. Sess. (1961) (Knox).
2. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan. L.Rev. 417 (1959).
3. Cal. Stats. 1967, ch. 327. See generally, Leavy & Charles, California's New Therapeutic Abortion Act: An Analysis And Guide to Medical and Legal Procedure, 15 U.C.L.A. L.Rev. 1 (1967).
4. Model Penal Code §§ 207.11 (Tent. Draft No. 9, 1959), 230.3(2) (Proposed Official Draft 1962).
5. Cal. Health & Safety Code § 25951 (c) (1967).
6. Ch. 177 (ACR 113) 1967; Cal. Health & Safety Code § 25955.5.
7. A Report to the 1971 Legislature: Fourth Annual Report on the Implementation of the California Therapeutic Abortion Act, at p. 3.
8. Therapeutic Abortion in California: A Biennial Report Prepared for the 1974 Legislature Pursuant to Section 25955.5 of the Health and Safety Code, at p. 8, Table 5.
9. Tietze & Lewitt, Legal Abortion, 236 Scientific American 21, 25 (January, 1977).
10. 410 U.S. 113 (1973).
11. Induced Abortion in California: A Biennial Report Prepared for the 1976 Legislature, at p. 2.
12. Ibid. See generally, Margolis & Goldsmith, Techniques for Early Abortion in (H. Osofsky & J. Osofsky, eds.) The Abortion

Experience: Psychological and Medical Impact (1973).

13. Therapeutic Abortion in California, supra note 8, at p. 2.

14. 448 U.S. 297 (1980).

15. Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981); followed, Committee to Defend Reproductive Rights v. Cory, ___Cal.App. 3d ___, ___ Cal.Rptr. ___ (1st. Dist. Nov. 6, 1981) (1981 budget).

16. Moe v. Secretary of Administration & Finance, ___ Mass. ___, 417 N.E.2d 388 (1981).

17. Doe v. Maher, # 19 68 74 (Conn. Super. Oct. 9, 1981); Fischer v. Department of Public Welfare, No. 283 C.D. 1981 (Penn. Aug.10, 1981); Right to Choose v. Byrne, 169 N.J. Super. 543, 405 A.2d 427 (1979) (decided on both state and federal grounds).

18. Alaska, Colorado, Hawaii, Maryland, Michigan, New York, North Carolina, Oregon, Washington, and the District of Columbia. See Women's Legal Guide to Reproductive Rights: A Publication of The Reproductive Freedom Project of the American Civil Liberties Foundation, at p. 5, n. 1 (1981) (the states listed were voluntarily funding most Medicaid abortions as of February, 1981).

19. Mr. Justice Marshall made this point in dissent in Beal v. Doe, 432 U.S. 438, 456-57 (1977).

20. Hardin, We Need Abortion For the Children's Sake, in (C. Reiterman, ed.) Abortion and The Unwanted Child at p. 5 (1971).

21. Sampling California public opinion in February 1979 (#7901) and July 1980 (#8004), the Field California Poll found strong approval for abortions when the baby was conceived as the result of rape or incest (approve, 859; disapprove, 130; no opinion, 29) (1980);

or when it might be born with a serious deformity (approve, 805; disapprove, 187; no opinion, 26) (1980); compare, on the same question, (approve strongly, 293; approve somewhat, 98; disapprove somewhat, 25; disapprove strongly, 52; don't know, 19) (1979). Opinion was more evenly divided where an abortion was sought because the mother feels the family can't afford to have another baby (approve, 503; disapprove, 477; no opinion 38) (1980) (approve strongly, 153; approve somewhat, 97; disapprove somewhat, 64; disapprove strongly, 152; don't know, 19) (1979), and when the abortion was sought because the mother was unmarried and doesn't want a child (approve, 510; disapprove, 476; no opinion, 32) (1980) (approve strongly, 158; approve somewhat, 84; disapprove somewhat, 73; disapprove strongly, 149; don't know, 21) (1979). Public opinion was negative when the question was put whether the mother should have an abortion whenever she desired it for any reason (approve, 384; disapprove, 604; no opinion, 30) (1980) (approve strongly, 101; approve somewhat, 83; disapprove somewhat, 78; disapprove strongly, 204; don't know, 19) (1979).

22. Testimony of John T. Noonan Jr. before the Subcommittee on the Separation of Powers, Committee of the Judiciary, United States Senate, May 21, 1981, at p. 17. He also suggested alternative language: "The Congress and the several States shall have power to protect life, including the unborn at every stage of biological development, irrespective of age, health, or condition of dependency." Ibid.

23. In 1953, Congress amended the 1901 District of Columbia abortion law to authorize the performance by physicians of abortions necessary to preserve the mother's "life or health", not merely her "life". See United States v. Vuitch, 402 U.S. 62, 70-71 (1971).

24. It can be argued that the Court's decisions beginning with Roe v. Wade, which construed the Fourteenth Amendment to create a right of choice whether to give birth triggered the Congressional power contained in section 5 of that Amendment to enforce its provisions. But it is that interpretation that would be nullified by the first sentence of this proposed amendment. Absent the second sentence, therefore, Congress would lack power to regulate abortions.

25. 127 Cong. Rec. S10196 (daily ed. Sept. 21, 1981) (remarks of Senator Hatch).

26. Id., at S 10197.

27. Id., at S. 10196.

28. Witherspoon, The New Pro-Life Legislation: Patterns and Recommendations, 7 St. Mary's L.J. 637, 684 (Appendix A) (1976).

29. In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

30. Cal. Stats. 1980, ch. 1071, amending Penal Code § 1165 (b) and (g).

31. Id., amending Penal Code § 1166(a).

32. Cathy R. v. Deukmejian, Original Proceeding filed in the Supreme Court of California by the A.C.L.U. of Northern California (1981).

33. Cal. Stats. 1981, ch. 29, amending Penal Code § 1165(b).

Senator HATCH. Our next witness will be Prof. Germain Grisez, who is professor of Christian ethics at Mount Saint Mary's College in Maryland. He has formerly been professor of philosophy at Georgetown University and the University of Regina in Canada. He is the author of a classic work on the subject of abortion, "Abortion: The Myths, the Realities, and the Arguments," as well as a collaborator in another work, "Life and Death with Liberty and Justice."

Professor Grisez, I would like to begin with you, go a few minutes, and then go vote and come back, if we can. Go ahead please.

STATEMENT OF DR. GERMAIN GRISEZ, FLYNN PROFESSOR OF CHRISTIAN ETHICS, MOUNT SAINT MARY'S COLLEGE, EMMITSBURG, MD.

Dr. GRISEZ. You have my prepared statement for the record, and I will try to summarize as briefly as possible the main points I wished to make in that statement.

MORALITY AND LAW

The first point has to do with the question of morality and constitutional law. Oftentimes the objection is made that we should not base our constitutional law or our statutes on morality, and in a certain sense this seems to me entirely right. We ought not to take the principle of the sanctity of life or reverence for life as a basis for determining the abortion issue. That is the basis about which people can and do disagree in our pluralistic society.

Nevertheless, there is a moral consideration which is relevant and which we have to take into account, and that consideration is fairness. Fairness is embodied in the Constitution, in the 14th amendment's guarantee of equal protection of the laws.

To see how fairness is relevant, just consider the question, Why is it that we have any laws with respect to homicide in our society at all? Well, obviously no society can do without some law against homicide.

Next question: Why doesn't our homicide law leave out of account—as many cultures' laws against homicide have done—weaker individuals, for instance, slaves, or women and children, or whatever, that the society does not have to protect for its survival as a society?

Well, in our society we have determined that not slaves, not Indians, not women, not children, not anybody can be excluded from the equal protection of the laws. We have a standard of fairness in our constitutional procedure. We are committed to a moral principle as the basis of our constitutional law. That standard of equal protection of the laws is a moral principle but it is also the basis of all our law.

I think that if one once sees this point the question under consideration here becomes, Why is it that human life is protected in other cases but is not protected in the case of the unborn. Obviously, the proponents of the present situation will argue that there is a difference in the case of the unborn: The unborn are not persons, those who are protected by our laws against homicide are persons.

And so we come to the second great issue in this matter, the question of personhood.

QUESTION OF PERSONHOOD

Now, it seems to me that this question has been confused in two ways: On the one hand, the relevant question about personhood is not and should not be thought to be an ultimate question. In other words, there is a problem about personhood which is metaphysical and theological, and everyone can have their own view on it. It is part of one's world view and it is never going to be settled in an agreed upon way in a society like ours.

There is a religious problem about personhood but that problem is totally irrelevant to the issue that is before us here, the constitutional issue of abortion. We are not in the position of having to settle the ultimate question of the personhood of the unborn any more than we are in the position of having to settle the question of the personhood of any other group when we apply the Constitution. The Constitution talks about the rights of persons in the 14th amendment. We find it quite possible, indeed easy, to apply that provision without ever knowing what persons ultimately are in a metaphysical or theological sense.

For instance, the Supreme Court in the case of *Levy* v. *Louisiana,* 391 U.S. 68 at 70 (1968), was talking about illegitimate individuals, and the Court said very clearly: We start from the premise that illegitimate children are not nonpersons. They are humans, live, and have their being. They are clearly persons within the meaning of the equal protection clause of the 14th amendment. The Court had no difficulty in using the word "person" in a meaningful sense. They were talking about legal personhood.

Another element which has led to confusion is that there is a factual matter here. The fact of the matter is that the unborn are alive; the human unborn are human, and human unborn individuals are individuals. We have living human individuals here.

Now that is the fact that is perfectly obvious. No one who is honest and informed can deny it. It is the fact that photographic evidence proves; it is the fact that is scientifically established. All one has to do is look at that Life magazine article of some years back—April 30, 1966—that has pictures of unborn individuals. Therefore, there is no doubt we are dealing with living human individuals. But that fact unfortunately, does not settle the crux of this matter: The unborn are living human individuals, but does that mean they necessarily have to be regarded as legal persons?

LEGAL PERSONHOOD OF THE UNBORN

I think that if we consider the question of legal personhood, however, the fact that the unborn are living human individuals has some weight. What is it that all of those protected by our laws against homicide have in common, besides being living human individuals? Only one thing, I think, that in fact they are already born. Therefore, the question comes down to, What does the dividing line of birth mean? What is the significance of that dividing line?

I think that if we look at the history of laws against abortion and the history of law respecting the unborn's interests and rights in other legal domains, we can see that there was a trend toward greater and greater protection of the unborn. As the Supreme Court said, the unborn were never considered persons in the whole sense. Their legal personhood was not simply declared outright; that is true.

Nevertheless, we are dealing with a group who were never considered absolute nonpersons either. They were not considered persons; they were not considered nonpersons in the law. They were considered to have some rights and interests that were protected in the law but yet not the same as those of everyone else.

Senator HATCH. Professor Grisez, if I can interrupt you at this point, I had better go vote because I only have so many minutes to get over there. I will come right back if you do not mind waiting for me.

Dr. GRISEZ. Certainly. I will be glad to.

[Brief recess.]

Senator HATCH. Professor Grisez, I am sorry for the interruption. It is just one of those facts of life. If you could finish, we would appreciate it.

Dr. GRISEZ. Thank you very much, Senator.

To recapitulate, I was saying that there are two extreme views with respect to personhood.

One is the view that the metaphysical and theological question has to be settled, and it seems to me that is clearly irrelevant to the problem before us. Our problem is a problem of legal personhood and we can use the concept of legal personhood, and do use it all the time in applying the Constitution, without ever settling the question of metaphysical and theological personhood.

The other view is that we do know something about the unborn. We have a class here of living human individuals. This is a factual point. Opponents of abortion often think this fact settles the question of personhood. But that clearly is not so either. Because, although we have in fact living human individuals here--and that is a matter of biology and it is evident to the eye—the question is, Should these individuals be regarded as legal persons? That is the question I think really has to be looked at and faced up to honestly. One cannot go on forever ignoring that question or refusing to face it squarely, as defenders, of legal abortion refuse to do.

Now I think the argument with respect to that issue can be settled, and that the unborn ought to be considered legal persons. Why? Basically because they are living human individuals, and the natural persons that we recognize to be legal persons have those characteristics in common and very little else, except they are also born. However, then the question is, Is birth all that significant a dividing line?

One might argue that it is because those born have greater independence, and yet many of those born do not have very much independence. On the other hand, the unborn could be independent. Many of the unborn can live apart from the mother if they are separated and given some support.

If we look at the trend in the legal developments before the 1973 decisions, we see the unborn were never considered persons in the whole sense; that is to say, the question of legal personhood of the unborn was never unequivocally settled one way or the other. That is true.

Nevertheless, there was a trend in the law more and more to regard the interests and rights of the unborn as something to be respected and protected by the law in various fields. That trend was moving along until the abortion question came up. At that point, and then only, it was decided that the unborn should now be considered nonpersons.

The legal nonpersonhood of the unborn is the real conclusion of the Supreme Court's 1973 decisions. We see the attitude that the unborn are legal nonpersons reflected in the statements of the proponents of the present situation, those statements which just totally disregard the unborn that refuse to even consider whether they may have some rights and interests that ought to be protected.

If indeed we look at it from this point of view, it then seems to be the case that the unborn, like the rest of us, are a group of living human individuals. Ought they to be considered legal persons? Well, the Court says," No". Why not? Because others wish to kill them. That hardly seems fair. Therefore, reverting to the relevant moral principle, equal protection of the laws, we come to the conclusion that the unborn ought to be protected, if there is no better way to do it, by a constitutional amendment of one sort or another.

WHAT AMENDMENT IS APPROPRIATE

If one argued, as many people will, that even the question of the legal personhood of the unborn cannot be settled one way or another—if as Congressman Pritchard said earlier, there is no more consensus now than there was in 1973 on these matters—well, if there is no consensus then the proper conclusion is surely not the very definite one that the unborn are certainly not legal persons, with no rights, and can in no way be protected by any legislature in this country, neither by Congress nor by any State legislature.

No; quite the contrary, if we were to agree that we cannot even reasonably settle whether the unborn are legal persons or not legal persons, then the reasonable conclusion from that would be something very much like the amendment Senator Hatch has submitted; namely, an amendment which would leave it open to protect them to some extent but not with the homicide laws that protect the rest of us—a situation in which we would not have the determination that the unborn are legal persons. Yet we would not have the current situation either, the current situation that fully reflects the arbitrary decision of the Supreme Court that the unborn are not legal persons. They pretended not to reach a conclusion; but they did in fact reach a negative conclusion, drew the consequences, and created the situation we are now up against.

RELEVANCE OF POLLS

I might make a couple of other comments on some things that were said. One point I think that is worth considering is that there is something rather anomalous in the view that, on the one hand, majority rule should never prevail in matters of fundamental rights but, on the other hand, that when we consider the question of the unborn we start citing poll statistics immediately, as if that settled the whole matter. Well, if the poll statistics settled the matter then the assumption is that there is not any basic right here. But that is begging the question. Precisely the issue is, Is there some basic right that needs to be protected here?

I think furthermore that if we look at the polls, while the polls do not support unqualified protection for the life of the unborn—that is to say, the polls that I have seen never give us a majority of the citizenry in this country saying no abortion should ever be permitted—the polls neither give us a majority saying abortion should be permitted as it is now permitted. The majority want some protection, but not all-out protection for the unborn.

Senator **Hatch**. Thank you, professor. Let me ask you this: How do we make distinctions as legislators between those issues or those actions which would be in violation of basic constitutional protections against the establishment of a particular religious view, and those which may simply relate to moral values generally, those that may be held by persons of religious feelings generally?

Dr. **Grisez**. I think the basic criterion is whether the argument can be reduced to one of moral principles that are embodied in the Constitution itself. My position is that the Constitution itself embodies some principles of morality. I think one cannot have a society that does not involve a kind of moral commitment on the part of its members. But it is a limited moral commitment.

In our case, we have a moral commitment to fairness. We go much further than practicality requires to be fair, for instance, in protecting the rights of criminals in many cases. We go much further than practicality requires to be fair in many areas, and I think rightly so, and we do so because that is part of our basic public commitment.

I think that if one can reduce this issue of abortion or any other public policy issue to considerations on the one hand of fairness, of equality of protection in application of the law, and on the other hand within the bounds of fairness to leave as much room for individual liberty as possible, then these moral considerations cannot be excluded as an imposition, for they are constitutional principles.

When anyone, regardless of their religious view—whether that religious view is a traditional Judeo-Christian one or whether it is a modern, secularist one, which is a kind of religious view, too—when anyone wants their positions to be embodied in the law and they cannot ground it on these principles of fairness and, beyond the public domain, respect for equal liberty, then I think we have trouble.

Senator **Hatch**. I am going to submit the rest of my questions in writing because of my time constraints but we appreciate your effort in being here and your thoughtful testimony.

Dr. **Grisez**. Thank you very much.

Senator **Hatch**. Can we put excerpts from your book in the permanent record?

Dr. **Grisez**. Certainly, Senator.

Senator **Hatch**. All right. Thank you so much.

[Dr. Grisez' prepared statement and excerpts from his book follow:]

PREPARED STATEMENT OF GERMAIN GRISEZ

My name is Germain Grisez. My doctorate is in philosophy, from the University of Chicago. From 1957 to 1972 I was a professor of philosophy at Georgetown University, and from 1972 to 1978 I held a similar position at the University of Regina, Regina, Canada. Since 1978 I have been the Reverend Harry J. Flynn Professor of Christian Ethics at Mount Saint Mary's College in Emmitsburg, Maryland. My main academic work has been in ethical theory, legal philosophy, and the application of such theoretical reflection to life-and-death issues.

I have published numerous articles and books; two of my books are of special relevance to this hearing. They are: ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS (New York and Cleveland: Corpus Books, 1970); and, in collaboration with Joseph M. Boyle, Jr., LIFE AND DEATH WITH LIBERTY AND JUSTICE: A CONTRIBUTION TO THE EUTHANASIA DEBATE (Notre Dame and London: University of Notre Dame Press, 1979).

In the latter book I deal with abortion in chapter eight, section G, as a type of nonvoluntary euthanasia; I also deal with relevant constitutional issues in chapter ten, especially section B. The following statement is mostly a summary of these parts of this book, and so further details, supporting references, and the like may be found there by anyone interested.

I commend this subcommittee--its honorable chairman and other members, its counsel and staff--for undertaking these hearings. I wish you well in this important work, which I trust will come to a fruitful conclusion through your sincere and patient efforts. Hence, I am glad to be able to participate in this work today and hope my contribution will help you serve justice in the very important life-and-death matter you are examining.

I have been asked to address myself to moral aspects of the abortion issue. I understand that your interest is in the morality of abortion as it bears upon the constitutional situation created by the decisions of the United States Supreme Court in 1973 and subsequently. Morality certainly is relevant here, for the matter cannot be reduced to a problem of political expediency or even of social welfare. Rather, bearing public responsibility on behalf of the people of the United States and acting as servants of their constitutional commitment to establish justice, you wish to know what is the right thing for you to do about this important matter.

Personally, I believe that human life is sacred, and that every human individual's life should be reverenced and held inviolable, whether the individual be a criminal, an enemy, or an unborn child. On this basis, I consider capital punishment, nuclear deterrence, and abortion morally abhorrent. This belief is not a peculiarly Christian one; indeed, not all Christians share it. In substance, however, I think it is rooted in a vast religious tradition, Indo-European, Judaic, and Christian. Moreover, if human hearts were not blinded by selfishness and hatred, I think reverence for life would be universal, for it follows, if I am not mistaken, from an insight written upon the human heart by our Creator; this insight is available to everyone through his or her own reflection for it is virtually a self-evident truth. As the Declaration of Independence affirms, the right to life is unalienable; every human creature is endowed with it by the Creator.

However, the Declaration of Independence is not the supreme law of this land. And I do not expect you to--nor do I think you should--enact legislation or propose any constitutional amendment on the basis of a moral conviction concerning the sanctity of life. Many members of our society clearly do not believe in the sanctity of human life. I think this pluralism of belief, even on this basic issue, must be respected. Hence, I would not appeal to the sanctity of life in opposing capital punishment or nuclear deterrence, and I never appeal to it in opposing legalized abortion.

What, then, do I point to as the moral ground for your handling of this matter? The best way to clarify the relevant ground is to ask the question: Why do we give legal protection to human life? Why in any case are there criminal laws against homicide?

Of course, every society exercises some control over homicide. Without such control, no human group could survive, for it would fail to offer the security and mutual protection which is a basic--perhaps the most basic--function of human societies. Yet many societies have limited their law against homicide so that only certain classes of individuals are protected and others are not. For instance, some societies allow families to kill unwanted children, slaves, and other helpless members.

One can imagine that our society too might adopt a policy which would provide for the lawful disposal of those permanently unable to care for themselves when no private individual or group was able and willing to care for them. From a constitutional point of view, would there be any obstacle to the adoption of such a policy? Of course, there would: It would violate the Fourteenth Amendment's requirement of equal protection of the laws.

To protect the strong and able with criminal statutes forbidding homicide and to withdraw similar protection from the weak and dependent clearly would be to deny equal protection. This denial would be grossly unfair. Fairness is a moral principle, but at the same time it is the most central principle of good law, and as such it is enshrined in our Constitution. This principle, fairness, is the only relevant moral foundation, I believe, for constitutional and other legal policy concerning abortion.

Of course, those who favor the protection the Supreme Court has extended to abortion will object that fairness is inapplicable to the unborn. Fairness extends to all persons, but only to persons, and (they will assert) the unborn are not persons. Hence, in the case of the unborn, defenders of legal abortion would exclude as irrelevant the requirement of equal protection. Let us examine this issue--the personhood of the unborn.

In its 1973 decisions, the Supreme Court noted that the unborn never have been considered persons "in the whole sense" and it held that the question of personhood ultimately is a metaphysical and theological one which cannot be settled by evidence and reasoning. The Court proposed to determine the constitutionality of abortion without settling the issue about personhood. How sound was the Court's approach to the question of personhood?

First, it must be admitted that Anglo-American law never has taken a consistent and unequivocal position on the legal status of the unborn. For some purposes, they were considered persons, or treated as if they were persons; for other purposes, they were treated as nonpersons. On the one hand, had the unborn been considered persons like anyone else, there never would have been special statutes concerning abortion, for the law of homicide which protects those already born would have protected the unborn. On the other hand, had the unborn simply and unequivocally been considered nonpersons, the special protections afforded unborn life never would have been enacted and enforced, nor would other areas of the law have protected various other rights of the unborn.

Second, there certainly is a very deep metaphysical and theological question about personhood. The human person is a mystery, and what one thinks of persons certainly is integral to one's entire worldview. However, in practice we have an adequate notion of person which we use in law without resolving or prejudicing the metaphysical and theological mystery. Therefore, I submit that in raising this question, the Supreme Court was confused about the basis for decision. The question was not: Whether in terms of ultimate reality the unborn are persons? The question rather was, and still is: Whether in all fairness the unborn should or should not be considered legal persons?

And so, third, the Court in admitting its incompetence with respect to the metaphysical and theological mystery of personhood evaded--or, at least, failed to fulfill--its responsibility to face up to and reasonably determine the only relevant issue about personhood in respect to the unborn, namely: Is it fair to treat this class of entities as legal nonpersons? For the Court precisely did this: It treated the unborn as legal nonpersons. It did not leave this issue open. Rather, it altogether excluded from the unborn any right or interest in their own survival. And the Court imposed this exclusion as the supreme law of the land while it virtually absolutized a woman's liberty with respect to her pregnancy and its outcome.

The Court also recognized a very limited State's right to protect its interest in viable unborn life. Note that while the Court declared viable life "meaningful," even in this case it recognized no right of the unborn themselves in respect to their own survival.

If the real issue concerning the personhood of the unborn is confronted squarely, how can it be resolved? Recall that the issue is: Is it reasonable to treat the unborn as legal persons or not? To answer this question, it is relevant to ask what characteristics mark off all those who are unquestionably considered legal persons in similar matters, and whether or not the unborn share these characteristics.

Obviously, when life and death are at stake, the legal status of corporations and other nonnatural persons is irrelevant. The laws concerning homicide do not apply to them because by the nature of the case they cannot. These laws apply only to a certain class of natural individuals. These individuals have in common that they are alive; otherwise, their lives would not need protection. But not every living individual is protected by homicide statutes. Whooping cranes, experimental monkeys, and pet dogs and cats are given considerable legal protection, but they are not considered legal persons. The natural individuals that are considered legal persons all have a characteristic which divides them from all other living individuals--they are members of the human species.

Thus, all living human individuals who are already born are considered legal persons having their own interest in their own survival and their own right to equal protection of their lives. But the human unborn also are living human individuals. Do natural legal persons have anything further in common--apart from the very fact that they are born--to distinguish them from the unborn? I submit that they do not.

I realize that the Supreme Court seemed even to deny that the unborn are alive when it used the phrase "potential life" to refer to the existence of already viable, unborn individuals. However, this expression was nothing but a confused attempt to get around the issue of legal personhood. Everyone knows that the unborn to be aborted are alive. This is the fact biology establishes and photography renders sensibly evident. Once this fact is distinguished from the quite distinct question of legal personhood, not even defenders of legalized abortion deny it.

It follows that if it is reasonable to refuse to consider the human unborn legal persons, this refusal must be grounded in something very significant about the very fact of their being unborn. Could this be their condition of dependence upon their mothers? No. For many people who are already born are equally or even more dependent upon others than the unborn are upon their mothers, while many of the unborn--namely, those already viable--could survive if they were separated from their mothers.

Moreover, any child already born but unable to survive beyond the twenty-eighth day of life is nonviable; such individuals, according to the Court's dictum, have no meaningful life. Although they are citizens of the United States, the Court has resisted the efforts of certain States to protect the lives of such nonviable individuals when they come to birth in the course of a procedure intended to kill them before birth.

Historically, there were two reasons why the unborn were not unequivocally classed with other living human individuals as legal persons. First, until modern times the factual situation was unclear; there was scientific uncertainty concerning when life begins and when it is specifically human. Second, for most purposes it was unnecessary to recognize and deal with rights of the unborn distinct from those which would later belong to these individuals once they were born.

However, in the course of the nineteenth century the factual situation became clear: Human life does not begin with each generation, but rather is a continuous stream, in which new individuals emerge at fertilization. As this factual situation became clear, development in various areas of law also pressed toward recognition in the unborn of rights of their own, which needed to be and were safeguarded even before they were born and in some cases even if they were never born alive.

Hence, although the Supreme Court was correct in stating that the unborn never were considered in our law "persons in the whole sense," it neglected to note that the trend of Anglo-American law for a century and more was uniformly in the direction of considering the unborn legal persons.

Once this trend is taken into account, one must face the question: What reasonable basis was there for the Court to treat unborn living human individuals as legal nonpersons when it considered the constitutionality of statutes prohibiting abortion? I submit that the only basis for treating the unborn as legal nonpersons was to clear the way for the establishment of a constitutional and legal policy permitting, protecting, and facilitating abortions. In other words, the unborn were considered nonpersons precisely so that they could be killed.

Clearly, this social-policy objective was relevant, but equally clearly it was not reasonable. By the same method, any group of burdensome and unwanted individuals might be declared legal nonpersons and the protection of the law of homicide withdrawn from them.

Thus, it seems clear that unborn living human individuals should be considered consistently and for all purposes to be legal persons. To establish the legal personhood of the unborn as constitutional law, in the absence of a decision by the Supreme Court overturning its previous rulings, a constitutional amendment is needed. Such an amendment need state only that every living human individual, whether born or not, is a legal person, with all of the rights guaranteed by the Constitution to every person.

If the legal personhood of the unborn were our established constitutional law, there would remain various problems. It seems to me that the provisions of homicide statutes which protect those already born would also protect the unborn. However, without unfairness to anyone, homicide statutes could be amended to provide for cases in which there might be conflict among the interests of various individuals in their own survival. Special provisions also would be needed to establish reasonable standards for determining that an unborn life in fact was threatened or taken.

What about an amendment having a more limited objective, such as the human life federalism amendment proposed by the Chairman of this Subcommittee, Senator Hatch, on September 21, 1981? An amendment of this sort would empower Congress and the various States to prohibit or regulate abortion; undoubtedly this power would be used to some extent; and so the amendment would help to prevent the destruction of many unborn individuals. To this extent it would provide a partial remedy for the unfairness of the present situation.

However, if the preceding analysis is correct, the only reasonable position is that unborn living human individuals ought to be considered legal persons; a human life federalism amendment clearly would not have this effect. In my judgment, an amendment of this type would not be fair to the unborn. Moreover, this unfairness would not be merely that of a particular piece of legislation which might easily be improved; it would be the entrenched unfairness of a social decision embedded in constitutional law.

Nevertheless, one might argue that for the Congress as a body and for the people of the United States as corporate makers of constitutional law, even the question of legal personhood is not rationally determinable. One might support this argument with the thesis that good constitutional law ought to be a virtually unanimously accepted system of social self-control.

Had the Supreme Court taken this agnostic and restrained stand in 1973, then it should have rejected the constitutional challenges to the then-existing statutes limiting abortions. For in the absence of a reasonable determination that the unborn either should or should not be considered legal persons, statutes providing some protection for their lives but protection distinct from and less than that provided undoubted persons seem quite appropriate.

In sum, if the conclusion of this subcommittee is that the unborn ought to be considered legal persons, and this is the conclusion I think you should reach, then your recommendation ought to be a constitutional amendment designed to have this legal effect. However, if the conclusion of this subcommittee is that there is no reasonable way for the Congress and people of the United States to determine the issue of the legal personhood of the unborn, then your recommendation ought to be a constitutional amendment along the lines of the human life federalism amendment.

To leave the matter as it is now would be tolerable and in accord with the constitutional principle of fairness only if it were clear that the unborn cannot reasonably be regarded as legal persons. Moreover, to leave the matter as it now is would befit the people of the United States as a self-governing body only if they were corporately convinced that the unborn cannot reasonably be considered legal persons. The contrary is demonstrated by the very existence of a powerful movement seeking a constitutional amendment to declare unborn living human individuals legal persons.

(EXCERPT FROM CHAPTER 8)

Life and Death with Liberty and Justice

A Contribution to the Euthanasia Debate

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~~Fair~~ Just Criterion: Membership in the Human Species

Proponents of euthanasia are likely to object to the preceding argumentation that if no quality-of-life criteria are admitted, than one must hold that all lives are inviolable regardless of their quality. After all. there are intelligent porpoises, parrots which talk, apes which seem to be able to use some simple tools, and so on. If qualitative considerations are excluded, an unqualified philosophy of reverence for life would require the protection of bacteria against penicillin.

But this objection presupposes the qualitative criteria—sharing in certain abilities to some degree—which the preceding argument has criticized. The opponent of euthanasia need not defend any philosophy of absolute reverence for life. The argument begins with an existing law forbidding homicide. The issue is whether that law ought to be modified to permit some human individuals to be killed whose lives until now have been protected by the law's prohibition. The opponent of the legalization of euthanasia need only defend as reasonable the line drawn by the existing law of homicide or a more inclusive line than that drawn by present law.

The line drawn by the existing law of homicide in Anglo-American jurisdictions protects every living human individual from birth, with the exceptions discussed in chapter seven. Being a human individual is an all-or-none property, not a quality in which one can share in various degrees. Human individuals are members of a well-demarcated biological species. They are easily recognized by their familial relationship with other members of the species, regardless of their individual performances.

Of course, not everything which pertains to human life is a human individual. For example, one's left arm is not a human individual; it is only part of an individual. Similarly, although one's sperm or ovum is alive, human, and an individual cell, it is not a human individual, but only part of some individual. The human individual is the whole organism of the species homo sapiens. In chapter three, section D, we distinguished between the death of such a whole and the death of its parts. Only the death of the whole is the death of a person.

Human individuals are the only natural persons recognized by Anglo-American legal systems. There is nothing else which all those now recognized as protected by the law of homicide have in common beyond the fact that they are members of the human species who have been born alive. Since the preceding argument shows that there is no way to protect some of those now protected while excluding others without introducing unjust principles of discrimination, the conclusion is that the law ought to continue to protect all human individuals without discrimination.

Drawing the line at this point is not at all unreasonable. As Rawls and others have pointed out, the legal system is made by humans for humans. By it human individuals regulate their relationships to each other so that these relationships reflect not merely the interests which humans share with other animals but the peculiarly human ideals of liberty and justice in which other animals do not participate. Still, to qualify for legal personhood and to have one's basic rights protected, in particular one's right to life, nothing beyond the common property of species membership can be required, or else the problems of quality which varies by degrees will emerge.

As to allowing nonhuman animals the status of legal personhood and the protection of basic rights which attend this status, this theoretical possibility is hardly a point which deserves serious consideration. Existing laws which protect animal life are based upon conceptions of human interests and ideals—for example, conservation for use, prevention of immoral cruelty, and the like.

In practice law cannot undertake to protect any large segment of nonhuman animals by making them legal persons, and there is no significant body of public opinion which would support such an innovation. If nonhuman animals were to be regarded as individuals due respect and in possession of their own rights, then either lines would have to be drawn on some arbitrary basis or even viruses would be included—something obviously unworkable.

G. Legalized Abortion a Violation of Justice

But what about the requirement that human individuals be born alive before being accepted as legal persons? This dividing line excludes from legal personhood a subclass of members of the species, the unborn, which are in reality whole organisms and distinct individuals. At present the law in the English-speaking countries does not consider the unborn to be legal persons, and the law of homicide does not forbid killing unborn individuals. This is true even where laws forbidding abortion provide some protection for such individuals; antiabortion laws are not based upon the assumption of the full legal personhood of the unborn, for if that assumption were accepted, the ordinary homicide laws would apply to them.

Two points may be made by way of jurisprudential defense of the present exclusion of the unborn from protection by the law of homicide.

First, this exclusion is based upon a status which is not a matter of degree. To this extent, using birth as a necessary condition for legal personhood is not legally unworkable in the way that using quality-of-life criteria is. Or, to put the point another way, the repeal of the laws forbidding abortion does not open the door to the killing of an indeterminately large class of individuals other than the unborn from whom this repeal withdraws legal protection.

Second, the exclusion of the unborn from protection by the law of homicide is not *in itself* a novel discrimination introduced as a practical application of one particular world view. As we have pointed out already, antiabortion laws were necessary to protect the unborn precisely because the commonly received legal view was that the unborn are not protected by the law of homicide which protects those who are already born. To permit nonvoluntary euthanasia would be a more radical step than to legalize abortion, for the legalization of nonvoluntary euthanasia would mean the withdrawal of protection from individuals until now protected by the same law of homicide which protects everyone. Those killed in a program of nonvoluntary euthanasia, whether declared nonpersons or not, would be individuals whose personhood before the law has been universally accepted in Anglo-American jurisdictions until now.

Nevertheless, we think that unborn human individuals ought to be considered legal persons and that the restriction of the law of homicide by which it protects only those who have been born alive ought to be abandoned. The case for this position has been stated at length elsewhere and need not be repeated in full here.[34] However, a few comments are in order.

First, until modern times no one knew when human life begins. It was commonly thought that it began from nonliving materials sometime during pregnancy. But by 1800 it was known that while new human individuals begin, human life as such does not begin but is transmitted continuously. Further, law generally stays close to common sense. From a common sense point of view there is something lacking for the full reality and personhood of an individual until birth occurs and one can begin to interact with the separate and distinct body of the infant. Between the time when spontaneous movement of the fetus is felt (animation) and live birth a common sense view is that the unborn is alive and growing—the baby *is coming*. Hence, there is a tendency to count the unborn as being in an intermediate state between nonbeing and being, between lifeless material and the fully real, liveborn infant. Law also has very important problems with evidence. No one can be held guilty of killing until it is certain that life is present, until it is clear that the act was the cause of death, and so on.

Under these conditions Anglo-American law would have found it extremely difficult to attempt to consider unborn individuals as legal persons whose lives would be protected by the laws forbidding homicide. Some clear dividing line was essential, and birth was quite naturally chosen. At the same time unborn individuals were protected by special laws, already to some extent at common law and later by statutes which were enacted beginning early in the nineteenth century when the real status of the unborn began to be understood more accurately.[35]

In its decision repealing laws forbidding abortion the United States Supreme Court accepted false historical claims by proponents of abortion which called into question the fact that abortion was a crime at common law and which denied that antiabortion statutes were intended to protect the lives of the unborn.[36] A more responsible effort by the Court to discover the relevant history of the law would have revealed the situation summarized in the preceding two paragraphs.[37]

Second, Anglo-American law never has taken a consistent position either that the unborn are not legal persons or that they are legal persons. In different areas of the law different solutions were reached at different times and places, solutions always recognizing the impossibility of completely excluding the unborn from the human community but never simply affirming their unqualified membership and rights. Nevertheless, if any recognition was to be given at all, it was very difficult not to give increasing legal status to the unborn. The reason for this is simple and obvious enough: If there is a claim of justice, less than full and unqualified recognition of the claimant is injustice. And so until the proabortion movement reversed a long-term trend, Anglo-American law tended for more and more purposes to regard the unborn as already existing legal persons in possession of rights before the law, some of which were actually enforced prior to birth.[38]

In its abortion decision the Supreme Court distorted this state of affairs in two ways. It suggested that there existed disagreement concerning when life begins and it proposed to avoid settling this disputed issue. It then noted that the law did not consistently regard the unborn as legal persons, minimized the respects in which personhood was in fact accorded the unborn by the law, ignored the trend toward fuller recognition, and summed up the situation by saying, "In short, the unborn have never been recognized in the law as persons in the whole sense."[39]

Third, inconsistency in the law with respect to the status of individuals as persons is intolerable. Law can deal with most things in different ways for different purposes. But persons are not simply something within the subject matter of legal concern. Persons are those for whom the law exists. If one is a person, one deserves the whole service of the law; if not, none of its service. The case of the unborn is not the only historical instance of legal inconsistency on this matter. Slaves and Indians also were treated inconsistently, being recognized as persons for certain purposes and denied personal status for other purposes.[40]

The controversy over legalization of abortion forced a decision which would settle the status of the unborn, for if they were persons, then the demand for abortion could not be admitted; while if they were not, it could not be resisted. The issue was not a matter of policy on which consensus or lack of it could be decisive, because the putative right of persons to live was at stake. Nor was it a matter on which a decision could be avoided.

The Supreme Court held that if the unborn were persons, then the case would have to be decided in their favor. But instead of facing the responsibility of settling this crucial issue the Court maintained that the case for personhood was not proved and thus that the unborn should not be considered persons. The question was what consistent policy ought the law to adopt; the Court begged this question by assuming that if the unborn were not already fully recognized as persons, then such recognition could not be given them.[41]

Fourth, the dividing line of birth is not particularly significant either with respect to the status of human individuals as members of the species or with respect to their status as individuals involved in human society. There is very little difference between an infant about to be born and a neonate. And the developments in the law made clear that in many respects the unborn are involved in society—for example, by owning property which must be managed, by needing the support of their fathers, by suffering negligent damage and death, by requiring medical care which a mother might reject for herself on religious grounds, and so on. Also, the quickly developing movement to allow nonvoluntary euthanasia of defective newborns clearly extends the acceptance of abortion to the class least distinct from the unborn.[42] Moreover, the unborn could be recognized as legal persons without any legal impracticality.

To insist upon birth in addition to membership in the human species under these circumstances—taking into account what has been known for more than a century—is discriminatory. Hence, all living human individuals should be considered legal persons; the same law of homicide should protect the lives of all equally.[43]

However, the Supreme Court claimed that killing the unborn must be permitted because they are only *alive* on one debatable theory—a patent absurdity. Still, the Court admitted that there is some sort of life which is other than life "as we know it": a potentiality of life, or potential life, or fetal life. At the point of viability a state can give some protection to this so-called potential life "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[44]

In taking this position the Court implied that the life of all those who survive either spontaneous or induced abortions but who are too young to survive the neonatal period is not meaningful, although such individuals certainly are legal persons and are citizens of the United States according to the Fourteenth Amendment. Thus in its decision on abortion the Court itself began the trend toward belittling the significance of the life of infants already born which is now unfolding in the movement to legalize killing some such persons, whether on the theory that such life is not meaningful and that such persons are better off dead, or on the theory that such individuals should be excluded from personhood, or on the crass view that whether such individuals are persons or not, they simply should be disposed of if they cost more than they are worth.

Our conclusion is that legalized abortion, except to save the life of the mother, is a violation of justice. Equal protection of the laws demands that the unborn be considered legal persons, and their lives be protected by the same law forbidding homicide which protects other persons. We shall return to this subject in chapter ten, section B.

Notes to excerpt from chapter eight of *Life and Death with Liberty and Justice*

34. Joseph M. Boyle, Jr., "That the Fetus Should Be Considered a Legal Person," *American Journal of Jurisprudence*, 24 (1979), forthcoming. See also Grisez, *Abortion*, pp. 361–442; Dennis J. Horan *et al.*, "The Legal Case for the Unborn Child," in Thomas W. Hilgers and Dennis J. Horan, eds., *Abortion and Social Justice* (New York: Sheed & Ward, 1972), pp. 105–141 and 301–328; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review*, 63 (1975), pp. 1250–1292 and 1331–1341; Joseph W. Dellapenna, "Nor Piety Nor Wit: The Supreme Court on Abortion," *Columbia Human Rights Law Review*, 6 (1974), pp. 389–409; Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review*, 41 (1973), pp. 807–862.

35. See Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 186–193 and 374–397.

36. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 133–137 and 148–153, 718–721 and 724–726.

37. In addition to the work cited in note 35 see Destro, *op. cit.*, pp. 1267–1292; Byrn, *op. cit.*, pp. 815–839. Nowhere other than in its careless acceptance of proabortion propaganda as historically determinative is the Court's bias and irresponsibility more evident.

38. Grisez, *Abortion*, pp. 361–402; Horan *et al.*, *op. cit.*, pp. 109–127.

39. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160–163, 730–731.

40. U.S. Constitution, art. 1, § 2; see James Madison, No. 54 of Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York and Scarborough, Ont.: New American Library, 1961), pp. 336–340, in which Madison avoids arguing for this provision by putting its defense into the mouth of a fictional southerner. Cf. Destro, *op. cit.*, pp. 1284–1289; Joseph Parker Witherspoon, "Impact of the Abortion Decisions upon the Father's Role," *Jurist*, 35 (Winter 1975), pp. 41–47. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York, Chicago, San Francisco: Holt, Rinehart & Winston, 1970), pp. 351–366 and *passim*, shows how the rights of American native people continued to be violated even after the ratification of the post-Civil War amendments and how they continued to be treated as semipersons.

41. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160–163, 730–731. See comments by Byrn, *op. cit.*, pp. 809–814 and 840–852; Destro, *op. cit.*, pp. 1263–1267; Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge, Mass. and London: MIT Press, 1976), pp. 127–129.

42. See Richard Trubo, *An Act of Mercy* (Los Angeles: Nash Publishing Co., 1973), pp. 141–158. Norman Podhoretz, "Beyond ZPG," *Commentary*, 53 (May 1972), pp. 6 and 8, already argued that if abortion entailed infanticide, as some argued, this should weigh against abortion. F. Raymond Marks, "The Defective Newborn: An Analytic Framework for a Policy Dialog," in Albert R. Jonsen and Michael J. Garland, eds., *Ethics of Newborn Intensive Care* (San Francisco and Berkeley: University of California, 1976), p. 102, notes that the Court's decision in Roe v. Wade embodies a fiction that the unborn is not a person and thus conceals the adoption of quality-of-life criteria for preferring other lives to its, but Marks argues (pp. 106–125) on the assumption that abortion is now accepted and so infanticide also must be accepted. It is frightening to notice that *at every stage* of its unfolding the control of life movement has insisted very strongly upon the utter difference between its immediate objective and the next step, and at every stage it has used its achievement as a step toward that next step—notably in using the acceptance of contraception to promote abortion and using liberalization of restrictions upon private activities to promote public programs of contraception and abortion.

43. See Grisez, *Abortion*, pp. 403–431; and other works cited in note 34, above. See also Joseph L. Lewis, "Homo Sapienism: Critique of *Roe v. Wade* and Abortion," *Albany Law Review*, 39 (1975), pp. 856–893.

44. Roe v. Wade, at 162–163, 731–732.

10: The Constitution, Life, Liberty and Justice

A. Liberty and Justice in Jeopardy

Many of the most important public debates involving jurisprudential issues in the United States since World War II can be viewed as conflicts between parties who prefer as much liberty as possible and parties who prefer as much equality as possible, especially in matters involving important components of justice. Libertarian arguments have been offered against the growth of the welfare state, equalitarian arguments for it; libertarian arguments against going beyond the ending of legally enforced segregation to begin legally enforced integration of the races, equalitarian arguments for it; libertarian arguments against criminal laws protecting the lives of the unborn, equalitarian arguments for such laws.

As a comparison of the individuals and groups on either side of these and similar issues quickly makes clear, no one is consistently a libertarian or an equalitarian. Simultaneously respecting both of these basic jurisprudential principles is never easy. Moreover, as exemplified in the preceding chapters, there are considerations of either liberty or equality or both on opposite sides of many, if not of all, important jurisprudential issues.

In the course of our study we have noted many important respects in which—assuming our conclusions correct—liberty and justice are presently being violated or are threatened with violation in the immediate future.

The liberty of competent persons to consent and to refuse consent to medical treatment has been violated, and the law has failed to provide effective means by which persons can exercise this liberty with respect to a future time of noncompetence. The recently passed natural-death or right-to-die legislation is objectionable for many reasons, not least that it arbitrarily restricts the very liberty it is intended to implement. The liberty of persons who wish to commit suicide sometimes is infringed by excessive measures of restraint and custody; such measures often infringe upon the privacy of persons who live in institutions. The liberty of members of society who oppose the death penalty to stand aloof from this form of official homicide seems to us to be violated by every jurisdiction which uses this method of punishment.

The liberty of members of society who consider abortion murder of the unborn to stand aloof from public programs which involve the state in this form of killing has been violated by every jurisdiction which has put public facilities and public funds at the disposal of those who engage in abortion. Similarly, if voluntary euthanasia is legalized and carefully regulated to the extent that it must be if it is to be safe, the liberty to stand aloof of all who regard as abhorrent such killing with the consent of the victim will be violated by the *institutionalization* of the practice. Everyone, nevertheless, will admit institutionalization to be necessary to protect the lives of those who do not consent to be killed.

The liberty of physicians to provide noncompetent patients with appropriate but not excessive medical treatment is violated to the extent that the present legal situation compels the physician to work in a context of uncertain liability, instead of facilitating a clear determination of the patient's constructive consent in cases in which there is doubt about it.

Not every limitation on liberty is a violation of it. Liberty is justly limited whenever all who are reasonable agree to its limitation for the sake of the common life they share, the social order which liberty itself creates. But every restriction of liberty without social necessity and every limitation of liberty which unfairly weighs on some for the good of others does involve injustice. The preservation of the blessings of liberty is itself a very important aspect of political society's constituting purpose.

Some proposed definitions of death would deprive living persons of their legal status as persons; such deprivation is a fundamental injustice which opens the way to a whole series of other injustices. At the same time to insist upon outdated standards for determining death is to compel the living to treat the dead as if they were alive, when the contrary can be established beyond reasonable doubt. This is unjust, especially when the dead person has made an anatomical gift which is interfered with. Competent persons are unjustly required to undergo and someone is required to pay the cost of unwanted treatment when the liberty to refuse treatment is insufficiently recognized and implemented. The noncompetent who are deprived of appropriate treatment or who have imposed upon them excessive treatment likewise suffer an injustice.

But most important is the unjust deprivation of life which is involved in the failure of the law to provide equal protection to this basic good. Those who are aborted before birth, those who are killed by omission after birth, and those for whom early death is sought as a management option are unjustly deprived of their lives. At the bottom of the present and growing tendency to deprive some persons of life is the ascendancy of one particular world view: secular humanism with its consequentialist ethics. According to this world view, one person can decide on behalf of another that he or she has a life or prospect of life not worth living, a life which does not merit preserving and protecting.

Secular humanists, of course, are entitled to affirm this world view and to seek to live their personal lives according to it, so long as they respect the interests of society and the rights of others. This is what liberty means. But in America today—for that matter, throughout the Western world—secular humanists are seeking to have their world view established as the exclusive legitimate framework for public policy.

Thus Western societies are moving very rapidly from a jurisprudence based upon the traditional religious morality of sanctity of life to the new morality of quality of life judged from a secular humanistic perspective. From the position of protecting every individual's life as inherently inviolable Western societies are moving directly to the opposite position of withdrawing legal protection from some individuals' lives considered as useless to themselves and others—as lives which ought not to have been conceived or which ought to be quickly terminated. The kindest possible treatment for such persons is to kill them, it is argued, for they will be better off dead.

The injustice of imposing upon a noncompetent person someone else's concept and standard of quality of life is patent. So is the injustice of imposing secular humanism as the established framework of public policy upon a whole society, many of whose members do not share the secular humanist faith. Indeed, as a matter of constitutional law, the use of the secular humanist perspective as a privileged basis for public policy—which was what happened in the legalization of abortion and is proposed in the argument for legalizing euthanasia—constitutes an establishment of religion in violation of the First Amendment of the United States Constitution.

Proponents of euthanasia no doubt will vehemently deny that they are attempting to establish a religion. Their own literature is filled with attacks upon the principle of the absolute inviolability or sanctity of human life precisely on the basis that this principle is rooted in a religious view which not everyone holds in contemporary pluralistic society. In effect, those seeking to justify nonvoluntary euthanasia are urging that instead of earlier religious principles, purely rational and humanistic principles ought to be accepted as a basis for public policy. According to these principles whatever policy will have the best social consequences, judged according to utilitarian ideas of what is best, ought to be adopted.

But in taking this position the proponent of euthanasia is saying in effect: "You may not legislate your morality, because I am going to legislate mine. And I have a right to do so, because mine is areligious while yours is religious." It has seriously been suggested that any legislation which enforces a religiously rooted morality, even in purely secular terms, amounts to an unconstitutional "establishment of religion"; on this view only legislation which serves an obviously rational, "independent, secular, utilitarian, social function" is acceptable.[1]

But can utilitarianism, with its consequentialist criteria for good policy, be made the final standard of the constitutionality of legislation without establishing secular humanism as the official religion of the United States? More generally, can any of the principles embodied in the arguments of proponents of euthanasia be admitted as a basis for excluding some human individuals from the equal protection of the law forbidding homicide without the establishment of the world view which would justify this exclusion and the imposition of this world view upon those to be excluded as well as upon other citizens who still hold to a different world view—for example, one which embraces some conception of the sanctity of life?

It may seem fanciful to suggest that the preference for areligious to religious world views in the determination of public policy issues constitutes an establishment of religion. After all, secular humanism, for example, is by definition *not a religion*. However, this point is not well taken.

The United States Supreme Court already is committed to the position that "secular humanism" is a religion despite its areligious character. In *Torcaso* v. *Watkins* the Court ruled that the State of Maryland had denied secular humanists the free exercise of their religion by demanding of them profession of belief in a Supreme Being as a condition of eligibility to hold the office of Notary Public.[2] In *United States* v. *Seeger* the Court held that a conscientious objector to military service should be considered as having an adequate religious basis for objection if his objection was based upon a belief which occupied in his life the same place as belief in God holds in the life of one clearly qualified for exemption.[3]

Still, in *Seeger* there remain suggestions that reference to something more than personal moral convictions is necessary for religion. But in a subsequent case, *Welsh* v. *United States*, the Court held:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.[4]

In taking this view the Court had to contend with the fact that the statute excluded from exemption persons whose objection was based upon "essentially political, sociological, or philosophical views or a merely personal moral code." The Court held that this language does exclude those whose beliefs are not deeply held and those whose judgment is not a matter of moral principle but rests only "upon considerations of policy, pragmatism, or expediency." But a deeply held conscientious conviction, regardless of its source or any reference to a ground beyond human relationships, qualified as religious.[5]

Presumably, proponents of euthanasia will maintain that their views are deeply and sincerely held, at least by themselves, and that these views somehow have a basis which transcends mere policy, pragmatism, and expediency—a basis for evaluation which is more than a mere personal preference. They must maintain as much to try to evade the charge of arbitrariness which we have leveled against them. But in holding their beliefs to be deeply and sincerely held proponents of euthanasia will fulfill the requirements for their beliefs to be considered religious.

Principles which would justify the limitation of the law of homicide on the basis of quality-of-life considerations, restrictions of personhood, or evaluations of the worth of contributions by various members of society thus are just as much religious beliefs as are principles which would preclude on the basis of the absolute sanctity of life the arbitrary refusal of care for themselves by competent persons who think they would be better off dead and so wish to die. Thus, while proponents of euthanasia are at liberty to hold and to live their personal lives in accord with their own world views, they are not entitled to have some sort of common denominator of their world views accepted and established as the basis for settling which human individuals until now protected by the law forbidding homicide shall be allowed in the future to be killed. Such acceptance and establishment would amount to the establishment of secular humanism and its imposition upon all members of the society, especially upon those whose right to life would be annulled in accord with it.

Commenting upon the Supreme Court decisions we have summarized, Paul Ramsey concludes:

> A well-founded conclusion from this is that any of the positions taken on controversial public questions having profound moral and human or value implications have for us the functional sanctity of religious opinions. The question concerning non-religious positions is whether they any longer exist; and whether proponents of one or another public policy are not, whether they like it or not, to be regarded as religious in the same sense in which traditional religious outlooks continue to affirm their bearing on the resolution of these same questions.[6]

We agree with Ramsey in recognizing as religious in the constitutional sense views which are on their face purely secular and humanistic.

However, we differ from his view to the extent that it implies that there can be no nonreligious or neutral basis for resolving controversial public questions. There is such a basis in the commonly recognized principles of liberty and justice which we have appealed to throughout this book. These principles required us to forgo any appeal to the traditional principle of the sanctity of life; the same principles equally require proponents of euthanasia to forgo any appeal to contemporary conceptions of the quality of life, the requirements for personhood, or the value of various sorts of contributions to society.

It is clear that in certain contexts the United States Supreme Court has been ready and willing to recognize secular humanism and other nontheistic, deeply held foundations of personal morality as religious. This recognition cannot fairly be extended to adherents of such religions when it is to their benefit and them conveniently forgotten when the same Court undertakes to adjudicate on abortion and other matters.

As we pointed out in chapter eight, section A, advocates of legalized abortion and nonvoluntary euthanasia such as Glanville Williams argue that the alternative to retaining a traditional morality of the sanctity of human life as the basis for public policy is adopting a utilitarian conception of quality of life which would justify legalizing some forms of murder or near-murder forbidden in the past by Anglo-American law.

Against Williams, and without invoking a moral principle of sanctity of life, we argued that utilitarian, consequentialist conceptions of the social function of homicide laws ought not to determine to whose lives these laws will extend protection. The distinct and neutral principle of justice—equal protection of the laws—should settle the issue. Even legitimate public policy concerns about problems such as poverty, pollution, and population ought not to be allowed to be weighed in a consequentialist scale against the value of the lives of members of society.

Of course, in the *Abortion Cases* the United States Supreme Court pretended to maintain judicial neutrality and reserve, especially in regard to the question when human life begins. But the Court's professed uncertainty about this well-known matter of biological fact was exposed as a pretense when it legalized the killing of the unborn—by attributing to them only *potential* life, which at most is *possibly* meaningful if the live birth occurs, and by refusing even to consider their interest in life—while it balanced women's interests against various state interests which it held become compelling as pregnancy progresses.

In *Roe* v. *Wade* the Supreme Court of the United States did not maintain judicial neutrality. Rather, it adopted one religious perspective, established it, judged in accord with it, withdrew from one group of living human individuals the legal protections hitherto afforded their lives, and imposed a new constitutional provision on American society in violation of the liberty of all who do not share the secular humanist perspective.

Someone will object that the Court had to decide the case one way or another, to please one side or the other. Strictly speaking, this is not true.

The Court could have declared itself and other courts incompetent to decide the issue on constitutional grounds and unable to decide it on other grounds. Such a decision would have left all parties to the debate free to promote their positions by political means in the legislatures, including Congress, and also free to seek the amendment of the Constitution to bring it into harmony with their own understandings of the conflicting claims of liberty and justice.

Instead, the Court chose to exercise raw judicial power to amend the Constitution in a manner other than those ways provided for in the Constitution itself. The amendment consisted in giving the right of privacy of pregnant women an absolute constitutional status, so that the states would no longer be permitted to protect as they had done—in some cases for more than a century and one-half—the lives of the unborn.

John Hart Ely remarked that *Roe* v. *Wade* was not constitutional law and showed almost no sense of an obligation even to try to be.[7] The reason is that in this case the Court exercised the only legally recognized policy function which is superior to constitutional law: the deliberation and consent which creates and amends the constitution. The American conception of free government demands that this deliberation and consent be the supreme exercise of the liberty of the people: "We the People of the United States . . . do ordain and establish this Constitution." In usurping this function, the Supreme Court most grievously violated the liberty of the people. The legitimacy of American government is severely wounded; powers which are not *just powers* are exercised with specious authority.

Thus, although the United States today remains in many ways unlike Nazi Germany, in many ways which are very important it has become like that lawless regime of might claiming to make right. Moreover, discrimination which rationalizes killing is equally vicious whether it is rooted in an ideology of racial perfection or in an ideology of individualistic perfection, which asserts that no unwanted child should ever be born and no life below a certain standard of quality should any longer be protected.

What is more important is that—as we argued in chapter eight, section G—the Supreme Court could have decided the legality of abortion without assuming as established either the traditional morality based upon the sanctity of life or the new morality based upon quality of life. The question should have been one of whether the law, which had never been consistent in regarding the unborn either as persons or as nonpersons, would better accord with the basic, common principles of justice and liberty if it were rendered consistent in one or the other way. Since the only thing common to all already recognized by law as natural persons is membership in the human species, and since the unborn of human genesis are members of the species, no nondiscriminatory basis exists for excluding the unborn from legal personhood. Once the unborn be admitted to be persons, equal protection of the laws demands that a society which cannot exist without a law of homicide protecting its strong members and those defended by strong protectors should also protect its weak and unwanted members by the same law of homicide.

In the preceding chapters we have suggested many ways in which laws might be reformed without alteration in the Constitution to conform better to the requirements of liberty and justice. Death can be defined, thus to protect those at this margin from being unjustly considered dead when they are not and to protect the living from being required to treat dead bodies as legal persons. Once the significance and breadth of the problem is recognized, we think this definition would best be made by an act of Congress under its enforcement power of the Fourteenth Amendment.

The impositions on liberty in relation to those who have attempted suicide can be eliminated easily. The liberty of competent persons to refuse treatment and the rights of the noncompetent to appropriate but not excessive care can be facilitated and protected by appropriate statutes, which we have outlined in chapters four and nine. Capital punishment can be abolished by statute, for if the practice is not unconstitutional, neither is its abolition.

However, in the United States, at least, not all of the existing violations of liberty and justice can be remedied so easily.

The rectification of the injustice to the unborn of denying their lives protection will require either a reversal by the Supreme Court of its decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* or a constitutional amendment to make clear the requirements of justice which the Constitution formerly respected and implemented but now—in the state of the law as it is after the Court's action amending the Constitution—ignores and blocks.

Moreover, the rectification of the violation of the liberty of the people involved in the establishment of the secular humanistic world view as the sole legitimate framework for the determination of questions of public policy will require either a reversal by the Supreme Court not only of the abortion decisions but also of certain others, which we shall discuss in section D, or a constitutional amendment to make clear the requirements of liberty in a pluralistic society with respect to every theistic and nontheistic religion, every world view which provides an ultimate foundation for any set of deeply held conscientious convictions by which citizens can live their personal lives within the common society.

B. Every-Human-a-Person Amendment

Various commentators on the Supreme Court's decisions in the abortion cases set forth the reasons why an attempt to amend the Constitution must be made in order to reverse the Court's denial of equal protection of their lives to the unborn. Various formulae of a possible amendment have been proposed.[8] Probably the simplest amendment which would reverse the Court's decisions would be one stating; "Nothing in this Constitution shall be construed as providing any foundation for any challenge to the laws respecting abortion which were in force in the year 1966, or to laws similar to them in protecting the lives of unborn human individuals."

Such an amendment would leave entirely open all of the questions which were raised by political efforts to modify the laws but would firmly exclude the courts from questioning the constitutionality of even the most conservative laws in force in 1966, before Colorado enacted the first of the so-called "liberalizations" of the antiabortion statutes. But an amendment of this sort would in fact be a form of states' right amendment and would have all the defects of that approach—defects we believe have been pointed out sufficiently by others.[9]

One difficulty with an attempt merely to turn the clock back is that the practice of denying the right to life of some persons already has extended, as we have shown, beyond the unborn to others, especially defective infants. We believe that the Supreme Court in *Roe* v. *Wade*—regardless of intent—laid the foundation for the extension of quality-of-life considerations to serve as a rationale for denying the right to life of persons already born when it said:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.[10]

The key expression here is "meaningful life." Implicit in the use of this expression is the concept that some lives are not meaningful, that some are so lacking in quality as not to merit equal protection of the law.

Someone will object that this reading of the Court's remark is unfair. All the Court intends in the context, it will be pointed out, is what could have been expressed as an explicit tautology: only when a fetus is developed sufficiently to survive after birth does it have the capability of surviving after birth. Prior to viability an aborted fetus by definition cannot live.

The objection probably correctly expresses what the Court intended. But the fact is that nonviable aborted fetuses do live for various lengths of time after they are born alive, since viability technically means the possibility of surviving not only birth but also the neonatal period—that is, the first twenty-eight days of life *after* birth.[11] Tiny embryos only about five and one-half weeks after conception have been delivered alive and lived long enough to determine by experiment that some reflex arcs already are established in the nervous system at this stage of development.[12] Some such individuals survive only for a few minutes, but more developed individuals survive for hours, days, or weeks, yet are considered nonviable after they die if they do not in fact survive twenty-eight days.

Now it is this life which nonviable infants live *after they are born* for any period up to twenty-eight days which the Supreme Court refers to as nonmeaningful. But it is clear that these individuals are considered not only persons but also citizens by virtue of the Fourteenth Amendment. While courts have had some difficulty in deciding when a person is born, they have never questioned that birth of a live—not a stillborn—infant begins the condition of one who is a potential victim of homicide.[13] In other words, the killing or the intentional shortening of the life of a nonviable person and citizen is the same crime of homicide as the killing or the intentional shortening of the life of anybody else. A nonviable infant is in no different condition than someone who is dying at a later stage in human existence. It is no defense against a charge of homicide to say that one's victim was certain to die within twenty-eight days regardless of one's deadly deed.

Thus in *Roe* v. *Wade* the Court—regardless of intent—took the startling and unprecedented step of declaring not to be meaningful the lives of a certain class of citizens. While it did not in that decision declare these citizens to be unprotected by the law of homicide, it did predicate the state's interest in preventing their abortion on the possibility of their extended survival. Hence, when a fetus is aborted alive, the Court implied that the nonviable had no meaningful life. The Court thus suggested that such citizens might not be able to be significantly deprived of what they did not meaningfully have.

This construction of what the Court meant in *Roe* v. *Wade* would be highly implausible were it not for subsequent events. Even prior to *Roe* v. *Wade* there were widely published reports of the killing of aborted infants delivered alive. One of the states which attempted to ensure protection for such citizens was Missouri, which in its 1974 abortion statute provided:

> No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter.

In challenging this statute before the Supreme Court the appellant in *Planned Parenthood of Central Missouri* v. *Danforth* argued that the provision was intended to prevent all abortions. Despite the implausibility of this contention and the declaration by Danforth, Attorney General of Missouri, that the section was meant to protect the lives of infants already born, the Court held that the section could not survive constitutional attack, for, "It does not specify that such care need be taken only after the stage of viability has been reached. As the provision now reads, it impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of the pregnancy." Moreover, the court refused to sever the second sentence from the first, claiming that the provisions must fall as a unit. Then the Court added, "And a physician's or other person's criminal failure to protect a live-born infant surely will be subject to prosecution in Missouri under the State's criminal statutes."[14]

This final sentence might be taken to mean that the Court is working on the standard assumption that an infant born alive, whether viable or not, is protected by the same statutes as anyone else. However, in the context of the Court's renewed insistence on the importance of viability the sentence also could be taken to mean that a nonviable infant henceforth is not to be regarded as live-born even though it is living apart from its mother after the abortion is completed. This interpretation is supported by the fact that the Court refused to sever the provisions of the section. Also, the Court's statements here at least can be read as a bit of free legal counsel for abortionists; Make certain there are no live-born infants and you have our protection.

The United States Court of Appeals, Eighth Circuit, dealt with the 1974 Minnesota abortion statute shortly after the Supreme Court decided *Danforth*. The Minnesota Statute had two separate and distinct sections, one requiring a physician to choose methods of abortion when feasible which would protect the life of a potentially viable fetus, the other clearly and explicitly concerned with the live-born infant:

> A potentially viable fetus which is live born following an attempted abortion shall be fully recognized as a human person under the law.
>
> If an abortion of a potentially viable fetus results in a live birth, the responsible medical personnel shall take all reasonable measures, in keeping with good medical practice, to preserve the life and health of the live born person.

The court of appeals held that this provision could not stand because it incorporates "potentially viable" and so requires a physician performing an abortion after the twentieth week "to exercise the prescribed standard of care and use only those procedures and techniques calculated to preserve the life and health of the fetus."[15] One might charitably assume that the court simply was confused, but this assumption is hard to sustain, inasmuch as one of its own members dissented and also pointed out the sense of the provisions which were struck down, just as Justice White, joined by Justice Rehnquist and the Chief Justice, had done in *Danforth*.[16]

In any case, the Supreme Court's reference to meaningful life in *Roe* v.

Wade clearly implies that the lives of nonviable citizens are not meaningful. The reason why they are not, presumably, is that they are going to be short: at most less than twenty-eight days from birth. If this fact deprives these lives of meaningfulness, however, a similar value judgment will deprive of meaningfulness the life of anyone who is about to die. And once some lives are agreed to be meaningless, it will be very hard to distinguish from them many other lives which are widely thought to have no more worth than they do. On this basis one should not be surprised that infanticide has become an acknowledged practice since 1973.

Apart from what the courts have done, we saw in chapter eight that there already is a significant movement to deny the humanity or the personhood of certain individuals already born, on the ground that they lack what some regard as minimal qualifications for inclusion in the human community. As we showed in chapter eight, section E, even those advocates of nonvoluntary euthanasia who do not explicitly deny the personhood of those whose lives they consider to be of poor quality hold principles which in practice will lead to the establishment of a system allocating persons with lives of diverse quality to diverse castes.

Under these conditions we do not consider it a sufficient response to *Roe* v. *Wade* to declare the personhood and protect the lives of the unborn. We do not criticize the efforts already made to draft an appropriate amendment; several of these are excellent and deserve support. But we do think that since no amendment has yet been passed, a broader approach which will better meet the present and developing denial of the equal protection of the law of homicide would be preferable.

We think an amendment should make explicit the legal personhood of all members of the human species. It also ought to reject explicitly the subordination of the protection of anyone's life to any other public or private interest or right, for there are many who argue that the lives of persons must be subordinated. The amendment also should make clear that classifications based upon quality of life considerations are just as suspect as racial classifications. Furthermore, while an amendment can exclude discrimination against the unborn as a class, there will remain problems of detail concerning the beginning of life and concerning death. These issues seem to us more appropriately resolved by a legislative process than by constitutional enactment. So we propose an enforcement power which would explicitly include legislative determination of doubts concerning classes of entities which might or might not be individuals belonging to the human species.

> Section one. Every living individual which is a member of the species homo sapiens whether born or not yet born shall be a person within the meaning of the word "person" in the Fifth and Fourteenth Amendments to this Constitution. No part of such an individual shall be a person even

> though such part be living, whether within or apart from the person of whom it is a part.
>
> Section two. No private or public interest or right shall be deemed sufficient to subordinate any person's right to equal protection of laws respecting homicide, nor shall protection of any person's life be conditional upon a belief that such life is meaningful, worth living, or of use or benefit to the person whose life it is.
>
> Section three. Legal classifications of persons on the basis of age, mental or physical normality, ability to take care of themselves, vigor, and strength shall be suspect, but shall be held permissible if such a classification is used to provide special advantages, privileges, or protections to persons who are not in the prime of life, are retarded, defective, deformed, dependent, declining, or weak.
>
> Section four. Nothing in this Article alters the status at law and the rights of corporations and other nonnatural persons.
>
> Section five. Congress shall have the power to enforce this article by appropriate legislation. This power shall include but not be limited to deciding disagreements which may arise in any jurisdiction subject to this Constitution concerning whether any class of individuals is a class of entities each of which is a member of the species homo sapiens.

We first explain the provisions included in this proposal and then indicate why some other possible provisions have been omitted.

Section one identifies the legal personhood of natural human individuals with the only thing they have in common—membership in the same biological species. It has been argued that those who supported the Fourteenth Amendment intended to do this.[17] We propose to make the point as explicit as possible. The second sentence, concerning parts of individuals, is added to make clear that only a whole organism of the human species will count as a natural person. Thus, the various organs which survive the death of a person are not persons; a man's sperm or a woman's ovum is not a person; one's cells growing in a culture are not persons. Neither is one's head or one's foot a person. This does not mean that a person's head cannot be legally protected. It and other parts of a person can be protected, but only in function of the protection of persons whose parts they are.

Section two attempts to establish equal protection of the lives of all persons against any and all supposedly conflicting claims, even claims based upon an individual's own interest in achieving the better condition of being dead rather than living a life of poor quality. We think that some formulation along these lines is essential if a right-to-life amendment is to be effective, since many are arguing that the right to life of some persons must yield to other's interests or the public's interest in avoiding a burden of welfare dependency, and many are arguing that for some persons death is a benefit.

Section three is intended to give the same protection to those whose quality of life is regarded by many as poor as the Fourteenth Amendment (as it is now understood) gives to those whose race is regarded by many as inferior. Classification which tends toward alleviating inequality is permitted, but classification for other purposes on such bases must be considered suspect and worthy of the closest scrutiny.

Section four is inserted only to avoid misunderstandings which might arise, since the amendment will define natural legal persons very carefully and might erroneously be understood to change the status of other legal persons.

Section five places an enforcement power in Congress, especially in order to be definite about where authority lies to settle doubtful cases. However, the enforcement power is not limited but is extended as far as the power granted Congress by the Fourteenth Amendment extends. For the most part the amendment as we have drafted it directs the courts and legislatures in their substantive work.

The first section does not limit itself to the right to life. We understand why proponents of other human life amendments have limited their scope. However, we think that logic and justice require that legal personhood be recognized where it reasonably exists and not restricted to certain purposes. Furthermore, we do not think that legal difficulties of any great magnitude will be created if the unborn are considered persons not only for the right to life but absolutely.[18]

The second section does deal with the right to life. However, we have put the matter not in terms of life itself, but in terms of equal protection of laws of homicide, to conform to our position that justice, not life itself, is the good directly at stake in political society. If a society could exist without any laws prohibiting homicide, then there would be nothing wrong in that society leaving all equally unprotected.

The approach by way of equal protection also avoids a serious difficulty, namely, that of either specifying a discriminatory exception allowing the subordination of the life of the infant to that of the mother or leaving open the possibility of even more extensive discriminatory exceptions.[19] Our approach, we think, would require any permission for killing to be formulated in a nondiscriminatory way, along the lines of the law we formulated in chapter seven, section G, which would permit killing when necessary to preserve the best chance of survival for the largest number of persons involved in a difficult situation.

It will be objected that our approach would require that every abortion be treated as first degree murder and that the woman undergoing the abortion be treated as a principal in the crime. We think that if the unborn are really to be considered persons, there is nothing unreasonable in considering killing them the same as killing other persons. But the usual requirements for proving someone guilty of murder would still apply. First, it would be necessary to show that a living individual had existed and been killed by the procedure. Second, it would be necessary that the intent and premeditation required for first degree murder were given. Furthermore, not all who are guilty of murder are punished with great or equal severity.

There would be nothing unfair in considering murder a crime which might be aggravated if the victim were deprived of other goods and if other persons and society were made to suffer other losses besides the life which every person stands to lose. Thus, the murder of a public official or of a person with dependents could be made a more serious crime, since in such cases more mischief is done than the killing itself. A law of homicide along these lines might provide equal protection of all against being killed, while providing supplemental protection to some lives in virtue of the related interests.

The third section is intended to protect the interests of those who are thought to have a poor quality of life against discrimination other than that which would permit homicide. It might be thought that this section is superfluous. Yet these persons are not always fairly treated, and a society which does not license killing them might well continue to neglect and mistreat them. Affirmative action programs cannot be written into the Constitution; different jurisdictions under varying conditions might have more or less ability to improve the condition of the disadvantaged. But the Constitution can make clear that any form of discrimination against these disadvantaged persons is excluded and can at the same time explicitly open the door to programs which would enhance the quality of their lives.

The fifth section, concerning enforcement, does not refer to laws prohibiting homicide. No one doubts that Congress and the state legislatures have power to make such laws for their respective jurisdictions, and no new grant of power is needed if such laws are to be framed in the terms the amendment specifies. However, Congress may need and would by this section be given the power to override discriminatory state legislation and to preempt the protection of the rights of the disadvantaged if the states fail in this respect. Moreover, some continuing authority is needed—and experience suggests that this authority had better not be the courts—to settle the problems which are bound to arise in borderline cases.

Even if one extends the protection of life to the unborn at every stage of their biological development or from fertilization on, factual issues still must be resolved—for example, whether a birth control device which prevents implantation is an attack upon a person or not, and whether cortical death is the death of a person or not. A uniform policy on such issues would be desirable, and a sound and uniform policy is more likely to be achieved by the Congress than by the courts or the state legislatures. Also, what is at stake here is legal personhood—as we pointed out in chapter three with respect to the definition of death—with all of the rights and privileges which attend it, not merely some part of these rights and privileges which are consequent upon citizenship at either the state or federal level, or both.

C. Need for Protection of Liberty

Although the enactment of a human life amendment along the lines that we or others have proposed might be difficult, the concept of such an amendment is easy in comparison with the concept of an amendment to remedy the infringements and threatened infringments on liberty which we have noticed. The difficulty here, primarily, is that the Supreme Court of the United States, which has itself determined that secular humanism and other nontheistic world views are religious, tends to treat the secular humanist view with its consequentialist ethic as if this view merely gave neutral form to the common principles of American society. In doing this—for example in *Roe* v. *Wade*—the Court, as we have argued, is establishing a religion and judging according to its sectarian tenets.

Leo Pfeffer, a professor of political science at Long Island University, serves as special counsel to the American Jewish Congress. He is a noted practitioner of constitutional law, especially in the domain of church-state relationships, and has argued many cases successfully before the United States Supreme Court, urging separation between religion and government, the exclusion of religion from the public schools, and the denial of public funds to nonpublic schools. In 1975 Pfeffer published a book concerning church-state relationships and the Court as referee in these relationships. This work is remarkable because of what it concedes from the point of view of a person who is both knowledgeable and friendly—or, at least, not hostile—about the direction which the Supreme Court has taken in recent years.

In chapter six, section I, we pointed out that government interests in the field of birth control and abortion go beyond a permissive attitude taken out of respect for liberty—invoked by the Court under the title of "privacy." In fact, the government has extensively promoted birth control, both at home and abroad; abortion also in various ways has become an instrumentality of public policy to deal with the welfare problem. Euthanasia already is seen by some as an extension of this approach to human problems.

Pfeffer offers a similar analysis of the Court's decisions concerning contraception and abortion.

The anticontraception laws were not a real obstacle to the liberty of persons who wished to use contraception. But they were an obstacle to a state policy encouraging contraception. Pfeffer notes:

> The middle income and the affluent, married and unmarried, use contraceptives; the poor have babies. When the poor, often racial minorities, are on the welfare roles, taxpaying Americans rebel and expect the state to do something about it.[20]

Other solutions being unacceptable, the practical way to limit the costs of public welfare programs was to get the poor to control births. Although the national government already was taking this approach in foreign aid programs, the states were obstructed by their own laws against contraception. Pfeffer speculates that the reason the Supreme Court struck down these laws as unconstitutional "may lie in the fact that the justices recognized the need to get the laws off the books" so that either the states themselves or private agencies could openly promote birth control. Pfeffer then adds a remarkable statement, which agrees entirely with the views of the most severe critics of the Court's decisions concerning abortion:

> In this respect the nine justices on the Supreme Court, being immune to political reprisal since they serve for life, may be performing a significant though quite controversial function; they may be compelling the people to accept what the judges think is good for them but which they would not accept from elected legislators.[21]

In other words, the Court is legislating, and in legislating is imposing on the people the justices' own conceptions of what is good and right. Pfeffer does not observe one important implication: that in so acting the Court is usurping a power which does not rightfully belong to it, to place itself above the law and infringe upon the liberty of the people.

Pfeffer extends his explanation of the Court's decisions from birth control to abortion. After mentioning other reasons why the Court may have legalized abortion, he adds:

> All this is true, yet it is probable that a major factor here, as in the case of contraceptive birth control, is the taxpayers' revolt against rising welfare rolls and costs. Legalization of contraception not having worked to an acceptable degree, and other measures . . . proving too Draconian for public acceptance, permissible abortion, encouraged by the state, is the next logical step.[22]

The Court's first dealing with the abortion law, in *United States* v. *Vuitch*, was inconclusive, because this decision allowed the laws to remain in force, although it limited their effectiveness. Apart from other inadequacies Pfeffer notes:

> . . . and perhaps more important, the decision did not meet the needs of the poor who receive their medical services from municipal and county hospitals and clinics. So long as an anti-abortion law was in the State's criminal code, the physicians and nurses were not likely to perform an

> abortion or even counsel one where the only reason for it was that the mother was a welfare recipient with seven children and no husband.[23]

Again, after summarizing the argumentation in *Roe* v. *Wade* and *Doe* v. *Bolton*, Pfeffer says that it "is difficult to escape the conclusion that nonlegal factors significantly influenced the decisions: our socioeconomic situation calls for the availability of abortion as a birth-prevention technique . . . "; but, Pfeffer adds, the legislatures were unable to act to repeal the abortion laws because of the "image of Catholic political power."

Actually, as everyone involved in the matter knows, the opposition to repeal was broadly based, and by 1973 it was beginning to become effective in many places where the Catholic contribution was a negligible factor. However that may be, Pfeffer concludes that "the Court had to do what had to be done and did it." He concludes the discussion on abortion with a parenthetical note regarding a 1973 New York City study which indicated that abortion had kept 24,000 children off the city's welfare rolls.[24]

Subsequently, in considering the efforts to repeal antihomosexuality laws, Pfeffer, reiterating his explanation of the contraception and abortion decisions, says that in the case of homosexuality those who advocate decriminalization "lack the most potent motivating factor possessed by the abortion reform movement, the economic factor. Homosexuality is not a practical or effective means of curbing the fruitfulness of welfare recipients."[25]

On June 20, 1977, The United States Supreme Court decided three cases related to the institutionalization of abortion. A whole series of lower court decisions had compelled the states to fund abortion under Medicaid and public hospitals to provide facilities for performing abortions.[26] Two of the 1977 cases concerned a Pennsylvania statute and a Connecticut Welfare Department regulation which limited state payment for abortion to those cases certified to involve medical necessity, thus to exclude payment for elective, nontherapeutic abortions.[27] The third concerned a directive by the mayor of St. Louis prohibiting abortions in public hospitals in the city except when there was a threat of serious physiological—not merely psychological—injury or death to the mother.[28]

The lower federal court decisions would have compelled Pennsylvania and Connecticut to remove their restrictions on funding and St. Louis to facilitate abortions in its city hospitals. The United States Supreme Court reversed these holdings, to permit governments at the various levels to settle through the political process to what extent abortion would be carried out as a state action. Thus, the Court recognized the distinction between the liberty of persons to have and to do abortions without criminal sanctions and the supposed right of such persons to the cooperation of the public at large, including those who consider abortion to be the killing of unborn persons and who for that reason find it utterly repugnant. In other words, the Court refrained from holding that the Constitution *requires* everyone to participate in the killing of the unborn.

However, the Court did not reach its conclusions on the basis of the liberty of those who consider abortion abhorrent to stand aloof from such killing. Rather, the Court merely denied that equal protection of the laws *requires* that the public facilitate abortion to the same extent that it facilitates childbirth. On the Court's analysis Pennsylvania, Connecticut, and the city of St. Louis had adopted a policy favoring childbirth. The Court held that the public could adopt such a policy without violating the Constitution, but the Court also said that nothing prohibited the adoption of a public policy funding and facilitating abortion.[29]

Those who oppose both abortion and the drafting into cooperation with it of the public at large could take some satisfaction in the Court's refusal to impose the institutionalization of abortion as a matter of constitutional obligation on every jurisdiction in the United States.

However, despite their disappointment and frustration, proponents of abortion as an instrument of public policy did not lose much of what they gained by the abortion decisions of 1973. In many places abortion has become institutionalized and what has been done will not be undone. Furthermore, private agencies, such as Planned Parenthood, can devote much of their resources to funding abortion and seek increased governmental support to replace such funds diverted from their other activities.

At the same time the liberty of persons to have and to perform abortions is recognized and protected by the Court, while the liberty of others to stand aloof is ignored. Had the Court carried through an adequate and consistent libertarian treatment of the issues, even without reversing its 1973 decisions, it should have held that while the state cannot interfere with abortion, neither can it facilitate it. The former violates the liberty the Court has ascribed to pregnant women and physicians, but the latter, in the absence of an overriding public necessity, violates the liberty to stand aloof of all who consider abortion abhorrent and who in no way consent to its inclusion in the activities conducted by a government which must derive its just powers from the consent of the governed.

One of the most interesting aspects of the 1977 decisions is that they contain explicit statements in the dissenting opinions of Justices Blackmun, Brennan, and Marshall which support Pfeffer's interpretation of the 1973 abortion decisions.

Brennan's remarks are the least telling of the three. He merely states that the 1977 decisions "can only result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the States had not weighted the scales to make their choice to have abortions substantially more onerous."[30] Blackmun in a brief dissent denies the distinction between a liberty and a right to have an abortion, speaks of the plight of poor women, and attacks the people of St. Louis for electing a mayor who ran on a platform promising to close the city's hospitals to nontherapeutic abortion. The people of St. Louis, according to Blackmun, "impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost." The Court had argued that jurisdictions have their own priorities and must be allowed to spend limited funds in accord with them. To this argument Blackmun replies:

> The Court's financial argument, of course, is specious. To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.

Blackmun concludes his dissenting opinion by noting the existence of another world "out there," thus to appeal to the public policy considerations which apparently prevailed over the principles of legality in the 1973 decisions. He says, "And so the cancer of poverty will continue to grow."[31]

Perhaps it is not surprising that Blackmun accepts as a strategy for a public war on poverty the elimination of this cancer by the elimination of the poor who are its victims. Of course, this rationale is terrifying when one thinks of its application to the problems which we have been examining, because all of the human misery which is involved in conditions which some regard as constituting a poor quality of life can finally be eliminated only in one way, by killing the miserable and afflicted. This one perfect and final solution also has the essential cost-benefit feature which Blackmun points out in respect to abortion.

What is surprising, however, is that Marshall is no less clear on his views:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed race children now spend blighted lives in foster homes, orphanages, and "reform" schools. Many children of the poor will sadly attend second-rate segregated schools. And opposition remains strong against increasing AFDC benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children [citations omitted].[32]

Marshall obviously *accepts* the evils he describes as inevitable and unalterable. He sees them as evils but fails to see them as challenges to be overcome. Poor black people who exist in utter misery are to be saved from misery by being killed before birth.

Someone who did not know otherwise might suppose that Marshall was an unreconstructed racist. One who does know better must suspect that while the United States Supreme Court is located only a few blocks from the Washington, D.C., ghetto, a man who has achieved the status of a member of the Court is so far alienated from the people of the ghetto that he can burn with hatred at the evils from which the people suffer without ever feeling true compassion for the people who suffer these evils, so that he has embraced the solution of the upper-middle-class establishment, which has set itself against the social change necessary if America is to be transformed into a good and just society. Or perhaps Marshall speaks from some dark depth of depression, disillusion, and despair, a melancholy which can no longer believe that children who are scorned can yet receive the respect they deserve, that children whose lives are blighted can yet know the love of which they are deprived, that children who attend second-rate segregated schools can yet enjoy the educational opportunities to which they are entitled, that children of poverty can yet be helped to grow in a minimally decent environment, that those who live a bare existence in utter misery need not even now be deprived of that bare existence to be redeemed from that utter misery.

Whatever Marshall's personal views, his dissenting statement together with the statements of the others provide fresh evidence that Pfeffer's explanation of the 1973 decisions was a sound hypothesis. The Court has been "compelling the people to accept what the judges think is good for them." Fortunately in this instance the Chief Justice and Justices Powell and Stewart were unwilling to impose public support of abortion to the extent that Brennan, Marshall, and Blackmun would have imposed such support. However, Blackmun's resentment against the legitimate policy decision of the people of St. Louis, who elected a mayor committed to excluding abortion from the city's hospitals, means that citizens cannot refuse to cooperate in killing the children of needy minorities, because this refusal amounts to imposing the people's "own concepts of the socially desirable, the publicly acceptable, and the morally sound."

Blackmun obviously thinks that only the elite who sit at the bench of the high Court, far above the mass of the people who live on the land below, are entitled to impose their own concepts of the socially desirable, the publicly acceptable, and the morally sound. And from the olympus of the Court these few men have the power to hand down their personal convictions, shaped by a secular humanist world view with its consequentialist ethic, not merely as advice, not merely as ordinary law, but as constitutional requirements—as the supreme and very difficult to amend law of the land.

It is hard to know how best to proceed in trying to disestablish the world view which the Court is effectively establishing. Congress and the various states are forbidden to establish a religion, but the Supreme Court cannot be prevented from doing so while it pretends that the world view it accepts is no more than the commonly held principles of liberty and justice which constitute the minimal public morality without which government would lack legitimacy. Nevertheless, a constitutional amendment could make clear at least that secular humanism and other nontheistic world views are on a par with traditional religions and could direct the Court to avoid confusing the moral convictions of its own membership with the minimal public morality.

Further, as our discussion in chapter six, section F, of the liberty to stand aloof made clear, a truly pluralistic society must avoid so far as possible making into public activities in which all must participate modes of action to which many citizens take profound conscientious objection. In some cases society must act despite the conscientious objections of a minority of its members. But such action is only justifiable if there is a substantial public purpose, recognized as such even by the objecting minority, to which the mode of action they find abhorrent seems to be a suitable and even necessary means, and if the adoption of this mode of action is by a general consensus reached by the majority despite its awareness of and respect for the views of the dissenting minority.

These conditions were fulfilled by World War II, to which strict pacifists objected on grounds of conscience. They were hardly clearly fulfilled at any stage of the Vietnam war and clearly were not fulfilled by the end of 1966. The conditions likewise clearly are not fulfilled by the use of abortion to eliminate misery by eliminating the miserable. Yet abortion is more or less extensively done by state action throughout the United States.[33] And there is every reason to expect that euthanasia will deeply involve public action, primarily to make it safe for those who do not wish to be killed and who are powerful enough to ensure that the state will protect them, secondarily to make it effective alongside contraception and abortion as an instrument for solving the problems of those who live miserably in public institutions at great expense to productive taxpaying citizens.

Thus, it seems to us, there is a need for constitutional recognition of the liberty to stand aloof, a declaration of the narrow conditions under which the state should proceed with forms of action to which some citizens conscientiously object, and a provision for the protection of such citizens from any more intimate involvement than necessary in the actions they find abhorrent. The diminishing foundation of consensus about goods other than liberty and justice themselves makes increasingly necessary provision for conscientious objection if there is to be any possibility of maintaining social unity with a government having even a plausible appearance of legitimacy.

(NOTES TO EXCERPT FROM CHAPTER 10)

1. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review*, 63 (1963), p. 408. Henkin makes clear (pp. 407–411) that he considers utilitarian reasons to have an exclusive claim on rationality.

2. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680 (1961); note the holding at 495–496, 1683–1684, and the dictum in footnote 11.

3. U.S. v. Seeger, 380 U.S. 163, 85 S.Ct. 850 (1965) at 184, 863. The fact that the Court interprets a statute in this case does not make it less significant for constitutional law, since the alternative clearly would have been to find the statute unconstitutional; cf. Robert L. Rabin, "When Is a Religious Belief Religious: *United States* v. *Seeger* and the Scope of Free Exercise," *Cornell Law Quarterly*, 51 (1966), pp. 240–244.

4. Welsh v. U.S., 398 U.S. 333, 90 S.Ct. 1792 (1970), at 340, 1796.

5. *Ibid.*, at 342–344, 1798. The prevailing opinion was held by only four members of the Court. The majority was formed by the concurrence of Justice Harlan, whose separate opinion rejected the opinion's construction of the statute. Yet Harlan held with the others that an unconstitutional establishment of religion could be avoided and religious neutrality nevertheless maintained by the government only if theistic and nontheistic religious beliefs and comparable secular views were treated alike (at 357, 1805).

6. Paul Ramsey, "Some Terms of Reference for the Abortion Debate," manuscript of a paper delivered at the Harvard-Kennedy Conference on Abortion (Washington, D.C.: September 6–8, 1967), p. 7.

7. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," *Yale Law Journal*, 82 (1973), p. 947.

8. See James L. Buckley, "A Human Life Amendment," *Human Life Review*, 1 (Winter 1975), pp. 7–20; John T. Noonan, Jr., "Why a Constitutional Amendment?" *Human Life Review*, 1 (Winter 1975), pp. 26–43; Robert M. Byrn, "A Human Life Amendment: What Would It Mean?" *Human Life Review*, 1 (Spring 1975), pp. 50–76 and 102–103; David W. Louisell, "The Burdick Proposal: A Life-Support Amendment," *Human Life Review*, 1 (Fall 1975), pp. 9–16; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *Human Life Review*, 2 (Fall 1976), pp. 30–108; Jesse Helms, "A Human Life Amendment," *Human Life Review*, 3 (Spring 1977), pp. 7–42.

9. Byrn, *op. cit.*, pp. 51–53; Helms, *op. cit.*, pp. 24–26.

10. Roe v. Wade, 410 U.S. 163, 93 S. Ct. 705 (1973) at 732.

11. See Dennis J. Horan, "Abortion and the Conscience Clause: Current Status," *Catholic Lawyer*, 20 (1974), pp. 297–302; Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 32–33.

12. Davenport Hooker, "Early Human Fetal Behavior, with a Preliminary Note on Double Simultaneous Fetal Stimulation," in Davenport Hooker and Clarence C. Hare, eds., *Genetics and the Inheritance of Integrated Neurological and Psychiatric Patterns*, Research Publications: Association for Research in Nervous and Mental Disease, vol. 33 (Baltimore: Williams and Wilkins Co., 1959), pp. 49–67.

13. Peter G. Guthrie, "Proof of Live Birth in Prosecution for Killing Newborn Child," 65 A.L.R. 3d, pp. 413–428.

14. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976) at 2847–2848.

15. Hodgson v. Lawson, 542 F.2d 1350 (1976) at 1355.

16. *Ibid.*, at 1360; Planned Parenthood of Central Missouri v. Danforth, at 2855.

17. Joseph P. Witherspoon, "Statement," *Proposed Constitutional Amendments on Abortion: Hearings before the Civil and Constitutional Rights Committee of the Judiciary, House of Representatives*, 94th Cong., 2d Sess., part 1 (1976), pp. 17–20.

18. Cf. Grisez, *op. cit.*, pp. 410–423.

19. See Byrn, *op. cit.*, pp. 62–67. It seems to us that there can be no better protection for the unborn than to make clear in the Constitution that they are persons and to exclude any reference to them in laws respecting homicide, for in this case the latter will allow minimal exceptions.

20. Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), p. 96.

21. *Ibid.*, p. 97.

22. *Ibid.*, pp. 99–100.

23. *Ibid.*, p. 101.

24. *Ibid.*, p. 104.

25. *Ibid.*, p. 111.

26. Jane Finn, "State Limitations upon the Availability and Accessibility of Abortions after *Wade* and *Bolton*," *Kansas Law Review*, 25 (1976), pp. 87–107.

27. Beal v. Doe, 97 S.Ct. 2366 (1977), the Pennsylvania case, was not decided on constitutional grounds; Maher v. Roe, 97 S.Ct. 2376 (1977), the Connecticut case, was.

28. Poelker v. Doe, 97 S.Ct. 2391 (1977).

29. Cf. John T. Noonan, Jr., "A Half-Step Forward: The Justices Retreat on Abortion," *Human Life Review*, 3 (Fall 1977), pp. 11–18; Robert M. Byrn, "Which Way for Judicial Imperialism?" *Human Life Review*, 3 (Fall 1977), pp. 19–35.

30. Brennan, dissenting, in Beal v. Doe, at 2376.

31. Blackmun, joined by Brennan and Marshall, dissenting in Beal v. Doe, Maher v. Roe, and Poelker v. Doe, at 2398–2399.

32. Marshall, dissenting in Beal v. Doe, Maher v. Roe, and Poelker v. Doe, at 2395–2396.

33. See above chapter six, notes 88–94 and accompanying text. Those urging the institutionalization of abortion have argued for an extremely inclusive concept of state action, so that the acts of any private entity which receives public funding would be state action. See Jane Finn, *loc. cit.;* Harriet F. Pilpel and Dorothy E. Patton, "Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses," *Columbia Human Rights Law Review*, 6 (1974–1975), pp. 279–305; and especially Marc D. Stern, "Abortion Conscience Clauses," *Columbia Journal of Law and Social Problems*, 11 (1975), pp. 571–627. Their point was to require abortion cooperation on the theory that anyone involved in state action could not abridge the woman's "right" to an abortion. Our point is that on their theory most abortions involve state action: the people at large are compelled to cooperate in what many regard as murder of unborn persons. This is an infringement on liberty to stand aloof.

Senator HATCH. I would like to call our next two witnesses as a panel, in fact our next three but one of them is not here. If he comes we will ask him to come to the witness table as well.

We will call at this time Frank Susman, who is a partner in the St. Louis law firm of Susman, Shermer, Remmer & Parker—Mr. Susman has litigated on the abortion issue extensively and Professor Norman Dorsen, who is a professor of law at the New York University Law School and president of the ACLU. We are happy to have both of you gentlemen with us today.

I am in a particular bind. I have to lead the floor effort on Dr. Koop at 3:30 and I have to leave here by 3:20, Now that only gives us 15 minutes. What I am going to have to do is call on you first, Professor Dorsen, and then I will call on Mr. Susman. If I have to leave we will have my counsel Mr. Markman continue to finish the record for me. We are building a record; it is important that we get your viewpoints on the record and also those of Mr. Rosenblum.

I will introduce Mr. Rosenblum at this time, although he is coming in from the airport. Victor Rosenblum is professor of law at the School of Law at Northwestern University and chairman of the Americans United for Life, which is the major litigating arm of the prolife movement. We will look forward to hearing his testimony as well.

I apologize in advance that I have this conflict but Senator Baker has required me to be on the floor. We will start with you, Professor.

STATEMENT OF PROF. NORMAN DORSEN, SCHOOL OF LAW, NEW YORK UNIVERSITY

Mr. DORSEN. Thank you very much, Senator Hatch.

As you may know, I am the president of the American Civil Liberties Union. I was a counsel in the first two abortion cases decided by the Supreme Court, argued one myself and participated in writing the brief in another.

I will say first of all how pleased I am to be here, and I wish you did have more time but I know how busy your schedule is, Senator.

Senator HATCH. I really apologize.

Mr. DORSEN. That is perfectly all right. I understand.

Now my basic position on the matter—incidentally, I should say I am appearing here in an individual capacity but the ACLU position and my own are very similar on this issue—my basic position is, with respect to the sincerity of those who differ, that it will be nothing short of a constitutional disaster if any of the pending amendments are permitted to become law.

The amendments that would directly reverse *Roe* v. *Wade* by defining when life begins or by some other means should be defeated because they are inconsistent with fundamental constitutional principles. The first principle is the long tradition of permitting Americans to live their private lives without interference, to make personal choices about their own families, to enhance the individual autonomy and liberty that were major goals of the Declaration of Independence and the Constitution.

The second set of principles is in some respects even more basic: It is to remove Government control over the lives of the American people. In this country, unlike others we could name, the Government serves but does not dominate.

Senator HATCH. I have just learned of another conflict. The Budget Committee is meeting and they are going to vote here in about 5 minutes, so I am going to have to go down there. I will listen as long as I can and then have Mr. Markman take over. I will, of course, read all the prepared testimony.

Mr. DORSEN. I appreciate that.

I was going to refer to something that I thought you and I would be in total agreement on——

Senator HATCH. Sure.

Mr. DORSEN [continuing]. And that is that in this country, unlike others, the Government serves and does not dominate its citizens. At a time when the direction of public policy in so many areas of life is to free people from Government intrusion and meddling oversight, is it not ironical, indeed is it not hypocritical, to wage a massive campaign to bring the heel of Government down on people who wish to live their lives according to their own and not someone else's religious, moral, and family beliefs?

I have used the word "people" but we all know it is not people of whom we speak, but women: women of all ages, classes, and races; women of disparate backgrounds and philosophies. Frankly, I am astonished that a male-dominated legislature is forcing women, purely as a result of their biological makeup, to use their bodies as they do not wish, to force them against their will to remain at home or accept welfare or both, and to force them to relinquish careers and the sort of family life that they happen to prefer. Not only that, they will be subjected to a much higher mortality rate from childbirth and from illegal abortion, as reliable statistics unequivocally demonstrate. The entire process reeks of the denial of full citizenship to women.

The frequently heard argument, which we have heard very eloquently today, is that the fetus nevertheless merits legal protection. But this is misplaced for several reasons. Initially, American law has never recognized full constitutional personhood to the unborn. Second, those who seek to do so rely on personal, religious, or moral views that, however sincerely held, should not be imposed on others who hold differing religious or moral convictions equally sincerely.

Finally, to accept a claim that a fetus should be constitutionally protected would be inevitably to reduce the autonomy, health, and lives of women who are compelled against their will to bear a child—a recognized, firmly established constitutional value, established by the Burger Supreme Court, not by the Warren Supreme Court, a constitutional value that is too often ignored or slighted.

I am blessed with three lovely daughters. I hope one day to be a proud grandparent, but I do not want to be a grandparent if my daughters are forced into childbirth against their will, at the behest of Government officials playing God with the lives of other people. By what right, sir, by what right?

I turn now to Senate Joint Resolution 110, the so-called federalism amendment. This is not a federalism amendment at all but a backdoor way of stripping women of constitutional rights. The amendment is being offered as a moderate measure, as a compromise which pays due deference to such well-ingrained concepts of American polity as federalism and democracy. However, with respect, sir, it is nothing of the sort. Indeed, your extensive address in introducing it to the Senate was entitled "The Human Life Federalism Amendment," a candid disclosure of its true purpose and desired effect.

Substantively, there is only the facade of federalism in the resolution. The text states that the Congress as well as the several States shall have power to restrict and prohibit abortions. Is this federalism? Is this State's rights? Of course it is not, because it permits the National Legislature to supersede the laws of any State by prohibiting abortions on a nationwide basis. Worse still, it is a slanted, one-sided approach because Congress may supersede State laws only if they are "less restrictive," whatever that vague term means. However, if a State law is "more restrictive," the State law governs. That is not the federalism I learned at law school or while serving as a law clerk to Justice John Marshall Harlan.

If there were any doubt about the dubiousness of the federalism label, it is altogether dispelled when one examines a recent memorandum stamped "confidential," coming from the U.S. Catholic Conference. This confidential memorandum states bluntly:

> The Hatch amendment avoids the drawbacks of a pure States rights approach which would allow some States to become abortion havens. A much more restrictive national standard might actually be obtained with this amendment.

So much for federalism. What about democracy? Isn't it just and right for a majority, acting through their elected Representatives in Congress and the States, to make this sort of decision, as the Hatch amendment provides? The answer is decidedly no, not because there is anything wrong with the concept of democracy but because it has been a premise of our system from the beginning that certain rights are not subject to majority rule.

Could a Christian majority prevent Jews or Moslems or nonbelievers from voting? Could a majority decide that persons accused of rape or embezzlement be sent to jail without a trial? Could a majority decide that all speeches critical of the President or the Supreme Court should be banned? Of course not.

A conservative jurist, Robert H. Jackson, made the point best almost 40 years ago in the related context of free expression. He said:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Given this time-honored principle, under what constitutional theory shall an official, high or petty, force a woman to act in this most personal of matters against her will? If there is a good answer to this question, it does not now occur to me.

If ratified, any of the proposed amendments would have profoundly destructive consequences for national harmony and for the constitutional system under which this diverse Nation has lived for two centuries. First of all, the amendments as enacted will not work. There will continue to be abortions in large numbers. Given limited law enforcement resources, a law that would require constant surveillance of millions of families and the medical profession could not be enforced except in the most arbitrary and selective manner.

Those families who want control over their own lives and destinies will not bow to a Government autocracy on this issue of fundamental personal liberty. They will not stand for it any more than, in a much quieter, more submissive age, the people of this country complied with "Prohibition." There will be unrest in the land. There will be hate and religious strife, and there will be a diminution of law and order at a time when so many are concerned about disrespect for law.

Everyone should be troubled about this prospect. Civil liberty does not flourish at times of conflict domestically any more than during times of international unrest. People will be threatened and abused and communal tensions will increase. I urge Congress to avoid such troubles at the outset.

A further consequence of passing any of these amendments would, if anything, be worse, for it would upset the delicate constitutional balance in an unprecedented and dangerous way. On no prior occasion except for the ill-starred Prohibition amendment has the Constitution been altered to destroy rather than add to the sum of individual rights held by Americans.

There are those who might reply to what I have said that we are here today only because the Supreme Court acted beyond its just power in *Roe* v. *Wade*. I happen to believe the decision was correct because it articulated and applied a longstanding principle that guarantees personal autonomy in matters of childbirth and family planning—I have cited some cases in my statement.

I know how strong the feelings are on this subject. I know how sincerely people feel who both agree and differ with what I have said, but I urge this subcommittee to take full advantage of the deliberative process that the wise framers of our Constitution built into the amending process, and to reflect on this issue deeply and truly. If you do, I am confident that you will reject all attempts, direct or indirect, to destroy a woman's right of free choice whether to bear a child as now safeguarded by the Bill of Rights.

Senator HATCH. Thank you so much, professor.

We will now call on Mr. Susman.

Mr. SUSMAN. Senator, in light of the time——

Senator HATCH. Mr. Susman, I hate to tell you but I am going to have to leave. Not only do I have to be on the floor but——

Mr. SUSMAN. I hope you appreciated my remarks.

[Laughter.]

Senator HATCH. I am sure I will. I will read them and, I am certain, enjoy them. I am going to have to go to the Budget Committee. They have two crucial votes right now. Then I will have to head over to the floor and, if you will forgive me, there is a vote on top of that. I don't know what to do.

[Laughter.]

Senator HATCH. We now have another vote on school prayer. I am sure both of you will appreciate the importance of that as well. In any event, I would like you to put your statement in the record. It is crucial that we continue to build this record on all sides of the issue.

I particularly enjoyed your statement, Professor Dorsen. It was very provocative and, I think, well put together.

Mr. DORSEN. Thank you, Senator.

Senator HATCH. I understand how deeply you feel about it, and I respect and admire that. I have also had an advance warning about you, Mr. Susman, that you are an excellent lawyer, and that you will do more than an adequate job of advocacy here.

Therefore, I am going to ask Mr. Markman to take the remaining testimony and I would also like to ask you to stay for some questions, that I had wanted to propose to you, if you will. He will ask some of the questions I would like to have asked. If you will forgive me, I had better go.

Mr. SUSMAN. Certainly.

Mr. DORSEN. Mr. Markman, I am going to leave the floor to Mr. Susman because I do have an engagement in New York, as you know, and I want to catch the 4 o'clock shuttle.

Mr. SUSMAN. Are you going to give me your vote, Norman?

Mr. DORSEN. I will give you my vote, with full confidence.

Mr. SUSMAN. Thank you.

Mr. MARKMAN. We appreciate your testimony under somewhat difficult circumstances today, and we will put it in the record in its entirety.

Mr. SUSMAN. Fine. Thank you very much.

Mr. MARKMAN. Professor Rosenblum, could we ask you to come up to the table here? I know Senator Hatch on his way out was able to explain to you some of the difficult circumstances of the hearings. As you know, we are considering the Koop nomination on the floor, and that is something that I know you are very interested in.

We would ask you both to give your statements for the record. They will go in the record in their entirety, and after that we would like to ask some of the questions that Senator Hatch had put together for the hearing.

I am sorry, Mr. Susman.

Mr. SUSMAN. That is all right.

STATEMENT OF FRANK SUSMAN, OF SUSMAN, SCHERMER, RIMMEL & PARKER, ST. LOUIS, MO.

Mr. SUSMAN. For the reasons previously stated, of course, I will decimate my written remarks and just be brief.

I would initially make comment that I find Senator Hatch's reference to the poll conducted by the Miami Herald interesting because one of the statistics he did not mention was that 70 percent of the respondents opposed any constitutional amendment whatsoever on the issue of abortion. That is 80 percent of our populace, and if he is going to rely upon that poll then he ought to rely upon all of the questions, not those that he picks and chooses.

Initially I would note that America is not unique in the world in permitting the provision of safe and legal abortions. This country has not run amok with the liberalization of abortion, nor is it out of sync with the remainder of civilized society, either today or historically. Over 75 percent of the world's population has access to legal abortion and much of the remainder has ready access to medical abortion, although not officially sanctioned.

Were America to reverse the status quo in any radical fashion, only then would it be an anachronistic anomaly in the world today. The fanciful yet outrageous specters of moral lawlessness, euthanasia, and a host of other maladies that abortion opponents prophesy will follow legalized abortion have not come to pass in any civilized society which, as an integral part of its civility, permits safe abortions.

Perhaps the most telling indices of the motivation for the adoption of uniform abortion statutes is that in the United States during the 1820's and the 1830's, when the only recognized statutory exemption was to save the life of the mother, is the following: All available evidence from the last century indicates that the dangers of abortional surgery and no other consideration provoked the statutes against abortion. In fact, a statute was proposed in New York in 1828, 2 years before adoption of its abortion statute, which would have criminally punished, and I quote, "any surgical operation unless it appears that the same was necessary for the preservation of life."

Now the New York reviser's notes that accompanied that statute stated that the section was offered in consequence, and again I quote,

> * * * of the rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves. The loss of life occasioned by the practice is alarming.

This statute obviously failed of passage and surgery stumbled out of its infancy. But in the early 1800's all surgery which involved insertion of instruments into body cavities was highly dangerous because of uncontrollable infection and pain-induced shock. Some 37.5 percent of all major surgeries in New York Hospital from 1808 to 1833 proved fatal.

Abortion, which would have involved the insertion of unclean instruments into the uterine cavity, was accordingly a frightfully dangerous procedure at that time. It was not until 1884, some 54 years after enactment of the first New York antiabortion statute, that the idea of Sir Joseph Lister that perhaps you ought to wash your hands and sterilize your instruments before you operated became accepted medical practice in the city of New York.

Women, and not fetuses, were the protected object of such laws. Although commonly the accomplice and the accessory of the illegal, nonmedical abortionist, women were never charged with a crime. The crime was performing an abortion upon a woman, not causing fetal demise.

I cannot seriously accept that the antiabortion forces are any more concerned with life than those who favor freedom of choice. The former are certainly more devoted to their conception and their value of fetal life, but to life as we all accept it in its fullest form, nothing could be further from the truth. I do not believe in fetus first and people second.

The politics of abortion in America has been unique. The recognition of a woman's right to mastery over her reproduction and the appropriateness of safe medical intervention in pregnancy occurred elsewhere worldwide following thoroughly reasoned and deliberative debates in legislative chambers. Elsewhere, the political, initial battles of words and reason preceded the final vote battle in logical order.

In America, on the other hand, the Rubicon was crossed in a few brief moments on Monday morning, January 22, 1973. On that day the U.S. Supreme Court, in an overwhelming 7 to 2 opinion, relying upon almost 200-year-old constitutional underpinnings of our free democratic society, upheld the right of our citizens to be free from unwarranted invasions of governmental intrusion into personal family matters of procreation and childbearing. The public debate, political machinations, the soul-searching for answers and an ease of feelings by millions of our citizens, have transpired subsequently to the fact of legalized, safe abortions.

Efforts to analogize the legalization of abortion with the holocaust or the *Dred Scott* decision are rationally inappropriate and personally objectionable. The present congressional efforts to prohibit abortion accurately mirror the consistent difficulties the law has always encountered when endeavoring to codify moral concepts which are not universally accepted: Witness the passage of the 18th amendment and the subsequent repeal by the 21st amendment.

Racial genocide and the institution of slavery are universally morally abhorrent. On the contrary, it is the practice and not the prohibition of abortion that is near universally accepted. The 18th amendment produced an acknowledged historical and constitutional disaster in our country's history and left us with the tragic legacy of organized crime which still infects our society. The abolition of legalized abortion will not stop the practice of abortion. It will only stop the availability of medically safe procedures for all but the affluent.

The present amendment before this committee undermines traditional family values and destroys the right of Americans to be free from governmental intrusion into their personal lives. It is not, as billed, "profamily." It is "antifamily." It says, "Have a family if you have it my way." It thrusts Government into bedrooms and into matters historically of a personal concern.

How and why do we ignore the fact that women of economic means have always had access to medical abortions? This amendment is a backdoor effort, disingenuously designed for public consumption. The frontdoor approaches attempted by the human life amendment and Senate bill 158 have faltered for good reasons too numerous to elaborate. The sugar-coated effort under consideration here is also doomed to failure because the electorate is discerning enough to pierce the gloss and reject the substance.

The amendment is not a legitimate endeavor to allow constitutional circumvention and legislative intrusion into the formulation of a codified abortion policy. It must be noted that the amendment would not allow a congressional determination of an abortion policy permitting and encouraging a climate of safe, legal, and accessible abortion services. The proposed legislative grant is strictly confined to, and I quote, "power to restrict and prohibit abortions." It is anti, it is negative, and it impinges upon personal freedom.

This amendment and any act of Congress promoting it would be unique by creating a shambles of the doctrine of statutory Federal preemption, and wreak havoc upon the "Supremacy Clause." It would allow the States legislative dominance in a manner irreversible except by subsequent constitutional tinkering. Seemingly granting a degree of States rights in this area, the amendment permits local option only if more restrictive.

This amendment suffers the same fatal infirmities of most antiabortion legislation. In its efforts to disguise its true and honest aim of eliminating all abortions, it feeds upon itself through its deceptive language and ends in self-consumptive defeat through illegality, inconsistency, and irrationality. Of the literally dozens of such cases I have litigated in this area, the unwillingness of legislators and prosecutors to be up-front has ultimately resulted in the judicial foreclosure of their efforts.

This amendment permits the Constitution to be and to say what Congress chooses. It seeks to alter the rules and perhaps should appropriately be numbered as article V[a] of the Constitution. It would allow amending the Constitution by a majority vote of each House of Congress or of State legislatures, rather than the necessary two-thirds of each House of Congress and three-quarters of the States.

This or any constitutional amendment cannot accomplish the long-sought-after goal of consensus in the abortion debate. The only realistic consensus or compromise obtainable is one of recognition of and tolerance for the rights of all persons to worship and to exercise self-determination in this sensitive part of their lives.

The affluent and the resourceful always have and always shall obtain abortions. Let us never forget the publicized travails of Sheri Finkbine in 1962, who—forced to bare her private, familial affairs to a sympathetic Nation—finally in desperation traveled to Sweden for relief. To deny to an indigent an equal opportunity to exercise control over her reproduction is to perpetuate the cycle of poverty. To deny a teenager a planned marriage and the opportunity to have children when she can physically, emotionally, and financially raise them in an atmosphere of love and caring, when she has been the victim of rape, incest, contraceptive failure, or momentary passion, is callous and unmerciful.

It is arrogant and presumptuous for anyone, and particularly for men, to pass statutory judgments upon the moral appropriateness of abortion in any given circumstance, much less to impose some procrustean judgment restricting all abortions. Decisions on abortion, like marriage, divorce, sexual activity, and like all other difficult personal decisions in life, are not accurately made in the abstract without proper regard for life's realities and other than presenting and relevant considerations.

During the past 9 years there has been no great groundswell of public opinion demanding an end to the right of abortion. Rather, there has been with each passing year a greater public knowledge and acceptance of the need to retain the option of abortion in those cases where the same is dictated as the most appropriate choice based upon the health and life interests of the pregnant woman.

Thank you for your consideration.

[The prepared statement of Mr. Susman follows:]

PREPARED STATEMENT OF FRANK SUSMAN

A

Mr. Chairman and Members of the Committee, good afternoon. My name is Frank Susman. I am an attorney from St. Louis, Missouri. I have been litigating the rights of women to safe and legal abortions in America for 13 years since 1968. I have argued more abortion related cases before the United States Supreme Court than any other attorney.

I believe with all my heart in and am convinced of the absolute necessity for the free and governmentally, unhampered interplay among individualized acts of conscience, attendant factual circumstances and the exercise of religious convictions in this most personal of life's decisional crises for a woman.

I am neither in favor of abortion nor against abortion. I shall never be faced with the awesome confrontation of pressures and conflicts concomitant with bearing an unwanted pregnancy. I know that I am not, and I am confident that I never shall meet the person whom I believe is, competent to pass judgments upon pregnant women and to decide in Solomonic fashion which conditional patterns justify an abortion and which ones do not. Similarly, I do not accept the government's competence to select which books we should be permitted to read and which films we should be permitted to view.

The abortion debate has seldomly been aired in a dispassonate, rational context. The depth of emotions, which pervades the polarity of those with unfathomable wells of feelings on both sides, prevents any reasoned discourse. It is exactly that degree of feeling which prevents any compassion, understanding, or empathy, much less tolerance, by anti-abortion persons for any differing perspective. For those opposed to abortion, discussions begin and end with their self-presumptively, inerrant espousal that abortion is tantamount to murder. From that position there is no room for difference, for reflection, for compromise. It is not inaccurate to portray many of the anti-abortion forces with the labels of virulence, stridency and contempt towards those who do not embrace their position.

B

There exist certain, indisputable facts which are germane to any consideration of the abortion issue.

I. We must acknowledge and deal intelligently with the fact that abortion presently, and for many years past, has been the most divisive issue in American society on a variety of planes, including but not exclusive of the political, the religious, the ethical and the sexual.

II. While not conceding the infallibility of public opinion polls, they cannot be ignored. With near total unanimity, all such polls taken since 1973, regardless of by whom or on whose behalf, reflect that an overwhelming and growing majority of Americans (presently 80%) believe that the option of abortion should be legally available, under circumstances ultimately determinable by a woman and her chosen physician. Numerous surveys taken by members of Congress in their respective home districts and states confirm these findings.

III. America is not unique in the world in permitting the provision of safe and legal abortion. This country has not run amuck with the liberalization of abortion, nor is it out of sync with the remainder of civilized society, either today or historically. Over 75% of the world's population has access to legal abortion and much of the remainder have ready access to medical abortion, although not officially sanctioned. Were America to reverse the status quo in a radical fashion, only then would it be an anachronistic anomaly in the world today. The fanciful, yet outrageous, spectres of moral lawlessness, euthanasia and a host of other maladies that abortion opponents prophecy will follow legalized abortion, have not come to pass in any civilized society which, as an integral part of its civility, permits safe abortions.

IV. Public plebiscites on the issue of abortion have been infrequent, but the results dramatically mirror opinion polls. Efforts by anti-abortion factions to impose uniformly their will by legislative fiat, have failed by almost identical margins of 2:1, in Italy in 1981 and in Toledo, Ohio in 1980. This, despite the fact, that in each instance the anti-abortion faction has controlled and manipulated the wording, the timing and the nature of the referendum campaigns.

V. Abortion is the most common surgical procedure in the United States. Each year, approximately 1.5 million women in this country elect to terminate pregnancy. This represents one of every three women who become pregnant. Forty percent of today's adolescent women will experience a teenage pregnancy. No one possesses either the unquestionable, moral Truth or the real or apparent authority to sit in self-righteous judgment to proclaim these women guilty of murder or of infanticide.

VI. The facts concerning abortion and fetal development are not in dispute. The physiological traits and characteristics of embryology and fetology are accepted. The sole and critical area of conflict of this highly charged dispute arises in the irresolvable arena of nomenclature. The feverishly charged terms of "unborn children", "human life", "conceptional ensoulment", "murder", etc. in this context are factually indefinable and disruptive of rational dialogue. The recent Subcommittee hearings chaired by Senator East amply demonstrated the total inability of resolving conflicting tenets, premised upon belief, faith or dogma and dependent for resolution upon an agreed appropriateness as to the proper appellations to be attributed to a given set of facts or definitions.

VII. Leaving aside for the moment the conceded and total, destructive impact of abortion upon fetal life, the highly beneficial impact upon women's health by the availability of abortion has been unquestionably significant. Not least of which have been the marked decrease in maternal mortality. Were legal abortions to become unavailable, the adverse effects upon health care in America have been thoroughly documented by the Center for Disease Control of the United States Department of Health and Human Services and by the American College of Obstetricians and Gynecologists.

VIII. As to the sole criterion of maternal health, abortion is safer by reason of both mortality and morbidity risks than childbirth, upto the sixteenth week of pregnancy. Ninety-six per cent of all abortions occur in the first 16 weeks of pregnancy. Emotional, psychotic reactions following abortions are one-third of similar episodes occuring post-partum.

IX. The legal and ready availability of abortion in America has revolutionized our health-care delivery system. What rapidly became the most prevalent surgery in this country has been delivered in a high volume, cost effective, inexpensive, out-patient, well-counseled, emotionally supportive and, in large part, non-physician controlled manner. Abortion is not only, from a medical viewpoint, the greatest surgical buy in this country but is that area of medicine most directly controlled by the patient population served.

X. There are millions of people of opposing positions on abortion who are deeply committed and well-meaning. The Supreme Court's observation in 1973 that: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" is no less true today, as the National Academy of Science recently reiterated to this Congress.

XI. The termination of pregnancy is a significant, traumatic experience for almost all women, and the decision to abort is arrived at only after a timely and deliberative period of conflict.

XII. Abortion is neither novel nor new. Abortion was first historically recorded in 3,000 B.C.E. in China, as an acceptable practice and is reflected in the writing of Plato and Aristotle. Historically it was neither a Church nor a civil offense.

XIII. Perhaps the most telling indice of the motivation for the adoption of uniform abortion statutes in the United States during the 1820s and the 1830s (when the only recognized, statutory exception was to save the life of the mother) is the following. All available evidence from the last century indicates that the dangers of abortional surgery, and no other consideration, provoked the statutes against abortion. In fact, a statute was proposed in New York in 1828, two years before adoption of its abortion statute, which would have criminally punished "any surgical operation . . ." "unless it appear that the same was necessary for the preservation of life . . ." The New York Revisers' Notes stated that the section was offered in consequence of the "rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves. . . . [T]he loss of life occasioned by the practice, is alarming." It failed of passage, and surgery stumbled out of its infancy.

In the early 1800's all surgery which involved insertion of instruments into body cavities was highly dangerous because of uncontrollable infection and pain-induced shock. Some 37.5% of major surgeries in New York Hospital from 1808-1833 proved fatal. Abortion, which would have involved the insertion of unclean instruments into the uterine cavity, was accordingly a frightfully dangerous procedure at that time. It was not until 1884, some 54 years after enactment of the first New York anti-abotion statute, that Sir Joseph Lister's aseptic techniques, the idea of washing one's hands and instruments, gained widespread acceptance in New York City circles.

Women, not fetuses, were the protected objects of such laws. Although commonly the accomplice and accessory of the illegal, non-medical abortionist, women were never charged with a crime. The crime was performing an abortion upon a woman, not causing fetal demise.

XIV. I can not seriously accept that the anti-abortion forces are anymore concerned with life than those who favor freedom of choice. The former are certainly more devoted to their conception and value of fetal life, but to life as we all accept it in its fullest form, nothing could be further from the truth. I do not believe in fetus first, people second.

C

The politics of abortion in America has been unique. The recognition of a woman's right to mastery over her reproduction and the appropriateness of safe, medical intervention in pregnancy occurred elsewhere world-wide, following thoroughly reasoned and deliberative debates in legislative chambers. Elsewhere, the political, initial battles of words and reason preceded the final vote battle in logical order. In America, the Rubicon was crossed in a few brief moments on Monday morning, January 22, 1973. On that day the United States Supreme Court in an overwhelming 7-2 opinion, relying upon almost 200 year old constitutional under-pinnings of our free, democratic society, upheld the right of our citizens to be free from unwarranted invasions of governmental intrusion into personal family matters of procreation and childbearing. The public debate, the political machinations, the soul-searching for answers and an ease of feelings by millions of our citizens, have transpired subsequently to the fact of legalized, safe abortions.

Efforts to analogize the legalization of abortion with the Holocaust or the Dred Scott decision are rationally inappropriate and personally objectionable. The present Congressional efforts to prohibit abortion accurately mirror the consistent difficulties the law has always encountered when endeavoring to codify moral concepts which are not universally accepted. Witness the passage of the Eighteenth Amendment (and the subsequent repeal by the Twenty-First Amendment). Racial genocide and the institution of slavery are universally, morally abhorrent. On the contrary, it is the practice and not the prohibition of abortion that is near universally accepted. The Eighteenth Amendment produced an acknowledged historical and constitutional disaster in our county's history and left us with the tragic legacy of organized crime which still infects our society. The abolition of legalized abortion will not stop the practice of abortion, but will only stop the availability of medically safe procedures for all but the affluent.

D

The present amendment before this Committee undermines traditional family values and destroys the right of Americans to be free from governmental intrusion into their personal lives. It is not as billed "pro-family". It is anti-family. It thrusts government into bedrooms and into matters historically of a personal concern. How and why do we ignore the fact that women of economic means have always had access to medical abortions through the feigned "psychiatric" route?

This amendment is a back-door effort, disingenuously designed for public consumption. The front-door approaches, attempted by the Human Life Amendment and Senate Bill No. 158, have faltered for good reasons too numerous to elaborate. The sugar coated effort under consideration here is also doomed to failure because the electorate is discerning enough to pierce the gloss and reject the substance.

The amendment is not a legitimate endeavor to allow constitutional circumvention and legislative intrusion into the formulation of a codified abortion policy. It must be noted that the amendment would not allow a congressional determination of an abortion policy permitting and encouraging a climate of safe, legal and accessible abortion services. The proposed legislative grant is strictly confined to the "power to restrict and prohibit abortions". It is anti, it is negative and it impinges on personal liberty.

This amendment and any act of Congress promoting it would be unique by creating a shambles of the doctrine of statutory federal pre-emption. It would allow the states legislative dominance in a manner irreversible except by subsequent constitutional tinkering. Seemingly granting a degree of states rights in this area, the amendment permits local option only if more restrictive. This amendment suffers the same fatal infirmities of most anti-abortion legislation. In its effort to disguise its true and honest aim of eliminating all abortions, it feeds upon itself through its deceptive language and ends in self-consumptive defeat through illegality, inconsistency and irrationality. Of the literally dozens of such cases I have litigated in this area, the unwillingness of legislators and prosecutors to be upfront has ultimately resulted in the judicial foreclosure of their efforts.

This amendment permits the Constitution to be and to say what Congress chooses. It seeks to alter the rules and, perhaps, should appropriately be numbered as Article V(A) of the Constitution. It would allow amending the Constitution by a majority vote of each House of Congress or of state legislatures, rather than the necessary two-thirds of each House of Congress and three-quarters of the states.

This or any constitutional amendment can not accomplish the long sought after goal of consensus in the abortion debate. The only realistic consensus or compromise obtainable is one of recognition of and tolerance for the rights of all persons to worship and to exercise self-determination in this sensitive part of their lives.

The affluent and the resourceful always have and always shall obtain abortions. Let us never forget the publicized travails of Sheri Finkbine in 1962, who forced to bare her private familial affairs to a sympathetic nation, finally in desparation traveled to Sweden for relief. To deny to an indigent an equal opportunity to exercise control over her reproduction is to perpetuate the cycle of poverty. To deny a teenager a planned marriage and the opportunity to have children when she can physically, emotionally and financially raise them in an atmosphere of love and caring, when she has been the victim of rape, incest, contraceptive failure or momentary passion, is callous and unmerciful.

It is arrogant and presumptuous for anyone, and particularly men, to pass statutory judgments upon the moral appropriateness of abortion in any given circumstance, much less to impose some Procrustean judgment restricting all abortions. Decisions on abortion, like marriage, divorce, sexual activity and like all other difficult, personal decisions in life are not accurately made in the abstract, without proper regard for life's realities and other then presenting and relevant considerations.

During the past nine years there has been no great groundswell of public opinion demanding an end to the right of abortion. Rather, there has been with each passing year a greater public knowledge and acceptance of the need to retain the option of abortion in those cases where the same is dictated as the most appropriate choice based upon the health and life interests of the pregnant woman.

Thank you for your consideration.

Mr. **Markman**. Thank you very much, Mr. Susman.

Professor Rosenblum?

If I could introduce Professor Rosenblum again—Victor Rosenblum is professor of law at the School of Law, Northwestern University, Evanston, Ill., and vice chairman of the Americans United for Life Legal Defense Fund, which has been the major litigating arm of the prolife movement.

Professor Rosenblum?

STATEMENT OF VICTOR G. ROSENBLUM, PROFESSOR OF LAW, SCHOOL OF LAW, NORTHWESTERN UNIVERSITY, EVANSTON, ILL.

Mr. **Rosenblum**. Thank you very much.

I apologize for the lateness of the flight in coming in. There was a mechanical failure on the plane and we were delayed by some 40 minutes in departure.

My name is Victor G. Rosenblum. For identification purposes I should say that I have been a professor of law and political science at Northwestern University in Illinois for some 20 years, having begun my career there in 1958. It should also be made clear at the outset that I am in no way appearing today on behalf of or under the auspices of the university.

I am testifying on my own personal behalf and in my capacity as vice chairman of the Americans United for Life Legal Defense fund, which as you stated is the only public-interest law firm in the Nation that devotes its full-time efforts to prolife matters. It was in this capacity that I had the privilege to argue orally the case for the Hyde amendment and similar State abortion funding restrictions before the Supreme Court.

As I begin my testimony, which is intended primarily to convey the analysis of Americans United for Life Legal Defense Fund concerning the legal meaning and effect of Senate Joint Resolution 110, the Hatch amendment, I recall an involvement as counsel for the amicus National Institute for Education in Law and Poverty in the case of *Goldberg* v. *Kelly*. The amicus argued that when a State terminates public assistance payments to a recipient it must afford him or her an evidentiary hearing before doing so, in order to comply with the due process clause of the 14th amendment.

It was gratifying to me that the Supreme Court was convinced that welfare benefits are not merely a gratuitous privilege extended to the poor which may be taken away at will but, once there is an entitlement, something to which the poor have a right which may not be arbitrarily infringed. Stressing the importance of the very means by which to live, the Supreme Court noted in *Goldberg* v. *Kelly* that "from its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."

I mention this, Mr. Chairman, because I am disturbed at the increasing tendency to characterize support for the life of the unborn as the concern exclusively of conservatives or of the so-called New Right. I take pride in being a lifelong Democrat who has tried to devote a portion of my life to the causes of the disadvantaged, the disenfranchised, and the victims of discrimination in our society. My concern for the unborn is an outgrowth of this commitment.

The mark of a humane society is, in my view, its attention to the protection of the weak, the dependent, the helpless, the victims of discrimination. The mark of a civilized and liberal nation is not willingness to cast off those who are dependent for their lives and well-being on those of us who are more fortunate but rather a readiness to share the fruits of our privilege.

Certainly advocacy of abortion as a way to reduce the welfare rolls is the last position anyone who claims to be liberal should take, and yet is it not the very people who charge prolifers with being ultraconservative, who so often point to the "billions in welfare payments" which "the children of teenagers cause," as did a New York Times editorial on November 1 of this year, in the context of asserting a need for the "essential alternative of abortion?"

It seems to me that the exclusion of the unborn from membership in human society and from the protection that entails is among the worst contemporary instances of discrimination. When that claim is based, as it often is, upon precisely the point that an unborn child is dependent on another human being, it inverts the whole order of rational and compassionate principles of justice.

I feel very comfortable, therefore, in appearing before this distinguished subcommittee to advance what I feel is the essentially liberal cause of restoration of legal protection to the unborn child. While I might have preferred to see a constitutional amendment which contains on its face a ringing reaffirmation of the equality of all members of the human race, including the unborn, I believe that the Hatch proposal nobly and effectively advances that cause.

I say this because, from a legal point of view, the unborn would not be treated unequally with other human beings in the constitutional text, were Senator Hatch's amendment to be adopted. Throughout the Constitution, including its amendments, the legislature is often prohibited from legislating with particular effects and often empowered to legislate on particular subjects but—except for duties related to the operation of the Government itself, such as apportioning the number of House Members for each State and paying themselves—the legislature is never required to legislate.

It is important to note that any constitutional amendment will need State and Federal legislative support for its implementation. This is so because the Federal Constitution, even when it contains provisions that restrict private conduct, such as are found in the 13th amendment, is not a criminal code nor a regulatory statute. Even when a provision is seemingly self-executing, the Constitution prohibits but does not punish, and therefore does not compel.

As Chief Justice Marshall reminded us so eloquently in *McCulloch* v. *Maryland*, "We must never forget that it is a Constitution we are expounding. * * * [P]rovision[s] made in a Constitution [are] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Thus, implementing legislation is always needed to adapt the broad and sweeping formulations of the Constitution to the needs of everyday law.

With this as background, let me proceed to an analysis of the amendment's language. The first sentence of Senate Joint Resolution 110 reads, "A right to abortion is not secured by this Constitution." This sentence would reverse *Roe* v. *Wade*, its companion case, *Doe* v. *Bolton,* and their progeny which declared that constitutional protection of privacy includes a decision whether or not to terminate pregnancy, free of unduly burdensome governmental restriction on access to abortion.

Senate Joint Resolution 110 is modeled on the 13th amendment in the sense that it applies to abortion as an institution, just as the 13th amendment applied to slavery as an institution, including all its badges and incidents. Thus any purported right such as privacy which is conceived to place obstacles in the way of the legal prohibition of abortion is intended by the amendment to be no longer secured under the Constitution.

The concern has been expressed that because the words of the amendment do not track precisely words employed by the Supreme Court in formulating the bearing of the right to privacy on abortion, it might be construed by courts to leave some or all of those formulations intact despite the clear intent of its framers. An attempt to cure such an alleged imperfection might well lead to the result it sought to avoid, for were the amendment to be tied to any technical formulation, courts might well escape it simply by altering the formulations they give to the right. By using the generic term "right to abortion," the entire field of possible aspects or reformulations of any abortional liberty is encompassed by the amendment more thoroughly than would be the case were the amendment to tie itself more specifically to language quoted from *Roe, Doe,* or one of their progeny.

While this is the clear intent and effect of the language as drafted, it arguably should be altered slightly to stress that intent so as to read: "No right to abortion is recognized by this Constitution." "No" emphasizes that any such rights are comprehensively denied. "Recognized" is preferable to "secured" because "secured" has, as Prof. John Noonan has testified, "too benign a flavor." It is also preferable, I think, to "conferred" because the term "conferred" could conceivably be construed not to cover putative 9th and 10th amendment rights and powers which are not conferred by the Constitution but merely retained by or reserved to the people under those amendments. In addition, it would be well to stress in the committee report that the Hatch amendment is intended to preclude reliance on 9th and 10th amendment reserved or retained rights and powers.

The most important legal impact of the first sentence of the Hatch amendment, apart from its removal of a blot upon our jurisprudence, is that it assures that the laws enacted by the Congress and the States in accordance with the second sentence would be subject only to the rational relationship test of constitutionality and not to the more exacting strict scrutiny test. Under present law, any governmental attempt to limit the right to privacy's protection of the abortion decision would, under strict scrutiny, not only have to be supported by a compelling interest but would also have to be narrowly drawn to suit only that interest. Thus proscriptive legislation might have to be very carefully drawn to protect the unborn, sorting out any incidental burden on the remaining privacy right protection of abortional liberty of the woman. When the right to abort is wholly and specifically abolished, on the other hand, as long as laws are rationally related to the legitimate State interest in unborn life they must be held constitutional.

The second sentence of Senate Joint Resolution 110 reads, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortion, provided that a law of a State more restrictive than a law of Congress shall govern." The meaning of the concurrent power shared by Congress and the several States, as used in a constitutional amendment, is clearly established by such decisions of the U.S. Supreme Court as *United States* v. *Lanza*, from which I quote.

Concurrent power, according to the Supreme Court,

> * * * means that power to take legislative measures * * * shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures.

"We have here," still quoting, "two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws. * * *" Thus under concurrent power State and Federal legislation, whether identical or different, coexists. There is no question of one preempting the other.

However, since professors are invariably concerned with hypothetical questions, I have to pose the question, What if there is a conflict? The full text of my testimony catalogs circumstances where one might suppose there would be a conflict and concludes that in fact no conflict can exist. The key to understanding this is the recognition that the power provided by the amendment is not a power to deal at will or whim with the subject of abortion but a power to restrict and prohibit abortion.

The only case in which there could be a conflict between State and Federal law would be when one of the two sought to compel or protect against interference abortions the other forbade. However, in such a case only the jurisdiction restricting abortion would be exercising power secured by the amendment. The power to compel or protect abortion, whatever ground it might be based upon, would be overcome by the constitutionally based restrictive power

On the other hand, if both jurisdictions forbade different classes of abortion or restricted them in different ways, there would be no conflict. The impact within the State would simply be cumulative. Similarly, if certain abortions were punished by both jurisdictions, the effect would also be cumulative. It would be possible to be punished twice for the same abortion, once under Federal and once under State law, if such provisions were adopted.

As introduced, the proposed amendment contains a proviso: "Provided that a law of a State more restrictive than a law of Congress shall govern." On the basis of the analysis just presented, however, it is likely that this proviso language is unnecessary. It is conceivable that the proviso might tempt courts to ignore the *Lanza* ruling and to embark upon a new construction of "concurrent."

There could be problems and indeed mischief if the Court were to use the proviso to find that only one law—whichever of the Federal or State laws it deemed more restrictive—could be in effect in any given State at one time. As between a statute outlawing all abortions but providing, say, a $50 fine for their violation, and a statute making an exception to prevent the death of the mother but providing prison sentences for its violation, which would be deemed more restrictive? If one jurisdiction proceeded by way of criminal penalties while the other employed injunctive relief and civil damages secured by private rights of action, might not one be more restrictive in theory while the other would be more effective in practice?

Any possibility of an either/or construction opens all of the dangers described in *Lanza*. This was the *Lanza* language:

> If a State were to punish . . . by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.

Therefore, it seems to me elimination of the proviso as it is now drafted is to be recommended. It would be preferable to end the second sentence with the word "abortion" and to rely specifically on the *Lanza* case and the other 18th amendment cases in the committee report.

Eliminating the article "the" placed before "concurrent" would also be desirable, even though it sounds like nitpicking, in order to bring the Hatch amendment into as exact correspondence as possible with the language previously construed by the Court. In light of the existence of such clear precedents on the meaning of "concurrent power" when that phrase was a part of the Constitution, a future Court would be hard-pressed indeed to misconstrue the clear intent of the amendment. Removal of the proviso would leave language entirely adequate to convey the intended meaning, particularly if the reliance of the amendment framers upon those precedents were made explicit in the committee report.

Nevertheless, to insure in the plain language of the amendment that "Lanza" and the other Supreme Court cases construing the term "concurrent power" should never be reversed by a future court, the language proposed by Prof. Richard Stith of Valparaiso University is desirable. Professor Stith has proposed this language for the amendment:

> No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

This simply restates the essential holding of *Lanza* and the other Supreme Court cases construing the meaning of "concurrent power" in the 18th amendment, and eliminates the prospect of their reversal by future Courts. "Abortion" is made singular instead of plural to emphasize its character as an institution.

The power to restrict and prohibit abortions is broad and plenary, designed to afford reasonable discretion to the legislatures. The term "abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter. It does not include the induction of labor after viability in order to bring about the earlier birth of a living infant. This should be made explicit in the committee report. That which harms or interferes with the physical integrity of the embryonic or fetal life is encompassed in that which threatens the life absolutely; thus, nontherapeutic fetal experimentation or genetic manipulation could be regulated or proscribed in accordance with the amendment.

The discretion vested in the legislature by the amendment is broad. Certainly, for example, the legislature, in taking account of the fact that most women who obtain abortions are under great stress, that they are usually ignorant of the humanity of their unborn child and unaware of the alternatives available to them, and that they are often much pressured by others, could decide to treat the woman subjected to abortion as a second victim and therefore decline to visit criminal punishment upon her. If the legislature employed this policy, which was one followed by a number of States prior to *Roe* v. *Wade*, yet did punish the abortionist, the statute embodying this choice could not be held unconstitutional as a violation of the equal protection clause of the 14th amendment because this sort of policy choice would be precisely what the Hatch amendment intended to vest the legislature with the discretion to make.

This does not mean that other constitutional protections would be abrogated whenever it could be argued that doing so--dispensing, say, with the rule against unreasonable searches and seizures or the right to a jury trial—might more efficiently restrict abortion. As the Supreme Court said in considering the effect of another constitutional amendment.

> Both the twenty-first amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues at stake in any concrete case.

My prepared testimony discusses the wording of the resolution to accompany the amendment, focusing on the question of the majority to be required in the State legislatures for ratification, and on whether a time limit should be specified. I hope, of course, that the subcommittee will have the opportunity to review that more detailed testimony.

In summary, Senate Joint Resolution 110 would reverse *Roe* v. *Wade*, *Doe* v. *Bolton*, and all of their progeny insofar as they are based on the assertion that the Constitution in any way protects abortion. Henceforth, statutes that restrict or prohibit abortion would be valid if rationally related to the protection of unborn human life. Further, Senate Joint Resolution 110, which provides concurrent power to restrict and prohibit abortion to the States and to Congress, would permit both the States and Congress to legislate and there is no possibility in my view that their laws could come into genuine conflict. This obviates the need for a proviso to counter any preemption problem that might arise under the supremacy clause.

To repeat, in accordance with these conclusions and other observations the following revised language is recommended:

> No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

It is desirable, I think, that the committee report emphasize several points: One, that Senate Joint Resolution 110 is intended to reverse *Roe* v. *Wade* and all of its progeny that recognize the existence of a constitutional right to abortion, however formulated; two, that the use of the word "recognized" as has been suggested—or of "secured" is intended to preclude use of any punative 9th or 10th amendment right to abortion; three, that the use of the term "concurrent power" is intended to invoke specifically the line of cases that include *United States* v. *Lanza* in which these words have been authoritatively construed; four, that the term "abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter, and that Senate Joint Resolution 110 provides for plenary legislative power to protect that life, and that the amendment further is intended to reach the institution of abortion including its "badges and incidents"; and fifth, that the elimination of a right to abortion and the provision for plenary power is intended to insure that legislation enacted in accordance with the amendment is judged by the rational relationship test.

It is further recommended that the resolution accompanying Senate Joint Resolution 110 provide for ratification by legislative majority in ratifying State legislatures, and that the subcommittee carefully consider whether to set a time limit for ratification of 10 years or, in the alternative, to permit a future Congress to determine whether ratification has occurred within a reasonable time.

Finally, I would like again to commend Senator Hatch for embarking upon a noble enterprise to protect the weakest among us.

[The prepared statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF VICTOR G. ROSENBLUM

My name is Victor G. Rosenblum, For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some twenty years. It should be made clear at the outset that I am in no way appearing today on behalf of or under the auspices of the University. I testify on my own personal behalf and in my capacity as Vice-Chairman of Americans United for Life Legal Defense Fund, the only public interest law firm in the nation that devotes its full-time efforts to prolife matters. It was in this capactiy that I had the opportunity to argue orally the case for the Hyde Amendment and similar state abortion funding restrictions before the Supreme Court.[1]

As I begin my testimony, which is intended primarily to convey the analysis of Americans United for Life Legal Defense Fund concerning the legal meaning and effect of S.J. Res. 110, the Hatch Amendment, I recall an involvement as amicus, together with the National Institute for Education in Law and Poverty, in the case of Goldberg v. Kelly.[2] The amicus argued that when a state terminates public assistance payments to a recipient it must afford him or her an evidentiary hearing before doing so in order to comply with the Due Process Clause of the Fourteenth Amendment.[3] It was gratifying that the Supreme Court was convinced that welfare benefits are not merely a gratuitous privilege extended to the poor which may be taken away at will but, once there is an entitlement, something to which the poor have a right which may not be arbitrarily infringed. Stressing the importance of "the very means by which to live," the Supreme Court noted, "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[4]

I mention this, Mr. Chairman, because I am greatly disturbed at the increasing tendency to characterize support for the life of the unborn as a concern exclusively of conservatives or of the so-called "New Right."

I take pride in being a lifelong Democrat who has tried to devote a portion of my legal and political energies to the causes of the disadvantaged and the disenfranchised in our society: the poor, the handicapped, and the victims of prejudice in many forms. My concern for the unborn is an outgrowth of this commitment. The mark of a humane society is, in my view, its attention to the protection of the weak, the dependent, the helpless, the victims of discrimination. The mark of a civilized and liberal nation is not willingness to cast off those who are dependent for their lives and well-being on those of us who are more fortunate, but rather a readiness to share the fruits of our privilege. Certainly, advocacy of abortion as a way to reduce the welfare rolls is the last position anyone who claims to be liberal should take, and yet is it not the very people who charge prolifers with being conservative who, so often, point to the "billions in welfare payments" which "the children of teen-agers cost," as did a New York Times editorial on November 1,[5] in the context of asserting a need for "the essential alternative of abortion."

It seems to me that the exclusion of the unborn from membership in human society and from the protection it entails is among the worst contemporary instances of discrimination. When that claim is based, as it often is, upon precisely the point that an unborn child is dependent on another human being, it inverts the whole order of rational and compassionate principles of justice.

I feel very comfortable, therefore, in appearing before this distinguished Subcommittee to advance what I feel is the essentially liberal cause of restoration of legal protection to the unborn child. While I might have preferred to see a Constitutional Amendment which contains on its face a ringing reaffirmation of the equality of all members of the human race, including the unborn, I believe that your proposal, Mr. Chairman, nobly and effectively advances that cause.

I say this because from a legal point of view the unborn would not be treated unequally with other human beings in the Constitutional text were your Amendment to be adopted. Throughout the Constitution, including its amendments, the legislature is often prohibited from legislating with particular effects and often empowered to legislate on particular subjects, but except for duties related to the operation of the government itself (such as apportioning the number of House members for each State[6] and paying themselves[7]), the legislature is never required to legislate.

It is important to note that any constitutional amendment will need state and federal legislative support. This is so because the federal Constitution, even when it contains provisions that restrict private conduct such as are found in the Thirteenth Amendment, is not a criminal code nor a regulatory statute. Even when a provision is seemingly self-executing, the Constitution prohibits but does not punish and therefore does not compel. As Chief Justice Marshall reminded us so eloquently in McCulloch v. Maryland, "We must never forget that it is a constitution we are expounding. ...[P]rovision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[8] Thus, implementing legislation is always needed to adapt the broad and sweeping formulations of the Constitution to the needs of everyday law.

With this as background, let me proceed to an analysis of the Amendment's language.

THE EFFECT OF THE FIRST SENTENCE: REVERSAL OF *ROE*, ITS HOLDINGS AND ITS PROGENY

The first sentence of S.J. Res. 110 reads, "A right to abortion is not secured by this Constitution."

This sentence would reverse *Roe v. Wade*,[9] its companion case, *Doe v. Bolton*,[10] and their progeny, which declared that constitutional protection of privacy includes a "decision whether or not to terminate . . . pregnancy"[11] free of "unduly burden[some]"[12] "governmental restriction on access to abortions."[13] The right of privacy under the Fourteenth Amendment[14] would no longer include protection of access to abortion. Nor would any other section of the Constitution include such a right. No court could find a right to an abortion expressly or impliedly under the Constitution. The explicit intent of the Amendment, as announced by its sponsor,[15] establishes that the Amendment eliminates any such right however formulated, as a constitutional matter. This should be reiterated in the Committee Report.

The words "right to an abortion" are used in their broadest sense and therefore include all lesser legal concepts. Since that right would no longer exist under the Constitution, any lesser formulation would likewise no longer exist under the Constitution.

S.J. 110 is modeled on the Thirteenth Amendment in the sense that it applies to abortion as an institution,[16] just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents.[17] Thus *any* purported constitutional right which is conceived to place obstacles in the way of the legal prohibition of abortion is intended to be no longer secured under the Constitution.

The concern has been expressed that because the words of the Amendment do not track precisely words employed by the Supreme Court in formulating the bearing of the right to privacy on abortions, it might be construed by the Court to leave some or all of those formulations intact, despite the clear intent of its framers.

An attempt at a cure for this reputed imperfection might well lead to the result it sought to avoid. Were the amendment to be tied to any technical formulation, the Court might well escape it simply by altering the formulation it gives to the right. It is important to recall that, unlike statutes, a constitutional amendment is necessarily broad and sweeping in its wording. By using the generic term "right to abortion," the entire field of possible aspects or reformulations of any abortional liberty is encompassed more thoroughly than would be the case were the amendment to tie itself to specific language quoted from Roe, Doe, or one of its progeny. Both literally and in terms of the framers' intent, S.J. Res. 110 ends any and all constitutional support for abortion.

In 1795 the Eleventh Amendment was adopted[18] in response to a Supreme Court decision, Chisholm v. Georgia,[19] holding that a state could be sued by a citizen of another state. Its text denied federal jurisdiction of "any suit . . . against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."[20] The Supreme Court held that it operated also to bar federal jurisdiction of a suit brought against a state by one of its own citizens, relying on a close examination of the history of the adoption of the Eleventh Amendment.[21] It noted the strong public reaction against Chisholm, and drew on the discussion of the decision and of the Amendment during the period between Chisholm and the Amendment's ratification to conclude that the people strongly believed that the Chisholm majority opinion was wrong in denying, and the dissenting opinion correct in asserting, that suing a state without its consent was unknown in law and unauthorized by the Constitution.

By similar analysis, any future court would have to conclude that the Hatch Amendment was intended to overturn Roe and its progeny. Certainly, it could not rationally conclude that the Amendment was designed merely to reaffirm the decision already established in Maher and Harris that there is no "unqualified 'constitutional right to an abortion'" such that the government must pay for the abortions of indigents.[22] It would be an utterly absurd result to assume that the people would have gone to the lengths necessary to adopt a constitutional amendment only in order to secure a confirmation of those decisions.

Let me also point out that the first sentence will have to be considered together with the second sentence. That sentence provides for a plenary power to "restrict and prohibit abortion," a power which clearly could not be interdicted by any antecedent abortional liberty.

While this is the clear intent and effect of the language as drafted, it should be altered slightly to stress that intent:

"No right to abortion is recognized by this Constitution."[23]

"No" emphasizes that any such rights are comprehensively denied. "Recognized" is preferable to "secured" because "secured" has too "benign a flavor," as Professor John Noonan has testified.[24] It is also preferable to "conferred" because the latter term could conceivably be construed not to cover putative Ninth and Tenth Amendment rights, which are not conferred by the Constitution, but merely "retained by the people."[25] In addition, it would be well to stress in the Committee Report that the Hatch Amendment is intended to preclude reliance on Ninth and Tenth Amendment reserved rights.

It follows from the first sentence that any holding in any federal or state case that relied upon recognition of a federal constitutional "right to abort" would be reversed to the extent that existence of such a "right" was a necessary predicate of the holding.

Thus, for example, the Supreme Court's decision in Planned Parenthood of Missouri v. Danforth,[26] declaring that the state cannot grant husbands and parents of minor children,"veto power" over the abortion decisions of wives and children would be implicitly vacated. Since abortion would no longer be a "constitutional right" under the Hatch Human Life Amendment, it could not be claimed as a basis on which statutes such as the spousal and parental consent provisons at issue in Danforth might be stricken. (Of course, Danforth's invalidation of the ban on saline abortions and its refusal to allow the imposition of a standard of care to preserve the life and health of the fetus would also be reversed.)[27] Colautti v. Franklin, striking another standard of care provision, and Bellotti v. Baird II,[28] which held unconstitutional a parental/judicial consent law and which set forth rigid rules for determining the constitutionality of such laws, would also be reversed. In addition, to the extent that the nonphysician abortion case (Connecticut v. Menillo[29]), the case abstaining from judgment on a parental consent law, (Bellotti v. Baird I[30]), the abortion funding cases (Maher v. Roe[31] and Harris v. McRae[32]), the public hospital case (Poelker v. Doe[33]), and the parental notice case (H.L. v. Matheson[34]) contain reaffirmations of the tenets of Roe, Doe, Danforth, Colautti, and Bellotti, the reaffirmations would be vacated. Any cases decided between now and the Hatch HLA's ratification would be reversed to the extent they relied upon or expanded the holdings in these cases. In addition, any other cases that cite or otherwise rely upon such holdings would stand only to the extent they could retain vitality independent of the support drawn from reliance on those authorities. The numerous lower court cases dependent on any of the Supreme Court's abortion holdings would also fall. The slate would be wiped clean: as far as judicial precedent is concerned, it would be as if Roe and its progeny had never existed. Such questions as those of the relative rights of parents and children or husbands and wives in the context of abortion would be restored to where they stood before the adoption of Roe and the subsequent decisions dependent on it.

What of ancillary questions decided in those cases, such as issues of standing, procedural holdings, and the like? They would have the same precedential status as the holdings in the many cases which are frequently cited as "reversed on other grounds."[35]

An interesting question is what would become of the holding in Roe that the unborn are not "persons" under the Fourteenth Amendment.[36] Nullification of the judicial abortion doctrine discredits the steps in the logic, expressed as subsidiary holdings, which led to the concluding holding creating the abortional liberty. The Court itself recognized that its holding that the unborn lack Fourteenth Amendment personhood was necessary to its decision.[37] Arguably, therefore, with the adoption of the Hatch Amendment the constitutional character of the unborn would be returned to pre-Roe--that is, unsettled--status. It would therefore be possible for those who have maintained that the unborn are in some sense "persons"[38] under the Constitution to renew their legal claims since the personhood of the unborn would again be an open question. Moreover, if it vacates the personhood holding of Roe, the Hatch HLA would remove a highly significant legal impediment to a federal statutory declaration of unborn personhood, such as that in the Human Life Bill (HLB) presently before the Congress.[39] Since this Amendment would at least call into question the validity of the Supreme Court's prior declaration of fetal nonpersonhood, it would implicitly require courts examining an HLB or otherwise confronted with a claim of unborn personhood in the wake of its passage to reevaluate carefully the logic by which the unborn were previously denied constitutional status. (It is certain, however, that the Hatch Amendment would not of itself make the unborn "persons.")

On the other hand, it is possible that the interpretation of the word "person" in the Fourteenth Amendment to exclude the unborn could conceivably be considered by the Supreme Court as extraneous to its creation of the abortional privacy right and therefore not affected by this amendment. In other words, the Court may hold, when interpreting the Hatch Amendment, that even though the abortional right of privacy is no longer secured by the Constitution, the unborn are still not persons "in the whole sense"[40] under the federal Constitution because its framers did not intend them to be. Such a conclusion would be erroneous, as I sought to demonstrate last year in testimony before the Subcommittee on Separation of Powers.[41] After adoption of the Hatch Amendment, however, states would unquestionably be free to make the unborn persons under their constitutions and laws.

Even taken apart from the second sentence of the Amendment, the nullification of the "right to abortion" accomplished by the first sentence would allow legislative proscription of abortion. In the absence of such a "right," various governmental entities, acting within their traditional spheres of jurisdiction, might legitimately proscribe or regulate abortion practices on behalf of their continuing, already judicially recognized, legitimate interest in the protection of fetal life.[42] This means that those laws that proscribe abortion which remain codified could be revived,[43] and that new laws could be enacted within traditional spheres of jurisdiction to proscribe and to restrict abortion should the various legislatures choose to do so.

Given the existence of the second sentence, however, the most important legal impact of the first sentence, apart from its removal of a blot upon our jurisprudence, is that it assures that the laws enacted by the Congress and the states in accordance with the second sentence would be subject only to the "rational relationship" test and not to the more exacting "strict scrutiny" test.

Previously proposed Human Life Amendments tended to focus on assuring the legal status of unborn children by declaring them constitutional "persons," thus providing the State with a "compelling state interest" in the protection of unborn life sufficient to overcome the woman's "fundamental right" to choose an abortion. ("Where certain 'fundamental rights' are involved, [such as the abortional liberty[44]] the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[45]) Because the abortional right remains intact despite the personhood of the unborn, however, governmental regulations intended to protect the unborn could continue to be "strictly scrutinized" by the courts and it is possible that "personhood" alone would not ensure the validity of fully restrictive governmental legislation. The rights of the unborn would be balanced against the privacy rights of the woman and, at least in some circumstances, the latter might be held to prevail.[46] Although the States would probably have a "compelling state interest" in the protection of the unborn once they were "persons," it is noteworthy that in Roe the Court recognized such a "compelling state interest" in the unborn after viability, yet still required that post-viability abortion be legal when done "to preserve the life or health of the mother."[47] Previously proposed amendments have attempted to meet this problem without specifically denying the existence of a constitutional abortional right by stating particular circumstances under which abortions will be permitted and proscribed[48] or by stating that the right to life of the unborn dominates or is "paramount" to any other contrary right which might be asserted.[49]

The Hatch Human Life Amendment meets this problem directly by simply denying the existence of the abortional right that lies at the very heart of constitutionally protected abortion. It would not have been necessary for the Roe Court to have found the unborn to be full "persons" in order to hold that governmental proscriptions on abortion were constitutional.[50] But it was necessary for the Court to acknowledge the existence of a constitutionally protected abortional right in order to establish the sweeping judicial control over legislative efforts to prescribe or regulate abortion that has ensued from Roe.[51]

To the extent that the right to privacy's protection of the abortion decision remained intact, any governmental attempt to limit its exercise would not only have to be supported by a "compelling" interest, but also would have to be "narrowly drawn" to suit only that interest.[52] Thus, proscriptive legislation might have to be very carefully and specifically drawn to protect the unborn, sorting out any incidental or unnecessary burden on the remaining abortional liberty of the woman. When the right to abort is wholly and specifically abolished, on the other hand, the "narrowly drawn" requirement that attaches to legislation that burdens a constitutional right could not be invoked.

Under this Amendment, therfore, state and federal legislation would not be subject to judicial review under the "strict scrutiny" test, but only under the less stringent "rational relationship test." Thus, if laws were rationally related to the legitimate state interest[53] in unborn life by protecting that interest, they would be held constitutional.

THE EFFECT OF THE SECOND SENTENCE: CONCURRENT POWER

The second sentence of S.J. Res. 110 reads, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions; Provided, That a law of a State more restrictive than a law of Congress shall govern."

The meaning of the "concurrent power" shared by "Congress and the several States," as used in a constitutional amendment, is clearly established by decisions of the United States Supreme Court.[54] The fullest explanation is in United States v. Lanza,[55] from which I quote:

> [I]t means that power to take legislative measures . . . shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures. . . . Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.
>
> . . . [T]he probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power . . . , state power would be excluded. In effect the . . . section . . . put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact . . . laws applying to all transactions within her limits. . . .
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignity, not that of the others.

The meaning of the "concurrent power" shared by the Congress and the states when the term is explicitly embodied in the Constitution is therefore very different from the meaning of that and similar terms when used in judicial opinions concerning the mutual authority of Congress and the States to regulate commerce.[56] In the commerce context the courts are dealing with a constitutional grant of power to regulate interstate and foreign commerce which is given only to the federal government.[57] The question of a power of "concurrent legislation" in the states thus arises only when the federal government has failed to act. It is a very complex question whether and to what extent a state may act, since in some circumstances federal legislation will be held to "pre-empt" the field,[58] while in others the state legislation will be upheld as a permissible complement.[59]

The cases dealing with pre-emption have no application here. In construing the meaning of the "concurrent power" provided in the Eighteenth Amendment the Supreme Court made this clear time and again.[60] Because, as in no other existing part of the Constitution, the power to be granted or recognized is "concurrent"--and therefore equal between any state and the Congress--there is no reason to be concerned about the application of the Supremacy Clause, which establishes that the Constitution and laws made in pursuance thereof take precedence over conflicting state laws.[61] There is no basis for use of the Supremacy Clause to invalidate state abortion legislation because the use of "concurrent power" affirms the equality of state with national power in the limited field of the Amendment; there is no need for its application because, under language that provides for "concurrent power to restrict and prohibit abortions," there is no possibility of a genuine conflict.

That there is no possibility of a genuine conflict arising from the independent exercise of the powers of Congress and the states to restrict and prohibit abortion is the crucial factor, and it bears elucidation.

When there was previously a provision of "concurrent power", in the Eighteenth Amendment to the Constitution, some lower courts indicated that by virtue of the Supremacy Clause, in the words of one decision, "In instances of ["immediate and hostile collision" of state with federal law] the state legislation must yield."[62] The Supreme Court never found or implied any applicability of the Supremacy Clause in Eighteenth Amendment cases and there is apparently no case at any level where there was an actual "conflict" of any type between state and federal legislation with regard to prohibition.

Consider the possible ways in which federal and state legislation might differ.

1. Congress might pass legislation restricting or prohibiting abortion (or both), while a given state did nothing. There would be no conflict.

Prohibited abortions or abortions done in violation of the restrictions would be crimes under federal though not under state law, and subject to injunction, prosecution, or whatever remedies were provided in the federal law, though they would not be subject to punishment under the state law. A mere failure to act by the state would not conflict with the federal law.[63]

2. A state might pass legislation restricting or prohibiting abortion (or both), while Congress did nothing. There would be no conflict.

The situation would be the same as above, but in reverse. A mere failure of Congress to act would not conflict with the enforcement of state law.

3. Congress might pass legislation outlawing some abortions but permitting others, while a state passed legislation outlawing some or all of the abortions permitted by federal law. There would be no conflict.

That the Congress permits particular abortions merely means (however the statute is phrased) that it fails to prohibit them. This in no way interferes with the capacity of a state, exercising its concurrent power, to proscribe them. Such abortions would simply be subject to injunction, prosecution, or any other remedy provided under state law, although immune from federal interdiction.

4. The same analysis would apply if a state outlawed some abortions, permitting others, and the Congress passed legislation outlawing abortions permitted by the state. There would be no conflict.

5. Congress and a state might pass seemingly incompatible regulations about abortions that were not prohibited. For example, Congress might require that all abortions be performed in hospitals, while a state might require that all or certain abortions be performed in free-standing outpatient surgical facilities. There would still be no conflict.

The key point is that the concurrent power provided by the Amendment is "power to restrict and prohibit abortion," not a general power to regulate on the subject of abortion. Under the Eighteenth Amendment's concurrent powers section, state statutes that penalized possession of liquor specifically licensed by federal law were upheld.[64] In the hypothetical example, both laws would be constitutional, and neither would be stricken; the cummulative effect within the state would be that abortions could be performed neither in hospitals nor in free-standing outpatient surgical facilities (nor, of course, in any other place or facility).

6. Theoretically, Congress might pass a law requiring or compelling the provision of certain abortions, or a law protecting certain abortions from interference, and a state might pass a law prohibiting or restricting those abortions. For example, Congress might require that agencies receiving federal funds make referrals for "medically necessary" abortions, or it might penalize any individual who interferes with an abortion sanctioned by federal law. As applied to abortions within that state, the congressional legislation requiring or protecting abortions forbidden by the state would be unconstitutional.

7. Alternatively, a state might pass a law protecting or requiring the provision of abortions precluded or restricted by federal law. So long as the federal law was in effect, such state legislation would be unconstitutional and therefore unenforcible.

Again, the essential point is that the concurrent power provided by the Amendment is "power to restrict and prohibit abortion," not a general power to regulate on the subject of abortion. To the extent either Congress or a state legislates in a manner restrictive of abortion, it is using power protected by the Amendment. To the extent either legislates in a manner permitting, protecting, or requiring abortion, it is using power which, if it exists at all, is derived from other provisions of the Constitution (or, in the case of state legislation, from the state constitution). To the extent incompatibility exists, a constitutional amendment supersedes all previously adopted amendments and other parts of the Constitution.[65] (With regard to state legislation, the Supremacy Clause[66] would apply in the sense that the federal constitutional Amendment would be the supreme law of the land, taking precedence over any state constitution.) Thus, state legislation that restricts or prohibits abortion takes precedence, within that state, over conflicting congressional legislation that actively requires or protects abortion, and congressional legislation that restricts or prohibits abortion takes precedence over conflicting state legislation that actively requires or protects abortion. In order to be stricken (or its application enjoined as applied within a particular state) legislation purporting to require or protect abortions prohibited or restricted (incompatibly) by the other jurisdiction would have to threaten direct practical effects if enforced--through criminal penalties, injunctions, disqualification for funding, provision of funding, or the like. Mere declaration of policy or hortatory statements, or failure to act, would not create a direct conflict.[67]

8. With regard to all or some abortions, Congress and a state might both enact legislation prohibiting them, enforced by similar or different penalties. There would be no conflict, and both laws could be enforced, even when applied to the same transaction.

This question was specifically addressed by the Supreme Court under the Eighteenth Amendment. It held that the provision for "concurrent power"

> contemplates that [the subject matter of the power] may be denounced as a criminal offense both by the federal law and by the state law; and that these laws may not only coexist but be given full operation, each independently of the other. Where such . . . is thus doubly denounced, one who engages therein commits two distinct offenses, one against the United States and one against the State, and may be subjected to prosecution and punishment in the federal courts for one and in the state courts for the other without any infraction of the constitutional rule against double jeopardy. . . .[68]

No "double jeopardy" is entailed under the Fifth Amendment[69] because an act of the state in prosecuting an individual for a particular act and an act of the federal government in prosecuting that individual for the same act are not actions by the same sovereign but by different sovereigns deriving their power from different sources. "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[70]

Prosecutions under both federal and state laws would be unconstitutional "double jeopardy" only if both laws derived their authority from the U.S. Constitution as amended by the Hatch Amendment. But while the federal power to restrict and prohibit abortion nationwide would be derived from the Amendment, the state power to do the same would not. The analysis used by the Supreme Court to construe the "concurrent power" section of the Eighteenth Amendment applies equally to the "concurrent power" section of the Hatch Amendment:

> To regard the Amendment as the source of the power of the States to adopt and enforce . . . measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution . . . each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the . . . Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact . . . laws applying to all transactions within her limits . . . . Such laws derive their force . . . not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution.[71]

The Court noted the unacceptable effect that would result from adoption of the contrary view, a danger which would be equally present in the abortion context:

> If a State were to punish . . . by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.[72]

What happens if an individual is sought by both federal and state authorities for the same transaction? This creates no substantive conflict, only the practical one of which jurisdiction would have priority in custody, trial and punishment. It would be resolved in the same way as in any other case in which an individual is subject to both federal and state charges, a common occurence even now: in the absence of a negotiated arrangement, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other, after which the other gains control.[73]

All of this analysis follows inescapably from the language, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions." As introduced, the proposed Amendment also contains a proviso: "Provided, That a law of a State more restrictive than a law of Congress shall govern." On the basis of the analysis just presented, however, it is likely that this language is unnecessary.

It is conceivable that the proviso might tempt the Court to ignore *United States v. Lanza*[74] and embark upon a new construction of "concurrent," particularly since there is some language in the introductory statement[75] by Senator Hatch which might possibly be viewed as suggesting that "preemption" doctrine does apply. It is important to note that the emphasis in the statement on the need for an "irreconcilable conflict"[76] before any enactment of one jurisdiction could invalidate the enactment of another *should* lead to the same conclusions as were expressed by the Supreme Court in its previous constructions of "concurrent power"--since, as has been demonstrated, no such "irreconcilable conflict" could ever exist. Nevertheless, there could be great mischief if the Court were to use the proviso to find that only one law, whichever of the federal or state it deemed "more restrictive," could be in effect in any given state at one time.

As between a statute outlawing all abortions, but providing a $50 fine for their violation, and a statute making an exception to prevent the death of the mother, but providing prison sentences for its violation, which would be deemed "more restrictive"? If one jurisdiction proceeded by way of criminal penalties, while the other employed injunctive relief and civil damages secured by private rights of action, might not one be "more restrictive" in theory while the other would be more effective in practice? Any possibility of an "either/or" construction opens all of the dangers described in Lanza as attendant upon a ruling of double jeopardy.

Therefore, elimination of the proviso, as it is now drafted, is recommended. It would be preferable to end the second sentence with "abortion," and to rely specifically on Lanza and the other Eighteenth Amendment cases in the Committee Report.

Eliminating the article "the" placed before "concurrent" would also be desirable in order to bring the Hatch Amendment into as exact correspondence as possible with the language previously construed by the Court.

In light of the existence of such clear precedents on the meaning of "concurrent power" when that phrase was a part of the Constitution, a future court would be hard pressed indeed to miscontrue the clear intent of the Amendment. Removal of the proviso would leave language entirely adequate to convey the intended meaning, particularly if the reliance of the Amendment framers upon those precedents is made explicit in the Committee Report.

Nevertheless, to ensure in the plain language of the Amendment that Lanza and the other Supreme Court cases construing "concurrent power" can never be reversed by a future Court, the language proposed by Professor Richard Stith of Valparaiso University is desirable:

Stith Revision of Hatch Amendment Language

> No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

This simply restates the essential holding of Lanza and the other Supreme Court cases construing the meaning of "concurrent power" in the Eighteenth Amendment, and eliminates any prospect, however remote, of their reversal by a future Supreme Court. ("Abortion" is made singular instead of plural to emphasize its character as an "institution.")

THE EFFECT OF THE PLENARY POWER PROVIDED BY THE HATCH AMENDMENT

The "power to restrict and prohibit abortions" is broad and plenary, designed to afford reasonable discretion to the legislatures. "Abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter. It does not include the induction of labor after viability in order to bring about the earlier birth of a living infant. This should be made explicit in the Committee Report. That which harms or interferes with the physical integrity of the embryonic or fetal life is encompassed in that which threatens the life absolutely; thus, nontherapeutic fetal experimentation or genetic manipulation could be regulated or proscribed in accordance with the Amendment.

As pointed out earlier in my testimony,[77] like slavery, abortion has become an institution in American life. Just as the Thirteenth Amendment, in abolishing slavery, gave to Congress power to deal with "all badges and incidents of slavery,"[78] so the Hatch Amendment, in providing for the concurrent power of Congress and the states to "restrict and prohibit" abortion, includes power to reach its "badges and incidents." Upholding under the Thirteenth Amendment a statute which it construed to prohibit private refusals to deal on the basis of race, the Supreme Court said, "Surely Congress has the power under the . . . Amendment rationally to determine what are the badges and the incidents . . . , and the authority to translate that determination into effective legislation."[79] The same principle should apply to the Hatch Amendment. Thus, for example, Congress or a state legislature could consider that _in vitro_ fertilization without embryo transfer (in which human embryos are created outside the human body, not with the intent of transferral to the uterus of an infertile woman, but with the intent of their use as research subjects and their subsequent destruction) entails the same assault on the unborn as does termination of pregnancy.[80] It is essentially part of the institution of abortion. It would be subject to restriction and prohibition under the Amendment.

The discretion vested in the legislature by the Amendment is broad. Certainly, for example, the legislature, in taking account of the facts that most women who obtain abortions are under great stress, that they are usually ignorant of the humanity of their unborn child and unaware of the alternatives available to them, and that they are often much pressured by others, could decide to treat the woman subjected to abortion as a second victim and decline to visit criminal punishment upon her. If the legislature employed this policy--one followed by a number of states[81] prior to Roe v. Wade--yet did punish the abortionist, the statute embodying this choice could not be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. That is because this sort of policy choice would be precisely what the Amendment intended to vest the legislature with the discretion to make. The principle would be the same as that in accordance with which the Supreme Court upheld a state statute treating beer imported from another state unequally with beer produced within the state, under the plenary and discretionary power over liquor given to the states when the Eighteenth Amendment was repealed by the Twenty-first: "[A] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[82]

As indicated earlier in my testimony during the analysis of the first sentence, the appropriate test would be whether the legislation bears a "rational relationship" to the "legitimate state interests" in restricting and prohibiting abortion recognized by the Amendment. For example, distinction on the basis of race in permitting or restricting abortions would obviously bear no rational relationship to those interests, and a law making such a distinction would be unconstitutional.[83]

This does not mean that other constitutional protections would be abrogated whenever it could be argued that doing so--dispensing with, say, the rule against unreasonable searches and seizures[84] or the right to a jury trial[85]--might more efficiently restrict abortion. As the Supreme Court said in ruling that New York's liquor regulation statute could not bar the operation of a duty-free shop at an international airport selling liquor for consumption abroad under the supervision of the federal customs service, "Both the Twenty-first Amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues at stake in any concrete case.[86]

THE RESOLUTION PROPOSING THE AMENDMENT

In addition to discussing the Amendment itself, it is well to consider the ratification process, in particular the question of what legislative majority should be required in the state legislatures in order to ratify.

As of 1975, 17 states require a majority of those present and voting to ratify a federal constitutional amendment, and 2 states require such a majority provided that it includes at least two-fifths of those elected.

24 states require a majority of those elected; 1 state requires a majority of those present and voting in the house, but a majority of those elected in the senate. 1 other state requires a majority of the authorized members, including any vacancies. 1 state requires two-thirds of those elected; 3 states require two-thirds of those elected to the house, but a majority of those elected to the senate; 1 state requires three-fifths of those elected.[87]

At least one state that requires a supramajority provides, "The requirements of this Section shall not govern to the extent they are inconsistent with requirements established by the United States "[88]

There is strong support for the view that the Congress has authority to establish requirements specifying the nature of the legislative majority uniformly to be required for state ratification, even in the absence of such state provisions.

The authority of the Congress to provide, in the resolution proposing a constitutional amendment, that the Amendment will be deemed ratified when so voted by a majority of those present and voting, a quorum being present, of each house of the legislatures of the requisite three-fourths of the states, is grounded in two concepts. The first is that the state legislatures in ratifying federal constitutional amendments perform a "federal function" under authority of the U.S. Constitution rather than under their own state constitutions and rules. The second is that Congress has authority to regulate the procedure of ratification as an incident of its power to designate the mode of ratification.

Article V of the United States Constitution provides, in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....

Upholding the Nineteenth Amendment against a claim that the alleged ratification by certain legislatures violated provisions in their state constitutions, the Supreme Court held, "[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."[89]

The states, then, are bound by the procedure set out by Article V. For example, they cannot require a referendum in order for their state legislature's ratification to be effective, or as a substitute for it.[90]

In the words of the Supreme Court, "The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution: that power is conferred upon Congress...."[91] In Dillon v. Gloss,[92] upholding the authority of Congress to establish a set time by which a constitutional amendment must be ratified, if the ratification is to have effect, the Court said, "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments." The Court emphasized that "with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. ...As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to that rule."[93]

Thus, the Court recognized the power of Congress to "determine ... an incident of its power to designate the mode of ratification."[94]

Whether the specification of a simple majority by Congress may pre-empt a state legislature's rule requiring a greater majority in the ratification process has never been directly faced by the Supreme Court, since no previous amendments have been proposed with such a specification. There is dicta in one three-judge court case that Article V consigns the specification of the requisite majorities to the state legislatures.[95] In that case, whose opinion was written by now Justice John Paul Stevens, plaintiff legislators challenged the failure of the Illinois General Assembly to certify ratification of the ERA, despite a simple majority vote in favor of it in both houses. The court did hold unconstitutional the provisions of the Illinois Constitution which required a majority of three-fifths of those elected to each house to ratify a federal constitutional amendment. However, because both houses of the legislature, independently of their state constitution, had adopted procedural rules containing the supramajority requirement, the requirement itself was not stricken. The court did not face, however, nor did it even in its dicta take into consideration the prospect of, direct Congressional regulation of the proportion of the majority required.

Although Congress has never provided for such a regulation, it entertained proposals to that effect in 1869.[96] Current legal commentaries have been favorable to the argument that Congress has constitutional authority in this regard.[97]

It may be presumed that Congress may not provide for ratification by less than a majority of the legislature, since that would vitiate the principle of state legislative ratification. With this limitation, however, there is strong support for the view that Congress may choose to advance uniformity among the various states and to reduce the chance that an obstreperous minority could block an amendment for which there is strong majority consensus by establishing that ratification by a simple majority in each house of the state legislatures will be adequate.

Following is language which would embody such a provision:

Senate Joint Resolution

Proposing an amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States within ten years from the date of its submission by the Congress:

[text of amendment]

You will note that this text provides for a ten year ratification period. Such a time is three months and eight days less than the time which has now been provided for the proposed Equal Rights Amendment.[98]

In the course of drafting the ratification resolution, the Subcommittee would be well advised to consider carefully what approach it wants to take toward the time provided for ratification. From the time of the Eighteenth Amendment, constitutional amendments submitted by Congress to the states for ratification have usually named a specific ratification time limit, either in the text[99] or in the resolutions proposing them.[100] The Nineteenth Amendment, however,[101] and Amendments I through XVII were proposed with no time limits.

In Coleman v. Miller,[102] the Supreme Court plurality opinion[103] stated that the timeliness of state ratifications is a matter entirely within the discretion of Congress and, with regard to amendments for which no deadline has initially been set, "the question [of whether a given amendment has achieved ratification within a reasonable time after its proposal] is an open one for the consideration of Congress when, in the presence of certified ratification by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment."[104]

Thus it would be entirely within your province to choose not to set a ratification deadline initially, but to leave that question to the Congress in existence when three-quarters of the states have ratified, as was the tradition for over a century.

A resolution embodying this decision could read:

Senate Joint Resolution

Proposing an amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States, provided that the Congress thereafter, by concurrent resolution, determines that the ratifications have occurred within a reasonable time from the date of its submission by the Congress:

[text of amendment]

CONCLUSION

In summary, S.J. Res. 110 would reverse Roe v. Wade, Doe v. Bolton, and all their progeny insofar as they are based on judicial recognition of a constitutionally protected abortional liberty. Henceforth, statutes that restrict or prohibit abortion would be valid if rationally related to the protection of unborn human life.

Further S.J. Res. 110, which provides "concurrent power" to restrict and prohibit abortion to the states and to Congress, would permit both the states and the Congress to legislate, and there is no possibility that their laws could come into genuine conflict. This obviates the need for a proviso to counter any preemption problem that might arise under the Supremacy Clause.

In accordance with these conclusions, and other observations, the following revised language is recommended:

> No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion.

To be certain that the meaning of "concurrent power" as it has been previously construed cannot be altered by a novel Supreme Court construction, the following language is recommended:

> No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

It is desirable that the Senate Committee Report emphasize:

1. That S.J. Res. 110 is intended to reverse Roe v. Wade and all its progeny that recognize the existence of a constitutional right to abortion, however formulated;
2. That the use of the words "recognized" (as has been suggested) or "secured" is intended to preclude use of any putative Ninth or Tenth Amendment right to abortion;
3. That the use of "concurrent power" is intended to invoke specifically the line of cases that includes United States v. Lanza in which these words have been authoritatively construed;
4. That "abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter and that S.J. Res. 110 provides for plenary legislative power to protect that life; that the Amendment is intended to reach the institution of abortion, including its "badges and incidents";
5. That the elimination of a right to abortion and the provision for plenary power is intended to ensure that legislation enacted in accordance with the Amendment is judged by the "rational relationship" test.

It is further recommended that the Resolution accompanying S.J. 110 provide for ratification by legislative majority in ratifying state legislatures and that the Subcommittee carefully consider whether to set a time limit for ratification of ten years, or, in the alternative, to permit a future Congress to determine whether ratification has occurred within a reasonable time.

Finally, let me again commend you, Mr. Chairman. You have embarked upon a noble enterprise to protect the weakest among us.

FOOTNOTES

1. Williams v. Zbaraz, 100 S.Ct. 2694, 2696 (1980); Harris v. McRae, 100 S.Ct. 2671 (1980).
2. Goldberg v. Kelly, 397 U.S. 254, 255 (1970).
3. U.S. Const. amend. XIV, §1.
4. Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970).
5. "They Want to Be Babied Themselves," The New York Times, Nov. 1, 1981, at 20 E.
6. U.S. Const. art. I, §2, cl. 3.
7. U.S. Const. art. I, §6, cl. 1
8. McCulloch v. Maryland, 17 U.S (4 Wheat.) 316, 407, 415 (1819).
9. Roe v. Wade, 410 U.S. 113 (1973).
10. Doe v. Bolton, 410 U.S. 179 (1973).
11. Roe v. Wade, 410 U.S.113, 153 (1973).
12. Maher v. Roe, 432 U.S. 464, 474 (1977).
13. Harris v. McRae, 100 S.Ct. 2671, 2688 (1980).
14. *See* Roe v. Wade, 410 U.S. 113, 154 (1973), and the cases cited therein.
15. 126 Cong. Rec. S10194, S10196 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).
16. For abortion as institution comparable to slavery, *see* J. Noonan, *A Private Choice [:] Abortion in America in the Seventies* 1-3, 80-89 (1979).
17. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968).
18. Congressional Research Service, Library of Congress, *The Constitution of the United States of America [:] Analysis and Interpretation*, S. Doc. No. 92-82, 92nd Cong. 2d Sess. 28 n.3 (1973).
19. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
20. U.S. Const. amend. XI.
21. Hans v. Louisiana, 134 U.S. 1 (1890).
22. Maher v. Roe, 432 U.S. 464, 473-74 (1977). *Accord*, Harris v. McRae, 97 S. Ct. 2671, 2688 (1980).
23. This language has been recommended by Professor Richard Stith of the School of Law, Valparaiso University.
24. *Pending Constitutional Proposals and Their Legal Input: Hearings on S.J. Res. 110 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st. Sess. _____ (1981) (statement of John Noonan at 13).
25. U.S. Const. amend. IX.
26. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).
27. Colautti v. Franklin, 439 U.S. 379 (1979).
28. Bellotti v. Baird II, 443 U.S. 622 (1979).
29. Connecticut v. Menillo, 423 U.S. 9 (1975).
30. Bellotti v. Baird I, 428 U.S. 132 (1976).
31. Maher v. Roe, 432 U.S. 464 (1977).
32. Harris v. McRae, 100 S. Ct. 2671 (1980).

33. Poelker v. Doe, 432 U.S. 519 (1977).

34. H.L. v. Matheson, 101 S.Ct. 1164 (1981).

35. *A Uniform System of Citation* 46 (12th ed. 1976).

36. Roe v. Wade, 410 U.S. 113, 158 (1973).

37. *Id*. at 156-57.

38. *See* Steinberg v. Brown, 321 F.Supp. 741, 746-47 (N.D. Ohio 1970); R. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford L. Rev. 807, 839-57 (1973).

39. S. 1741, 97th Cong., 1st Sess., 126 Cong. Rec. S11528 (daily ed. Oct. 15, 1981).

40. Roe v. Wade, 410 U.S. 113, 162 (1973).

41. V. Rosenblum, *Abortion, Personhood and the Fourteenth Amendment* (Americans United for Life Studies in Law and Medicine No. 11, 1981).

42. Harris v. McRae, 100 S.Ct. 2671, 2692 (1980); Poelker v. Doe, 432 U.S. 519, 520-21 (1977); Maher v. Roe, 432 U.S. 464, 478-79 (1977); Beal v. Doe, 432 U.S. 438, 445-46 (1977); Roe v. Wade, 410 U.S. 113, 162 (1973).

43. This would depend upon principles of state law.

44. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

45. *Id*. at 155.

46. J. Bopp, *Proposals for a Human Life Amendment*, in [book to be published early 1982] manuscript pp. 5-9).

47. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

48. *E.g.*, S. J. Res. 17, 97th Cong. 1st Sess. (1981).

49. S. J. Res. 19, 97th Cong., 1st Sess. (1981).

50. Roe v. Wade, 410 U.S. 113, 159 (1973).

51. *Id*. at 512-55, 162.

52. San Antonio School District v. Rodriguez, 411 U.S. 1, 29-40 (1973).

53. *Id*.

54. McCormick & Co. v. Brown, 286 U.S. 123, 144-45 (1932); Everard's Breweries v. Day, 265 U.S. 545, 558-59 (1924); United States v. Lanza, 260 U.S. 377, 380-85 (1922); National Prohibition Cases, 253 U.S. 350, 387 (1920).

55. United States v. Lanza, 260 U.S. 123, 381-82 (1932).

56. *See* Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

57. U.S. Const. art. I, § 8, cl. 3.

58. *See*, *e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

59. *See*, *e.g.*, Askew v. American Waterways Operators, 411 U.S. 325 (1973).

60. McCormick & Co. v. Brown, 286 U.S. 131, 143-45 (1932); Van Oster v. Kansas, 272 U.S. 465, 468-69 (1926); Hebert v. Louisiana, 272 U.S. 312, 314-15 (1926); Vigliotti v. Commonwealth of Pennsylvania, 258 U.S. 403, 408-409 (1922). *See also* Commonwealth v. Nickerson, 128 N.E. 273, 277-78 (Mass. 1920).

61. U.S. Const. art. VI, cl. 2.; *see* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

62. Commonwealth v. Nickerson, 128 N.E. 273, 279 (Mass. 1920). *Accord*, State v. Lucia, 157 A. 61 (1931); State v. Ligaarden, 230 N. W. 729 (1930); State v. Gautheir, 118 A. 380 (1922).

63. *See* National Prohibition Cases, 253 U.S. 350, 387 (1920) ("The power confided to Congress . . . is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.")

64. McCormick & Co. v. Brown, 286 U.S. 131, 145 (1932); Idaho v. Moore, 212 P. 349 (Id. 1923), *aff'd* 264 U.S. 569 (1924).

65. *See* State Board v. Young's Market Co., 299 U.S. 59, 62 (1936).

66. U.S. Const. art. VI, cl. 2.

67. *Cf.* Wynn v. Scott, 449 F.Supp. 1302. 1314-15 n.9 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) (legislative statement affirming fetus to be human being not unconstitutional despite constitutional right to terminate pregnancy).

68. Hebert v. Louisiana, 272 U.S. 312, 314 (1926).

69. U.S. Const. amend. V.

70. United States v. Lanza, 260 U.S. 377, 382 (1922).

71. *Id.* at 381-82.

72. *Id.* at 385. These considerations were reiterated in Abbate v. United States, 359 U.S. 187, 195 (1959).

73. Ponzi v. Fessenden, 258 U.S. 254 (1922).

74. 260 U.S. 377 (1922).

75. 126 Cong. Rec. S10194, S10197 (daily ed. September 21, 1981) (remarks of Sen. Hatch).

76. *Id.*

77. *See* text accompanying note 16 *supra*.

78. Civil Rights Cases, 109 U.S. 9, 20 (1883).

79. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-443 (1968). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976) and Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (employment discrimination); Runyun v. McCrary, 427 U.S. 160 (1976) (right of black children of admission to private nonsectarian commercial schools). *Cf.* National Prohibition Cases, 253 U.S. 350, 387-88 (1920) (Eighteenth Amendment allows Congress to define nature of intoxicating liquor); Everard's Breweries v. Day, 265 U.S. 545, 560 (1924) ("[T]he power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating.")

80. *Cf.* Leon Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer* 4, in Ethics Advisory Board, U.S. Dep't of Health, Education and Welfare, *Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer* (1979).

81. 4 *Abortion: Hearings on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong. 1st Sess. 117 (1975) (statement of Robert M. Byrn).

82. State Board of Equalization v. Young's Market Co., 299 U.S. 59, 63-64 (1936). *See also* California v. LaRue, 409 U.S. 109, 116 (1972).

83. *Cf.* 126 Cong. Rec. S10194, S10197 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

84. U.S. Const. amend. IV.

85. U.S. Const. amend. VI.

86. Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964). *See also* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

87. Dyer v. Blair, 390 F.Supp. 1291, 1295, 1305 n.34 (1975).

88. S.H.A. Const. art. XIV,§4 (1971) (Illinois).

89. Leser v. Garnett, 258 U.S. 130,137 (1922).

90. Hawke v. Smith, No. 1, 253 U.S. 221, 229-31 (1920).

91. *Id.* at 227.

92. Dillon v. Gloss, 256 U.S. 368,373 (1921).

93. *Id.* at 373,376.

94. *Id.* at 376.

95. Dyer v. Blair, 390 F.Supp. 1291,1308 (1975).

96. Cong. Globe, 41st Cong., 1st Sess. 75,102,334 (1869).

97. *See* P. Brannon, D. Lillehaug, & R. Reznick, *Note [:] Critical Details: Amending the United States Constitution*, 16 Harv. J. Legis. 763, 798-805 (1979); Corwin & Ramsev. *The Constitutional Law of Constitutional Amendment*, 26 Notre Dame Lawyer 185, 210 (1951): *contra*, Dodd, *Amending the Federal Constitution*, 30 Yale L. J. 321, 341 (1921).

98. H.J. Res. 638, 95th Cong., 2nd Sess., 123 Cong. Rec. S 17318-19 (daily ed. Oct. 6, 1978).

99. U.S. Const. amends. XVIII, XX, XXI, XXII.

100. P. Brannon, D. Lillehaug, and R. Reznick, *Note [:] Critical Deatils: Amending the United States Constitution*, 16 Harv. J. Leg. 763, 768-69 (1979).

101. A ratification time limit was defeated on the floor of the House. 58 Cong. Rec. 93 (1919).

102. Coleman v. Miller, 307 U.S. 433 (1939).

103. The four concurring justices considered the question of the time taken to ratify nonjusticiable; *Id.* at 460-70. This leaves as equal discretion to Congress as do the views expressed in the plurality opinion.

104. *Id.* at 454.

Selected Publications:

"On Integrating Empirical Realities into Administrative Law and Vice Versa," 32 *Ad.L.Rev.* 1 (1980) pp. 59-68;

Co-editor (with William R. Hazard) of "Education: Progress and Prospects," special edition of *American Behavioral Scientist* (Nov.-Dec. 1979);

"Schoolchildren Yes, Policemen No--Some Thoughts About the Supreme Court's Priorities Concerning the Right to a Hearing in Suspension and Removal Cases," 72 *Nw. U.L. Rev.* 146 (1977);

"The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles," in *Recent Studies Relevant to the Hearings and Appeals Crisis*, Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Rep., 94th Cong., 1st Sess. (Committee Print, Dec. 20, 1975) 17-24

"Dealing with Federal Regulatory Agencies," Ch. V in *Legal Issues for Post-secondary Education*, American Ass'n of Community and Junior Colleges (1976);

"Dimensions of Purpose and Priority in Federal Regulation of Utilities," 14 *Proceedings of the Iowa State U. Regulatory Conf.* 12 (1975);

"Handling Citizen-Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices," 26 *Ad.L.Rev.* 1 (1974) 1-47; Reprinted in *A Formula for Liberals*, pp. 131-150 (Nellen Pub. Co., 1979);

"The Continuing Role of Courts in Allocating Common Property Resources," in The Governance of Common Property Resources," edited by Edwin T. Haefele (Johns Hopkins Univ. Press, 1974) 119-143;
"Of Beneficiaries and Compliance," in The Limits of Law: NOMOS XV (Lieber-Atherton, 1974) 256-267;
Constitutional Law: Political Roles of the Supreme Court, co-edited with A. Didrick Castberg (Dorsey Press, 1973);
"Legal Dimensions of Tenure" (Ch. 4) in Faculty Tenure (Report of the Commission on Academic Tenure in Higher Education) [Jossey-Bass, 1973];
"On Davis on Confining, Structuring, and Checking Administrative Discretion," 37 Law & Contemporary Problems (Winter 1972) 49-62;
"A Place for Social Science Along the Judiciary's Constitutional Law Frontier,' 65 Nw. U.L. Rev. 455 (1971);
"Justiciability and Justice: Elements of Restraint and Indifference," 15 Cath. U. L.Rev. 141 (1966);
"Low Visibility Decision-Making by Administrative Agencies--The Problem of Spectrum Allocation," 18 Ad. L.Rev. 19 (1965);
"Realities of Regulation," in Krislov and Musolf, The Politics of Regulation, pp. 247-254 (1964); "Regulation in Orbit: Administrative Aspects of the Communication Satellite Act of 1962," 58 Nw. U.L.Rev. 216 (1963);
"The Federal Communications Commission and Miami's Channel 10" in The Uses of Power, pp. 174-228 (A. Westin, ed.) [Harcourt, Brace 1962].

VITA

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Positions:

1970-	Professor, Law and Political Science Northwestern University
1968-1970	President, Reed College.
1958-1968	Northwestern University: Associate Professor, 1958-1963; Professor 1963-1968.
1966-1967 and Fall 1978-79	Visiting Professor, School of Law and Institute for Administrative Law, University of Louvain, Belgium.
1957-1958	Associate Counsel, Subcommittee on Executive and Legislative Reorganization, Committee on Government Operations, United States House of Representatives.
1953-1957	Assistant Professor of Political Science and Supervisor of American History and Institutions Requirements, University of California at Berkeley.
1952-1953	Staff Associate, Governmental Affairs Institute, Washington, D.C.

Professional Associations:

Law and Society Association: President 1970-1972; Trustee 1972--.

American Political Science Association: Council Member 1965-1967; Constitutional Revision Committee, 1969-1971; Member, Committee on Professional Ethics and Academic Freedom, 1975-1977; Member, Joint Committee of the American Political Science Association and the Association of American Law Schools on Political Science and Administrative Law, 1964-1967.

American Bar Association: Chairman, Administrative Law Section 1977-1978 Administrative Law Section Council Member 1963-1965, 1972-1975; Editor, Administrative Law Review 1958-1962, 1965-1966; Member Board of Directors, Center for Administrative Justice, 1972-1978; ABA advisor to the National Conference of Commissioners on Uniform State Laws Drafting Committee on the Revised Model State Administrative Procedure Act 1979--.

Miscellaneous:

Member, Board of Visitors, School of Law, Washington University at St. Louis, 1970-1976.

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Member, Advisory Committee of National Institute of Law Enforcement and Criminal Justice 1973--; Chairman, 1977-1978; Member, LEAA Task Force on Organized Crime 1975-1977.

Member, Advisory Committee on Administrative Law Judges, U.S. Civil Service Commission 1975-1978;Lecturer, Legal Education Institute, U.S. Civil Service Commission 1974--.

Chairman, Board of Directors, Treatment Alternatives to Street Crime Illinois Drug Abuse Program, 1976--.

Member, Advisory Council of Institute forHumanistic Studies, State University of New York, Albany, 1976--.

Mr. MARKMAN. Thank you very much, Professor Rosenblum. Your prepared testimony is extremely thorough and comprehensive, and you can be assured that the entire statement will go in the record.

If you would be so kind, though, we would like to ask just several questions for the record. These are questions that Senator Hatch would have liked to have asked you, had he been able to stay here.

Let me direct this question first to Mr. Susman, if I could: Assuming that I were a State legislator, and assuming that I were opposed to abortion, what legislative actions if any could I take currently to limit the incidence of abortion or to insure that a more considered decision was made by a woman prior to undergoing an abortion? In other words, what is the effective scope of present authority possessed by a State legislator to act with respect to the subject of abortion?

Mr. SUSMAN. I think the scope is very broad. There are numerous laws and ordinances throughout this country which have been enacted, which either have never been challenged in any court action or, if challenged, have survived such challenge. One of the great things we keep hearing about is that the States and municipalities have no right to prohibit abortions after viability. That just is not true.

First of all, I think we have to recognize that when we talk about abortions after viability; where are they? They just do not occur. Therefore, first we ought to analyze whether there is any real need to enact such legislation before we talk about what that legislation is.

The Supreme Court has said in *Wade* and *Bolton* in 1973 that the State could prohibit all abortions after viability except those necessary to preserve the life or health of the mother. Some 25 States have enacted legislation in that regard but those States, the other 25 which have not enacted that legislation, do not have any greater rate of postviability abortions than those that have the legislation. They both have a rate of almost zero. Some 96 percent of all abortions occur in the first 16 weeks of gestation.

As far as statutes previability, there are numerous ones providing that in fact physicians must inform patients of all the risks, complications, the alternatives to abortions; all of this type of legislation to provide a real, informed consent has survived judicial challenge.

Mr. MARKMAN. Let me turn that question around just a little bit and I would like you to respond to it, if you could, and then perhaps Professor Rosenblum.

Let's put aside the idea of what statutory authority exists in State legislatures. What effective barriers are there, legal and constitutional barriers, to a woman desirous of obtaining an abortion at any stage of her pregnancy? Are there effective limitations upon her ability to obtain an abortion?

Mr. SUSMAN. Not if she is committed to obtaining that procedure. It may delay her; it may frustrate her desire but if she has the resources, which many women do not, and she has the sophistication and she has the education to see that decision through with her family, she will see it through. However, that is basically what the Supreme Court was talking about in 1973, that it is a personal decision and ultimately must be made between that woman and her physician.

Mr. MARKMAN. Professor Rosenblum.

Mr. ROSENBLUM. Well, I wish that I could give a concrete and definitive answer to that. I think it is because the answer to the question has been so much in doubt, and because there has been so much construction of the *Roe* and *Doe* decisions to mean that there are no absolute limitations that can be placed upon access to abortion, that I am so strong a proponent of the present amendment.

Now even with regard to the definition of viability, we have to bear in mind that there is a great gap today between what has been legally asserted by the Supreme Court to be the standard of viability and what represents the scientific reality of viability today. Even lay publications such as the New York Times magazine last spring made clear that technologically we have been moving back the realistic time of viability about 1 week every couple of years; that it is technologically possible to save the lives of children born today considerably earlier than the literal onset of the third trimester.

I have heard no proposals coming from our friends on the prochoice side urging legislation to move back the time of viability so as to bring that time of viability legally in line with the technological, medical discoveries and efforts that have been able to preserve life. Consequently, there simply continues to be, under the present state of the law, vast uncertainty that any kind of absolute prohibition can be placed upon abortion. To repeat, it is for that reason that I strongly favor the constitutional amendment.

Mr. MARKMAN. One of the criticisms of Senate Joint Resolution 110, Senator Hatch's proposed constitutional amendment—and we have heard it here today from several of our witnesses—is that it would leave an issue of "fundamental right" to the democratic process. Now Senator Hatch has responded to this several times by stating that he was in agreement with the basic point that was being made—that fundamental rights should not in fact be determined in that manner—but that there seems to be an absolute lack of consensus here as far as exactly what these fundamental rights are.

I wonder if each of you could discuss briefly this idea generally, the propriety of dealing through the representative processes with issues in which fundamental rights are in arguable conflict.

Mr. Susman.

Mr. ROSENBLUM. Mr. Susman might prefer to rebut on that.

Mr. SUSMAN. Go ahead.

Mr. ROSENBLUM. It would be perfectly fine with me.

Well, to me one of the strongest points to be made for the Hatch amendment is that it does not involve new Constitution-making. What it does is to undo what the Supreme Court did, acting on its own authority and at its own initiative, in a matter that represented a severe departure from previous actions in the courts with regard to the abortion issue. It is by undoing the *Roe* and *Doe* decisions and their progeny that the Hatch amendment essentially returns us to the situation that prevailed before *Roe* and *Doe* but it also makes explicit that the matter of restricting or prohibiting abortion is a matter that is within the concurrent authority of Congress and the States.

I find in that a return to basic norms of interpreting and applying the Constitution which are consonant with other provisions of the Constitution and represent a faith in the constitutional system. We have traditionally had a system of separation of powers and of checks and balances. That system of separation of powers and checks and balances is not in any way altered by Senate Joint Resolution 110. We are simply returned to the pre-*Roe* and *Doe* state, plus the recognition of the concurrency of authority of Congress and the States to deal with the matter.

Mr. SUSMAN. I would thoroughly disagree that *Wade* and *Bolton* was any radical departure from prior Supreme Court decisions. The whole concept of privacy as it deals with one's own body was first enunciated by the Supreme Court in *Botsford* way back in the 1800's, some 80 years prior to *Roe* v. *Wade.* If you work your way up, and you look at *Griswold,* and you read those things, these decisions in retrospect, or if you read *Eisenstadt* v. *Baird* a year before the Supreme Court ruled in *Wade* v. *Bolton,* there is a sentence and language in *Eisenstadt* that tells you, that answers the abortion question a year earlier.

It talks about the right to bear and to beget, both rights, not just a contraceptive right, which was the only right under consideration in *Eisenstadt,* but it talked about begetting and bearing both. There was no radical departure whatsoever because it was not a radical decision. It was not a close decision, and this was the "Nixon" Court. This was not a 5 to 4 nor a 6 to 3; this was one of those few overwhelming decisions that was 7 to 2. It was not radical whatsoever, and I disagree about that.

This is not an undoing and merely going back to January 21, 1973; this would be an undoing of 200 years of our constitutional history.

Mr. MARKMAN. There seems to be a good deal of controversy, particularly among opponents of abortion, about the significance of the personhood concept to the ultimate decision in *Roe* v. *Wade.* Perhaps, Professor Rosenblum, you are a little bit more sensitive to this controversy than Mr. Susman might be, though I am sure you are also very much aware of this.

However, I wonder if each of you could briefly explain for the subcommittee what the Supreme Court in fact had to say about this issue. Is it necessary to confer personhood upon the unborn in order to overturn the *Roe* decision?

Mr. ROSENBLUM. Well, once again, this is a very important and a very complex question. I discussed the issue of abortion and personhood and the 14th amendment in my testimony earlier this year before another subcommittee, and I would not want to repeat all of that testimony at this juncture.

I think that personhood is, of course, very important. I stated at the outset that personally I would prefer an amendment that made explicit all of these factors plus the personhood of the child in the womb but I do not believe that personhood has to be dealt with at this juncture in order to fulfill the objective the Hatch amendment has. I think that the objective can be and is fulfilled through the present language.

While I believe in the personhood of the unborn, and while I would prefer to see explicit language that recognizes, if it is not necessary to confer, that personhood, I still feel that the present language of the Hatch amendment fulfills the objective of undoing the consequences of *Roe* and *Doe* and making it possible for legislative protection of the unborn to return to the position that it had prior to *Roe* and *Doe.* Any uncertainty about the relationship between congressional and State action that might have existed before *Roe* and *Doe* would also be resolved by the Hatch amendment.

Personhood has had, as many other provisions of the law, a not wholly consistent career in going through the courts. State courts in tort cases have taken a considerably different view of the personhood of the unborn than have courts recently in constitutional cases, and it was the Supreme Court's decisions in *Roe* and *Doe* that made for this conflict.

Roe and *Doe* denied that there was personhood as such in the unborn but much earlier legal history recognized such personhood. I can only repeat that I would personally be gratified to see *Roe* and *Doe* abolished and to have us be able to return to the very heavily favorable climate that existed prior to *Roe* and *Doe* for the protection of the unborn as a person.

Mr. SUSMAN. I think the problem of personhood and the similar types of labels like "unborn children" is exactly the heart and crux of the issue. Neither side of this issue disagrees on what the physiological characteristics and traits of embryos and fetuses are. Both sides agree when a heart rate can first be detected, brain waves can first be detected, and all the other physiological traits.

The disagreement only comes in the nomenclature battle. What terms are we going to apply? Are we going to call it a fetus? Are we going to call it a human being? Are we going to call it personhood? Do we have ensoulment at conception, and on and on, ad nauseam.

The correct determination of which terms are to be applied to a given set of facts upon which both sides agree will never be achieved because there is no consensus. We all agree that there is fetal life but there is a vast difference of opinion as to what value will be placed upon that fetal life, and the value to be placed upon that fetal life is not determinable by facts, Professor Guze notwithstanding.

There is vast disagreement on the value, and we know there are deep divisions in this country of various people on various planes, whether they be moral, ethical, religious, or any other number of facets on which they can disagree upon that value. When you have an issue which is a moral issue, and the terms you use are determined by the moral values that you place upon that life, then this is not a proper subject of legislation.

The law has always encountered difficulties in attempting to codify moral values which are not universally accepted. It is clear to both sides that moral values surrounding abortion do not obtain a consensus either in this country or worldwide. There is a deep division, and the law will be making a serious mistake to try to impose one set of values upon everybody in this area.

Mr. **Markman**. I would like to submit several additional questions on Senator Hatch's behalf for your response. I would like to ask Professor Rosenblum just one concluding question. We addressed this to Mr. Horan earlier today: That is, that some opponents of abortion have criticized Senate Joint Resolution 110 for implicitly reading in the concept of abortion into the Constitution. How would you respond to that criticism? Are we doing that?

Mr. **Rosenblum**. Well, I am a strong believer in the unity of the prolife movement and I deeply respect the concerns of those who construe language somewhat differently than I do. I do not think that the Hatch amendment is vulnerable to that charge because I think that we have to recognize that under our constitutional system of separation of powers and checks and balances, that things can be done sometimes quite effectively by a single branch in the absence of countervailing action on the part of other branches.

Now what was done here was that the Supreme Court in *Roe* and *Doe* read abortion, through privacy, into the Constitution. How is Congress to deal with that if it wishes by constitutional amendment to correct what the Supreme Court did? It seems to me that a very effective way is for Congress explicitly to reverse the action of the Supreme Court.

As far as the law today is concerned, whether you or I or Mr. Susman or anybody else in the audience or the Nation likes it or not, through the interpretation of the privacy right the Supreme Court has provided protection for dimensions of the abortion decision. A Congress that reflects the growing national concern about this and reflects the public's wish to reverse the Supreme Court, does not create or assert a right to abortion but makes it clear that what the Supreme Court did in *Roe* and *Doe* is not part of the Constitution.

Mr. **Markman**. Did you have any final comments on that, Mr. Susman?

Mr. **Susman**. Well, I would only differ that there is a growing consensus against abortion because the public opinion polls taken since 1973 show a greater proportion of people in favor of the right of a woman and a doctor to decide on abortion, with every passing poll, regardless of whom it is taken by or upon whose behalf.

Mr. **Markman**. Of course, to pursue Professor Grisez' comments, I think you would agree that if in fact it were determined that the fundamental right involved here were the right of the fetus to life, that these polls would not make much difference one way or the other. I think you commented in that respect with respect to the relationship between fundamental rights and democratic protections.

Mr. **Rosenblum**. I think that Mr. Susman does indeed correctly report on some of the polls but I think that any reading of the election returns of the most recent elections, and the stances taken on abortion issues and the votes cast for people who were prochoice and those that were prolife, indicates that there is a groundswell of support for the prolife position as a matter of national reality.

Mr. **Susman**. I think the prolife forces are quick to take credit for any election in which that was an issue. But to isolate one issue out of a multi-issue campaign is extremely difficult. However, perhaps instead look at the only place in recent years in which the single issue has been before the voting public: 1980, Toledo, Ohio.

Who put it on the ballot? The antiabortion people put it on the ballot. What does that tell us? Well, that tells us obviously, of course, that they controlled the timing of the election, the wording of the proposal and everything else that went into it because they controlled it and they manipulated it. It was even under the guise, it was called a maternal health bill, very attractive.

What did the people of Toledo, Ohio, do? They saw right through the veneer, went to the heart of the substance, and defeated it 2 to 1.

Mr. ROSENBLUM. With that kind of certainty, Mr. Susman, you should be a supporter of this amendment.

Mr. MARKMAN. We want to thank both of you gentlemen again for coming today.

Mr. MARKMAN. Again, I would like to extend Senator Hatch's apology for having to leave early. We will be having an additional day of hearings some time in early December on this issue. It may be the concluding day of hearings. We thank everyone for coming today.

The committee stands adjourned.

[Whereupon, at 4:15 p.m., the committee recessed, to reconvene at the call of the Chair.]

CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

MONDAY, DECEMBER 7, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 1:35 p.m., in room 6226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Stephen Markman, chief counsel; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. This marks the eighth day of hearings by the Subcommittee on the Constitution on the proposed amendments to the Constitution relating to abortion. One final day of hearings is scheduled next week on December 16.

Today this subcommittee will hear testimony from a number of organizational representatives with various perspectives on the abortion debate. We will hear further testimony from organizations on our final day of hearings next week.

In addition, we will hear from two witnesses this afternoon on the subject of public opinion and the issue of abortion.

Let me emphasize that there are two distinct questions that relate to public opinion on abortion. The first, one that we have discussed at a number of the earlier hearings, relates to the relevance of public opinion on the abortion issue.

To the extent that abortion is perceived as a fundamental right or a fundamental violation of rights, it is fair to say that the relevance of public opinion is limited. Quite simply, under our Constitution we do not count noses with respect to fundamental rights. I am one of those who looks at abortion as involving the denial of the most basic of human rights, the right to life.

My own views aside however, it is clear that there is tremendous disagreement in this country as to what rights are involved here. Is the preeminent right that of the mother, that of the unborn child, or that of society generally? There is clearly no social consensus on the issue of abortion as a matter of inherent, fundamental rights.

The value of public opinion analysis, however, is that it may suggest the existence of a social consensus on the issue of abortion from a different perspective. While there may be no consensus on abortion as a matter of human rights, there may nevertheless be a consensus on abortion as a matter of public policy.

Should abortions be permitted during the third trimester? Should minors be required to consult with their parents on whether or not to obtain abortions? What obligations should be imposed upon doctors to save the lives of aborted fetuses who are born alive? What preconditions should attach to the abortion operation? These are all very important questions, and no one on either side of this issue can slide over these questions easily.

If there is a social consensus on the abortion issue as a matter of public policy, it seems to me that we ought to attempt to identify it rather than allowing those who see abortion on demand as a right to impose their own views upon an unwilling public. Normally of course, the way that this society attempts to develop consensus in the area of public policy is through the legislative process.

Some of the questions, thus, that I would hope to explore with our first two witnesses are:

First, is there a consensus today in behalf of either the prochoice or the prolife position among the American people?

Second, is there a consensus with respect to public policy generally on the subject of abortion?

Third, if there is a consensus that exists at some point other than the status quo of abortion on demand, is there support for a constitutional amendment that would enable that consensus to be achieved?

Fourth, how well can this consensus be identified on the basis of polls and surveys that have been conducted to this time?

I very much look forward to hearing our witnesses today. With the exception of our first two witnesses, I must reluctantly say that we are going to have to maintain a 6-minute time limit.

We would like to be able to give our organizational representatives more time, but we simply do not have any more time available. Each of our witnesses, however, should know that their entire statement will be placed in the permanent hearing record, which is after all what we are trying to build. We appreciate each of you being with us today.

At the conclusion of next week's hearing we will have presided over, I believe, the most comprehensive hearings on abortion that I think have ever been held.

I have been impressed with everybody who has testified before this subcommittee. We have made it a habit and policy to treat everybody in this committee room with equal respect, regardless of our own personal, firmly held viewpoints.

This morning we are happy to have Prof. Raymond J. Adamek, professor of sociology, Kent State University, Ohio. He is the author of a number of scholarly articles on polling, particularly on the subject of abortion, and has taught courses on polling at Kent.

We are also very pleased to have Dr. Barbara Bryant, group vice president of Market Opinion Research, a national survey research and opinion polling consulting organization. Market Opinion has recently done a survey on public attitudes about abortion commissioned by the National Abortion Rights Action League.

We are very happy to have you with us.

We will start with you, Professor Adamek, and then we will go to you, Dr. Bryant.

STATEMENT OF RAYMOND J. ADAMEK, PROFESSOR OF SOCIOLOGY, DEPARTMENT OF SOCIOLOGY AND ANTHROPOLOGY, KENT STATE UNIVERSITY

Mr. ADAMEK. I would like to thank you, Senator Hatch, and the members of the subcommittee for this opportunity to testify regarding the nature of public opinion in the United States on the abortion issue.

I will base my testimony on a review of major national polls on abortion and of major studies of these polls conducted by other social scientists.

In my review I have focused on four questions: First, under what circumstances does the American public believe that legal abortions should be available? Second, what is the public's view of our current abortion policy? Third, what is the public's view of proposed changes in our current policy? Finally, what are the major sociodemographic factors related to attitudes on abortion?

Before we examine these questions however, I think a few caveats regarding the interpretation of poll findings are in order.

First, since we are interested in the opinions of all adult Americans, national samples which are drawn in such a way that they can be validly generalized to the total U.S. population are preferable to local polls.

Second, in interpreting polls, one should consider the actual wording of each question asked. Particularly on sensitive issues like abortion, the different wording of questions intended to measure attitudes toward the same object may account for apparent shifts in public opinion as large as 28 percent. If we look at table 1, we can see some examples of this.

Two recent studies on abortion questions also note that simply reversing the order of the items asked may produce apparent shifts as large as 17 percent.

Third, the fact that people are willing to express an opinion about something does not necessarily mean that they are knowledgeable about it. This is particularly a problem when we ask people for their opinion about complex and specific matters, such as the Supreme Court's decisions.

When respondents are not familiar with the content of Supreme Court decisions, they may respond to a question asking them whether they agree or disagree with the decisions on the basis of their impressions of the Court's prestige or the erudition of its members.

Fourth, one should be aware of who is sponsoring, conducting, and reporting a poll, since their frames of reference, assumptions, and words will be reflected in the questions asked, the responses obtained, and in the way the findings are reported. Often it is instructive to consider what questions have not been asked as well as to consider what questions have been asked.

Let us turn now to the state of recent and current public opinion regarding abortion. Analysts generally agree that approval for abortion under various circumstances increased between the early 1960's and early 1970's and then leveled off after a final spurt immediately following the Supreme Court's 1973 decisions.

At least three studies suggest that the increase in approval for abortion between 1972 and 1973 may be attributed to the Court's decisions, suggesting that to some extent we can legislate or adjudicate morality.

In fact, Dyck states that, "most adults in any culture are at a stage of moral development where existing laws and customs are the most important bases for deciding what is right and what is wrong." Laws then can mold public opinion as well as reflect public opinion.

CIRCUMSTANCES JUSTIFYING LEGAL ABORTION

Considering now the National Opinion Research Center's several polls—see table 2—it is clear that a substantial majority of Americans state they believe legal abortion should be available for what have come to be known as the "hard reasons"—that is, where the mother's life or health has been seriously endangered, in cases of rape or incest, or in cases where there is a strong chance of serious defect in the baby.

A bare majority in these polls support legal abortion where the family has a very low income, and only a minority support abortion if the woman is not married, if she is married but does not want any more children, or if she simply wants an abortion for any reason.

The NORC polls are valuable, since they employ exactly the same questions over time. Two recent Gallup polls are even more valuable, however, since they add a time dimension, asking at what stage of pregnancy various circumstances would justify abortion. These data are in table 3.

The Gallup polls indicate that about 22 percent of adult Americans believe abortion should be illegal in all circumstances. The next 54 to 55 percent, which I call the middle majority, believe that abortion should be legal only for hard reasons and generally only in the first 3 months of pregnancy. The only circumstance the middle majority feels justifies abortion beyond the first trimester is a threat to the woman's life.

It would appear then that the middle majority approves of less than 5 percent of the legal abortions currently taking place in the United States, since less than 5 percent are performed for hard reasons.

Parenthetically, we note that when the question about circumstances is concretized as in table 3, the Gallup poll, by asking the respondent to think about a particular stage of pregnancy rather than being asked in a more general way, as in the NORC polls, the amount of support for abortion decreases considerably. See table 4.

Again, these results suggest that a majority of the American public approves of legal abortion only for hard reasons and generally only in the first trimester.

PUBLIC'S VIEW OF CURRENT ABORTION POLICY

What is the public's view of our current abortion policy? Before attempting to answer this question, we should briefly note the nature of the Court's decision which governs our policy.

Considering abortion a private matter between a woman and her physician, the Court mandated abortion on request through viability while permitting the State, if it chooses, to proscribe abortion except where it is necessary for the preservation of the life or health of the mother.

Given its broad definition of the components of health, the Court in effect legalized abortion in the third trimester as well.

There are two types of questions which attempt to gage the public's opinion of the Supreme Court's 1973 decisions—general questions which tend to indicate approval of the decisions and more specific questions which tend to indicate disapproval of the decisions.

The general questions are exemplified by those asked by Harris and Gallup, which appear in table 5. These questions, and particularly the Harris questions, are seriously flawed, since they narrowly focus the respondent's attention on the first trimester of pregnancy.

Asking the question in this form misleads uninformed respondents about the actual nature of the Court's ruling, giving them the impression that the Court did not legalize abortion after 3 months, while it simultaneously restricts the attention of informed respondents to the first trimester clause. It therefore fails to measure opinions about the Court's overall decision and tends to overestimate the extent of support for the decision.

More specific questions tapping public opinion about several aspects of the Court's decision strongly indicate that most Americans disagree with the Court. We have already seen, for example, in table 3 that, while the Court legitimated abortion on request through the second trimester and even in the third trimester, most Americans would generally limit abortion to the first trimester.

One reason for this substantial disagreement between the public and the Court on timing seems to be clear—a different evaluation of the crucial questions of when human life begins and when the human being may be considered to be a person.

On the first question, the Court's explicit position was that it did not know when human life began. Implicitly, however, the Court's ruling favored the viability or birth answers to the questions of when human life begins, since while it stated that prior to viability the state had no compelling interest in protecting "potential human life," it did allow the state to prohibit abortion after viability in some circumstances and indicated that after birth the Constitution protected the individual.

In a special Gallup poll conducted 1 week after the Court's decisions, however, Judith Blake found that only 15 percent of American men and 12 percent of American women thought that human life begins at viability, and only 19 percent of the men and 8 percent of the women thought human life begins only at birth. See table 6.

On the other hand, 36 percent of the men and 50 percent of the women, believe that human life begins at conception.

Three other polls taken just this year indicate that a majority of the public believes that human life begins within the first trimester, while only 5 to 17 percent believe it begins only when the baby is born. These may also be seen in table 6.

On the issue of personhood the Court noted that, as used in the Constitution, the word "person" has application only postnatally and concluded that the Constitution's protection of rights guaranteed to persons begins only at birth.

However, when Blake asked the American public when they thought the unborn "may be considered a human person," only 18 percent of the men and 8 percent of the woman adopted the Court's position by responding, "At birth," while 33 percent of the men and 51 percent of the women responded, "At conception."

Besides strongly disagreeing with the Court on the basic issues of the beginning of human life and personhood as well as on the issues of timing and circumstances, Blake has shown that only a minority of Americans supported the Court's judgment on the type of medical facility where abortions might take place and on its endorsement of the legality of out-of-State abortions.

Likewise, Blake found that only a minority of Americans agreed with the Court's subsequent decision that a married woman should be able to get an abortion without her husband's consent.

Blake also found that only a minority of Americans agree with the Court's decision that minors may obtain abortions without parental consent.

The closest the Court and the American public come to agreement on abortion policy appears to be on the issue of using tax funds to pay for abortions. In 1977 the Court decided that neither Federal nor State government had to provide tax money to pay for elective abortions. Public opinion polls on this issue generally indicate that Americans do not want their tax dollars to finance abortion. These may be seen in table 7.

It is evident then that, when we ask specific questions about various aspects of the Supreme Court's decisions a majority of the American public is seriously at odds with the Court.

Given the nature of the Court's 1973 decisions, I think it is fair to characterize the Court as prochoice. Clearly, however, the vast majority of the American public is not prochoice in the same sense.

How then do we account for the result of 11 polls which indicate that between 67 and 81 percent of the American public believe that the right or decision of the woman to have an abortion is for her and her doctor to decide?

I believe the apparent contradiction between these polls and those we have just reviewed, which illustrate the public's disagreement with specific ideas embodied in the Court's opinions, is again a question of wording. See table 8.

As we have already seen, more people will agree with a general statement than with specific instances implied by that statement when these are spelled out. General statements, such as those in table 8, allow respondents to focus on specific instances of their own choosing.

For example, even respondents who believe that abortion should be legal only for hard reasons can logically agree with the statements in table 8, referring to a woman making the decision with her doctor, if they focus on the hard reasons.

Blake has noted that the first question in table 8 also suffers from other methodological errors which bias responses in an affirmative direction. The Harris question in this table again focuses the respondent's attention only on the first 3 months of pregnancy, thus tending to elicit an affirmative response.

The Market Opinion Research item in this table would appear to be even more loaded in favor of a positive response, which it apparently produces. Thus, it speaks of "the consenting patient" as though her decision has already been made and then asks whether the abortion "should be performed by a licensed physican in conformance with good medical practice." To disagree with this item, the respondent must almost place himself in the position of endorsing back-alley butchers.

To summarize, close examination of the types of questions asked suggest that the majority of Americans do not approve of our present abortion policy.

PUBLIC'S VIEWS ON HUMAN LIFE AMENDMENT

Third, what is the public's view of proposed changes in present abortion policy? A review of 15 national polls by Market Opinion Research indicates that anywhere from 49 to 71 percent of Americans say they oppose an amendment to the Constitution which would make abortion illegal, while anywhere from 22 to 45 percent say they favor such an amendment.

That there is so much opposition to making abortion illegal should not come as a surprise, since we have already seen that the middle majority of Americans believe that abortion should be legal but only in the first trimester and only for hard reasons. However, opposition to an amendment which would ban all abortion does not constitute endorsement of present abortion policy.

Perhaps what is surprising about the responses to the 15 polls reviewed by Market Opinion Research and 2 additional polls on this topic is the relatively large minority of Americans who say they do favor a constitutional amendment banning all abortions.

Since Market Opinion Research's recent survey of eight national polls found that only 10 to 22 percent of Americans believe abortion should be illegal in all circumstances, why should no less than 22 percent and up to 45 percent endorse a constitutional amendment which would ban all abortions?

Judith Blake's recent study suggests part of the answer to this apparent contradiction. In a detailed analysis based on eight NORC polls, eight Gallups polls, and the two national fertility polls, Blake divided respondents into three groups on the basis of their endorsement of four circumstances which might justify legal abortion.

Those who endorsed abortion under no circumstances or only where the pregnancy seriously endangered the woman's health she called negatives. Those who endorsed all four justifications for abortion she called positives. Those in between these two polar positions she called equivocators.

What she found is that people who equivocate—that is, favor abortion in only some instances—are more negative than positive in their views about legalizing abortion. In fact, she said, "It may be fair to say that these respondents are closet negatives"—that is, closet antiabortionists.

Equivocators were consistently found to be more like negatives than positives in background characteristics and other attitudes as well.

Blake found that even the group that endorsed all four reasons for abortion generally disagreed with the Supreme Court on three aspects of its decision for which measures were taken—that is, abortion beyond the first 3 months of pregnancy, abortion if the husband opposes it, and abortion for minors without parental consent.

Blake concludes that it is evident that a large majority of Americans do not endorse the tenets of the prochoice movement.

In a study of prochoice and prolife activists, Granberg and Denny also find that the general adult population is closer to prolife activists than to prochoice activists in values and attitudes.

Again, while a majority of the public does not wish to ban all abortions, they do not agree with our present policy, which is prochoice.

SOCIODEMOGRAPHIC FACTORS RELATED TO ABORTION ATTITUDES

Finally, in summary form, what do studies and polls show about what sociodemographic factors are related to attitudes on abortion?

They generally show that whites are more likely to be permissive about abortion than blacks or nonwhites, that males are more likely to be permissive about abortion than females, that those with more formal education are more likely to be permissive than those with less formal education, that those who live in large cities are more likely to be permissive than those who live in small cities or rural areas, that those who live in the West and East are more likely to be permissive than those who live in the Midwest and South, that those with higher incomes are more likely to be permissive than those with lower incomes, and at least since the seventies, that younger persons are more likely to be permissive than older persons.

The studies also find that Jews are more likely to be permissive than Protestants, who are more likely to be permissive than Catholics.

Finally, persons who score lower on religiosity scales are more likely to be permissive than those who score higher on such scales.

In conclusion, I would say our analysis of public opinion on abortion in the United States indicates that a majority of Americans do not endorse either prochoice or prolife platforms. If anything, they are closer to the prolife ideology. Our present public policy, however, as mandated by the Supreme Court, is essentially prochoice in ideology. This, I suggest, is the main reason for the turmoil we have experienced over this issue in recent years.

It would seem to me that a constitutional amendment, which would remove the major responsibility for our abortion policy from the Supreme Court and return it to the legislatures, would go a long way toward resolving the turmoil in a just and rational manner.

Thank you

[Mr. Adamek's prepared statement and additional material follow:]

PREPARED STATEMENT OF RAYMOND J. ADAMEK

My name is Raymond J. Adamek. I am a Professor of Sociology at Kent State University in Kent, Ohio. I would like to thank Senator Hatch and the members of this Subcommittee for this opportunity to testify regarding the nature of public opinion in the United States on the abortion issue.

I will base my testimony on a review of major national polls on abortion and of major studies of these polls conducted by other social scientists. In my review, I have focused on four questions:

1. Under what circumstances does the American public believe legal abortion should be available?
2. What is the public's view of our current abortion policy?
3. What is the public's view of proposed changes in our current policy?
4. What are the major socio-demographic factors related to attitudes on abortion?

Before we examine these questions, however, I think a few caveats regarding the interpretation of poll findings are in order.

First, since we are interested in the opinions of all adult Americans, national samples which are drawn in such a way that they can be validly generalized to the total U.S. population are preferable to local polls of subsamples of that population.

Second, in intrepreting polls, one should consider the actual wording of each question asked. Not knowing the exact wording hinders interpretation and comparison of polls results. Particularly on sensitive issues like abortion, the different wording of questions intended to measure attitudes toward the same object may account for apparent shifts in public opinion as large as 28 percent (see Table 1). Two recent studies on abortion questions (Blake, 1977b; Schuman et al., 1981) also note that simply reversing the order of the items asked may produce apparent shifts as large as 17 percent.

Third, the fact that people are willing to express an opinion about something does not necessarily mean that they are knowledgeable about it. For example, Blake (1977a, 1977b) found that even as late as 1975, only 49 percent of the public of voting age had heard of the Supreme Court's 1973 decisions, and correctly understood that their effect was to make it easier for a woman to obtain an abortion. This is particularly a problem when we ask people for their opinion about complex and specific matters such as the Court's decisions. When respondents are not familiar with the content of these decisions, they may respond to a question asking them whether they agree or disagree with the decision on the basis of their impression of the Court's prestige, or the erudition of its members.

Fourth, one should be aware of who is sponsoring, conducting, and reporting a poll, since their frames of reference, assumptions, and words will be reflected in the questions asked, the responses obtained, and in the way the findings are reported. Often it is instructive to consider what questions have not been asked, as well as to consider what questions have been asked.

All of this is not to say that poll results are worthless, but only that they must be interpreted with caution.

I. UNDER WHAT CIRCUMSTANCES SHOULD LEGAL ABORTION BE AVAILABLE?

Let us now turn to the state of recent and current public opinion regarding abortion. Analysts generally agree (Arney and Trescher, 1976; Blake, 1971, 1977a; Evers and McGee, 1977; Granberg and Granberg, 1980; Jones and Westoff, 1973; Market Opinion Research, 1981) that approval for abortion under various circumstances increased between the early 1960's and the early 1970's, and then leveled off after a final spurt immediately following the Supreme Court's 1973 decisions. At least three studies (Arney and Trescher, 1976; Blake, 1973; Granberg and Granberg 1980, 1981) indicate that the increase in approval for abortion between 1972 and 1973 may be attributed to the Court's decisions, suggesting that to some extent, we can legislate (or adjudicate) morality. In fact, Dyck (1972) states that "most adults in any culture are at a stage of moral development where existing laws and customs are the most important bases for deciding what is right and what is wrong." Laws, then, can mold public opinion as well as reflect public opinion.

Considering the National Opinion Research Center's (NORC) polls (see Table 2), it is clear that a rather substantial majority of Americans state they believe legal abortion should be available for what have come to be known as "hard " reasons: the mother's health being seriously endangered (88-90 percent), rape (80-83 percent), and a strong chance of serious defect in the baby (80-83 percent).

A bare majority support legal abortion where the family has a very low income (45-52 percent) in these polls, and only a minority support abortion if the woman is not married (40-48 percent), if she is married but does not want any more children (39-46 percent), or if she wants an abortion "for any reason" (32-39 percent).

The NORC polls are valuable, since they employ exactly the same questions over time. Two recent (1977, 1979) Gallup polls are even more valuable, however, since they add a time dimension, asking at what stage of pregnancy various circumstances would justify abortion. The results of the Gallup polls may be seen in Table 3. These data indicate that about 22 percent of adult Americans believe abortion should be illegal in all circumstances. The next 54-55 percent (the middle majority) believe that abortion should be legal only for hard reasons (woman's life endangered, severe threat of health damage to the woman, rape/incest), and only in the first three months of pregnancy. The only circumstance the middle majority feels justifies abortion beyond the first trimester is a threat to the woman's life. It would appear, then, that the middle majority approves of less than five percent of the legal abortions currently taking place in the United States, since less than five percent (and perhaps something approaching one percent) are performed for hard reasons (Kahn et al., 1971; Steinhoff, 1972; U.S. DHEW, 1971).

Parenthetically, we note that more general questions focusing on the stage of pregnancy at which abortion should be legal also show that only a minority approve of abortion beyond the first three months (see Blake, 1977b: 62-64; Gallup, July, 1975). We also note that when the question about circumstances is concretized (as in Table 3) by asking the respondent to think about a particular stage of pregnancy, rather than being asked in a more general way, as in the NORC polls, the amount of support for abortion decreases considerably (see Table 4). Some of this decrease is undoubtedly also due to differences in item wording.

II. WHAT IS THE PUBLIC'S VIEW OF OUR CURRENT ABORTION POLICY?

Before attempting to answer this question, we should briefly note the nature of the Court's decision. Essentially, considering abortion a private matter between a woman and her physician, the Court mandated abortion on request through viability (considered to occur in the 24th to 28th week of pregnancy), while permitting the State "if it chooses" to "proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (U.S. Supreme Court Reports, 1973:183-184). It further went on to note that in determining whether an abortion was necessary to preserve the mother's health, "medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient" (U.S. Supreme Court Reports, 1973:212). Given this broad definition of the components of health, the Court in effect legalized abortion in the third trimester, as well.

There are two types of questions attempting to gauge the public's opinion of the Supreme Court's 1973 decisions: general questions which tend to indicate approval of the decisions, and more specific questions which tend to indicate disapproval of the decisions.

The general questions are exemplified by those asked by Harris and Gallup (see Table 5). These questions, and particularly the Harris questions (see Adamek, 1978, attached), are seriously flawed, since they narrowly focus the respondent's attention on the first trimester of pregnancy. Asking the question in this form misleads uninformed respondents about the actual nature of the Court's ruling, giving them the impression that the Court did not legalize abortion after three months, while it simultaneously restricts the attention of informed respondents to the first trimester clause. It therefore fails to measure opinions about the Court's overall decision, and tends to overestimate the extent of support for the decision.

More specific questions tapping public opinion about several aspects of the Court's decision strongly indicate that most Americans disagree with the Court. We have already seen, for example (Table 3) that while the Court legitimated abortion on request in the first, second, and even the third trimester, most Americans would limit abortion to the first trimester, and then only for hard reasons. One reason for this substantial disagreement between the public and the Court on timing seems to be clear: a different evaluation of the crucial questions of when human life begins, and when the human being may be considered to be a person. On the first question, the Court's explicit position was that it did not know when human life began (U.S. Supreme Court Reports, 1973:181). Implicitly, however, the Court's ruling favored the "viability" or "birth" answers to the question of when human life begins, since while it stated that prior to viability the state had no "compelling interest" in protecting "potential human life," it did allow the state to prohibit abortion after viability in some circumstances, and indicated that after birth the Constitution protected the individual.

In a special Gallup poll conducted one week after the Court's decisions, however, Blake (1977a) found that only 15 percent of American men and 12 percent of American women thought that human life begins at viability, and only 19 percent of the men and 8 percent of the women thought human life begins "only at birth." Thirty-six percent of the men and 50 percent of the women, on the other hand, believed that human life "begins at conception" (see Table 6). Three other polls taken just this year indicate that a majority of the public believes that human life begins within the first trimester, while only 5-17 percent believe it begins only when the baby is born (also Table 6).

Gallup has demonstrated that there is a strong relationship between one's beliefs about when life begins and other aspects of the abortion issue. Thus, while only 27 percent of those who believe life begins at conception say they favor the Court's ruling, 73 percent of those who say life begins at birth favor the ruling. Similarly, while only 11 percent of those who believe life begins at conception believe abortion should be legal in all cases, 44 percent of those who believe it begins at birth feel it should be legal in all cases (Gallup, July, 1981).

On the issue of personhood, the Court noted that as used in the Constitution, the word person "has application only postnatally" (U.S. Supreme Court Reports, 1974:179), and concluded that the Constitution's protection of rights guaranteed to persons begins only at birth. However, when Blake (1977a) asked the American public when they thought the unborn "may be considered a human person," only 18 percent of the men and 8 percent of the women adopted the Court's position by responding "at birth," while 33 percent of the men and 51 percent of the women responded "at conception."

Besides strongly disagreeing with the Court on the basic issues of the beginning of human life and personhood, as well as on the issues of timing and circumstances, Blake (1977b) has shown that only a minority of Americans supported the Court's judgment of the type of medical facility where abortions might take place, and on its endorsement of the legality of out-of-state abortions. Likewise, in Gallup polls taken in August 1972, October 1974, and April 1975, Blake (1977a, 1977b) found that only a minority of Americans (20 to 35 percent) agreed with the Court's subsequent (1976) decision that a married woman should be able to get an abortion without her husband's consent. Blake (1981) also found that only a minority of Americans agree with the Court's 1976 decision that minors may obtain abortions without parental consent.

The closest the Court and the American public come to agreement on abortion policy appears to be on the issue of using tax funds to pay for abortions. In 1977 (U.S. Supreme Court Reports, 1977), the Court decided that neither federal nor state governments had to provide tax money to pay for elective abortions. Public opinion polls on this issue generally indicate that Americans do not want their tax dollars to finance abortion (see Table 7).

It is evident, then, that when we ask specific questions about various aspects of the Supreme Court's decisions, a majority of the American public is seriously at odds with the Court.

Given that the Court's 1973 decisions stated abortion was a private matter between a woman and her physician, and that it allows abortion through the second trimester, and even in the third trimester, I think it is fair to characterize the Court as "pro-choice". Clearly, however, the vast majority of the American public is not "pro-choice" in this same sense.

How, then, do we account for the results of eleven polls (Market Opinion Research, 1981:16) which indicate that between 67 and 81 percent of the American public believe that the right or decision of the woman to have an abortion is for her and her doctor to decide? I believe the apparent contradiction between these polls and those we have just reviewed, which illustrate the public's disagreement with specific ideas embodied in the Court's opinions, is again a question of wording (see Table 8). As we have already seen, more people will agree with a general statement than with specific instances implied by that statement when these are "spelled out". General statements such as those in Table 8 allow respondents to focus on specific instances of their own choosing. For example, even respondents who believe that abortion should be legal only for hard reasons can logically agree with the statements in Table 8 if they focus on the hard reasons. Blake (1973) has noted that the first question in Table 8 also suffers from other methodological errors which bias responses in an affirmative direction. We should also point out that the Harris question (Table 8, #4) focuses the respondent's attention only on the first three months of pregnancy, again tending to elicit an affirmative response.

The Market Opinion Research item (Table 8, #6) would appear to be even more loaded in favor of a positive response, which it apparently produces. Thus, it speaks of "the consenting patient" as though her decision has already been made, and then asks whether the abortion (to which she has already consented) "should be performed by a licensed physician in conformance with good medical practice." To disagree with this item, the respondent must almost place himself in the position of endorsing "back alley butchers."

III. WHAT IS THE PUBLIC'S VIEW OF PROPOSED CHANGES IN PRESENT ABORTION POLICY?

A review of 15 national polls from 1978 through 1981 by Market Opinion Research (1981:15) indicates that anywhere from 49 to 71 percent of Americans say they oppose an amendment to the Constitution which would make abortion illegal, while anywhere from 22 to 45 percent say they favor such an amendment. That there is so much opposition to making abortion illegal should not come as a surprise, since as we have already seen (Table 3), the middle majority of Americans believe that abortion should be legal, but only in the first trimester, and only for hard reasons. However, opposition to an amendment which would ban all abortions does not constitute endorsement of present abortion policy.

Perhaps what is surprising about the responses to the 15 polls reviewed by Market Opinion Research, and two additional polls on this topic (NARAL, 1978:4), is the relatively large minority of Americans (between 29 and 45 percent in 12 of 17 polls) who say they do favor a constitutional amendment banning all abortions. Similarly, three recent polls (see Table 9) on the Human Life Bill are endorsed by 29 to 42 percent of the public, even though they employ strong language, implying that such a law would make abortion "murder." Since Market Opinion Research's (1981:15) recent survey of 8 national polls found that only 10 to 22 percent of Americans believe that abortion should be illegal in all circumstances, why should no less than 22 percent and up to 45 percent endorse a constitutional amendment which would ban all abortions? Judith Blake's (1981) recent study suggests part of the answer to this apparent contradiction.

In a detailed analysis based on eight NORC polls (1972-1980), eight Gallup polls (1968-1974, and 1977), and the two National Fertility polls (1965 and 1970), Blake divided respondents into three groups on the basis of their endorsement of four circumstances which might justify legal abortion (mother's health, deformed baby, financial stress, and simply not wanting any more children). Those who endorsed abortion under no circumstances, or only where the pregnancy seriously endangered the woman's health, she called "negatives." Those who endorsed all four justifications for abortion she called "positives," and those in between these polar positions she called "equivocators." What she found is that, "People who equivocate ... apparently are more negative than positive in their views about legalizing abortion. In fact, it may be fair to say that these respondents are 'closet negatives'" (i.e., closet anti-abortionists) (Blake, 1981:315). Equivocators were consistently found to be more like "negatives" than "positives" in background characteristics and other attitudes as well.

Blake found that even the group which endorsed all four reasons for abortion generally disagreed with the Supreme Court on three aspects of its decision for which measures were taken: abortion beyond the first three months of pregnancy, abortion if the husband opposes it, and abortion for minors without parental consent. Blake concludes that it is evident that a majority of Americans do not endorse the tenets of the pro-choice movement.

In a study of pro-choice and pro-life activists (members of NARAL and NRLC, respectively), Granberg and Denny (forthcoming) also find that the general adult population is closer to pro-life activists than to pro-choice activists in values and attitudes.

IV. WHAT SOCIODEMOGRAPHIC FACTORS ARE RELATED TO ATTITUDES ON ABORTION?

In summary form, studies and polls have generally found that:

1. Whites are more likely to be permissive about abortion than Blacks/Non-whites.

2. Males are more likely to be permissive about abortion than females.

3. Those with more formal education are more likely to be permissive on abortion than those with less formal education.

4. Those who live in large cities are more likely to be permissive on abortion than those who live in small cities, or rural areas.

5. Those who live in the West and East are more likely to be permissive on abortion than those who live in the Midwest and South.

6. Those with higher incomes are more likely to be permissive on abortion than those with lower incomes.

7. At least since the 1970's, younger persons are more likely to be permissive on abortion than older persons.

8. Jews are more likely to be permissive on abortion than Protestants, who are more likely to be permissive than Catholics.

9. Persons who score lower on "religiosity" scales are more likely to be permissive on abortion than those who score higher on such scales.

CONCLUSION.

Our analysis of public opinion on abortion in the United States indicates that a majority of Americans do not endorse either the pro-choice or pro-life platforms. If anything, they are closer to the pro-life ideology.

Our present public policy, however, as mandated by the Supreme Court, is essentially pro-choice in ideology. This, I suggest, is the main reason for the turmoil we have experienced over this issue in recent years.

It would seem to me that a constitutional amendment which would remove the major responsibility for our abortion policy from the Supreme Court and return it to the legislatures would go a long way toward resolving the turmoil in a just and rational manner.

REFERENCES

Adamek, Raymond J. 1978, "Comment on Abortion Polls," *Public Opinion Quarterly* 42: 411-413.

Arney, William Ray and William Trescher. 1976, "Trends in Attitudes Toward Abortion, 1972-1975," *Family Planning Perspectives* 8: 117-124.

Blake, Judith. 1971, "Abortion and Public Opinion: The 1960-1970 Decade," *Science* 171: 540-549.

Blake, Judith. 1973, "Elective Abortion and Our Reluctant Citizenry" in Howard Osofsky and Joy D. Osofsky, *The Abortion Experience, Psychological and Medical Impact*, Maryland: Harper and Row Publishers.

Blake, Judith. 1977a, "The Supreme Court's Abortion Decisions and Public Opinion in the United States," *Population and Development Review* 1 and 2: 45-62.

Blake, Judith. 1977b, "The Abortion Decisions: Judicial Review and Public Opinion," pp. 51-82 in Edward Manier et al. (Eds.), *Abortion: New Directions for Policy Studies*, Notre Dames Press, 1977.

Blake, Judith and Jorge H. Del Pinal. 1981, "Negativism, Equivocation, and Wobbly Assent: Public 'Support' for the Prochoice Platform on Abortion," *Demography* 18: 309-320.

Davis, James A. 1980, *General Social Surveys 1972-1980*, Chicago: National Opinion Research Center.

deBoer, Connie. 1977, "The Polls: Abortion," *Public Opinion Quarterly* 41: 553-564.

Dyck, A.J. 1972, "Is Abortion Necessary to Solve Population Problems?" in T.W. Hilgers and D.J. Horan (Eds.), Abortion and Social Justice, New York: Sheed and Ward.

Evers, Mark and Jeanne McGee. 1977, "The Trend and Pattern in Attitudes Toward Abortion: 1965-1976." Paper presented at the annual meetings of the American Sociological Association, Chicago, September.

Gallup, George. 1975, "Stage of Pregnancy is Key to Public Approval of Abortion," The Gallup Opinion Index (July) Report No. 121:11-13.

Gallup, George. 1981, "Public Evenly Divided On 1973 Decision," The Gallup Report (July) Report No. 190: 18-22.

Granberg, Donald and Beth Wellman Granberg. 1980, "Abortion Attitudes, 1965-1980: Trends and Determinants," Family Planning Perspectives 12: 250-261.

Granberg, Donald and Beth Wellman Granberg. 1981, "Pro-Life Versus Pro-Choice: Another Look at the Abortion Controversy in the U.S.," Sociology and Social Research 65: 424-434.

Granberg, Donald and Donald Denny. 1982, "The Coathanger and the Rose: Comparison of Pro-Choice and Pro-Life Activists in the Contemporary U.S.," to be published in Transaction/Society (May).

Jones, Elise F. and Charles F. Westoff. 1973, "Changes in Attitudes Toward Abortion: With Emphasis Upon the National Fertility Study Data," in H.J. Osofsky and J.D. Osofsky, The Abortion Experience, New York: Harper and Row.

Kahn, J.B. et al. 1971, "Surveillance of Hospital Abortions in the United States, 1970," reviewed in Family Planning Perspectives 3: 59.

Life 1981, "Abortion: Women Speak Out--An Exclusive Poll," (November): 45-54.

Market Opinion Research. 1981, "Voters' Attitudes About Government Involvement in the Abortion Issue," (November 18): 1-19.

Mileti, Dennis S. and Larry P. Barnett. 1972, "Nine Demographic Factors and Their Relationship to Attitudes Toward Abortion Legalization," Social Biology 19: 43-50.

NARAL (National Abortion Rights Action League). 1978, "Public Opinion Polls on Abortion Issues, 1976-1977."

Pomeroy, Richard and Lynn C. Landman. 1972, "Public Opinion Trends: Elective Abortions and Birth Control Services to Teenagers," Family Planning Perspectives 4: 44-55.

Schuman, Howard, Stanley Presser and Jacob Ludwig. 1981, "Context Effects on Survey Responses to Questions About Abortion," Public Opinion Quarterly 45: 216-223.

Singh, B. Krishna and Peter J. Leahy. 1978, "Contextual and Idealogical Dimensions of Attitudes toward Discretionary Abortion," Demography 15: 381-388.

Steinhoff, Patricia G., Roy G. Smith and Milton Diamond. 1972, "Characteristics and Motivations of Women Receiving Abortions," Sociological Symposium 8: 83-89.

Tedrow, Lucky M. and E.R. Mahoney. 1979, "Trends in Attitudes Toward Abortion: 1972-1976," Public Opinion Quarterly 43: 182-189.

U.S. Department of Health, Education and Welfare. 1971, The Effects of Changes in State Abortion Laws, Washington, D.C.: Government Printing Office.

United States Supreme Court Reports 1973, 35: 1-281; 1976, 49: 788-825; 1977, 53: 464-505.

Westoff, Charles F., Emily C. Moore and Norman B. Ryder. 1969, "The Structure of Attitudes Toward Abortion," Milbank Memorial Fund Quarterly 47: 11-38.

Table 1. The Effect of Question Wording on Response: Three Examples

	Responses*	
A. Questions Regarding a Human Life Amendment		
	Should Be	Shouldn't Be
1. "Do you think there should be an amendment to the Constitution prohibiting abortions, or shouldn't there be such an amendment?"	29	67
2. "Do you believe there should be an amendment to the Constitution protecting the life of the unborn child, or shouldn't there be such an amendment?"	50	39
Source: New York Times/CBS News Poll. The New York Times, August 18, 1980, p. 1. Both questions were asked of the same respondents.		
B. Questions Regarding the Abortion Decision		
	Agree	Disagree
1. "As you may have heard, in the last few years a number of states have liberalized their abortion laws. To what extent do you agree or disagree with the following statement regarding abortion: The decision to have an abortion should be made solely by a woman and her physician?"	64	31
	Yes	No
2. "Do you think it should be lawful for a woman to be able to get an abortion without her husband's consent?"	24	67
Source: Question 1 was commissioned by Planned Parenthood and asked in a Gallup poll. The Gallup Opinion Index, Report 87, Sept. 1972. Question 2 was commissioned by Blake and asked in a Gallup poll two months after Question 1. Blake (1973)		
C. Questions Regarding the Supreme Court Decisions of 1973		
	Favor	Oppose
1. "The U.S. Supreme Court has ruled that a woman may go to a doctor to end a pregnancy at anytime during the first three months of pregnancy. Do you favor or oppose this ruling?"	47	44
2. "The U.S. Supreme Court has ruled that a woman may go to a doctor for an abortion at any time during the first three months of pregnancy. Do you favor or oppose this ruling?"	43	54
Source: Question 1: Gallup poll conducted March, 1974. The Gallup Opinion Index, Report 106, April 1974. Question 2: Sindlinger, "Special Hitchhiker on Abortion," for National Review, May 1974.		

*All responses in this and subsequent tables will be given in percentages. Figures may not add to 100 percent because of rounding, or because the "Other," "Don't Know" and "No Answer" responses have been omitted.

Table 2. Percent of Respondents Approving of Legal Abortions In Various Circumstances, (NORC)

Question: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion ...

	1972	1973	1974	1975	1976	1977	1978	1980
1. "If the woman's own health is seriously endangered by the pregnancy?"	88	90	90	88	89	88	88	88
2. "If she became pregnant as a result of rape?"	74	80	83	80	80	80	80	80
3. "If there is a strong chance of serious defect in the baby?"	74	82	83	80	82	83	80	80
4. "If the family has a very low income and cannot afford any more children?"	46	52	52	50	51	52	45	50
5. "If she is not married and does not want to marry the man?"	40	47	48	46	48	47	40	46
6. "If she is married and does not want any more children?"	38	46	45	44	44	44	39	45
7. "If the woman wants it for any reason?"	(not asked prior to 1977)					36	32	39

Source: James A. Davis, General Social Surveys 1972-1980. Chicago: National Opinion Research Center, 1980. I have varied the order in which the questions were presented to respondents to indicate decreasing extent of approval as we go from the "hard" reasons to the "soft" reasons.

Table 3. Percent of Respondents Approving of Legal Abortions in Various Circumstances (Gallup)

Question: "Do you think abortions should be legal under any circumstances, legal only under only certain circumstances, or illegal in all circumstances?"

Response	1975	1977	1979	1980	1981
Legal, any circumstance	21	22	22	25	23
Legal, certain circumstances	54	55	54	53	52
Illegal, all circumstances	22	19	19	18	21
No opinion	3	4	5	4	4

Focusing, then, upon the middle majority who said they thought abortion should be legal only under certain circumstances, Gallup asked these questions: "Now, thinking about the first (second) (last) month of pregnancy, under which of these circumstances do you think abortions should be legal ... when the woman's life is endangered, when the soman's mental health is endangered, where the pregnancy is a result of rape or incest, when there is a chance the baby will be born deformed, when the woman may suffer severe physical health damage, if the family cannot afford to have the child."

	Life Endangered	Rape/ Incest	Health Damage	Baby Deformed	Mental Health	Can't Afford
1st trimester						
1977	77	63	54	45	42	16
1979	78	59	52	44	42	15
2nd trimester						
1977	64	38	46	39	31	9
1979	66	32	46	37	31	9
3rd trimester						
1977	60	24	34	28	24	6
1979	59	19	33	28	22	4

Sources: 1977 poll, The Gallup Opinion Index, Report 153, April, 1978. 1979 poll, The Gallup Opinion Index, Report 166, May, 1979. The lines indicate the circumstances and stage of pregnancy in which a majority of respondents think abortion should be legal. Source for the top half of this table is The Gallup Report, Report 190, July, 1981.

Table 4. Percent of Respondents Approving of Legal Under Given Circumstances in Selected NORC and Gallup Polls, Similar Items

Circumstance*	NORC		Gallup 1st trimester	
	1977	1980	1977	1979
Woman's life endangered	-	-	77	78
Health seriously/severely endangered	88	88	54	52
Rape/Rape-Incest	80	80	65	59
Baby: serious defect/ chance deformed	83	80	45	44
Very low income, can't afford/ can't afford	52	50	15	16

*The first wording summarizes that of the NORC polls, the wording after the slash summarizes that of the Gallup polls. For complete wording of these items, see Tables 2 and 3.

Source: NORC data: James A. Davis, General Social Surveys 1972-1980. Chicago: National Opinion Research Center, 1980. Gallup data: The Gallup Opinion Index, Report 153, April, 1978, and The Gallup Opinion Index, Report 166, May, 1979.

Table 5. Responses of the Public to General Questions Regarding the Supreme Court's 1973 Decisions

Question: "In 1973, the U.S. Supreme Court decided that state laws which made it illegal for a woman to have an abortion up to three months of pregnancy were unconstitutional, and that the decision on whether a woman should have an abortion up to three months of pregnancy should be left to the woman and her doctor to decide. In general, do you favor or oppose this part of the U.S. Supreme Court decision making abortions up to three months of pregnancy legal?"

Response	Feb. 1973	April 1975	Aug. 1976	July 1977	Feb. 1979	June 1981
Favor	52	54	59	53	60	56
Oppose	41	38	28	40	37	41
Not sure	7	8	13	7	3	3

Source: 1973-1979 data, ABC News--Harris Survey, "Majority Favors Abortion, But Foes Have Political Strength." Vol. 1, No. 28, March 7, 1979. 1981 data, Kent-Ravenna Record-Courier, "Majority backs legal abortion," June 8, 1981, p. 17.

Question: "The U.S. Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling?"

Response	March 1974	May 1981
Favor	47	45
Oppose	44	46
No opinion	9	9

Source: 1974 data, The Gallup Opinion Index, Report 106, April, 1974. 1981 data, The Gallup Report, Report 190, July, 1981.

Table 6. When Does the American Public Believe Human Life Begins?

Question: "It is sometimes said that the morality of abortion rests on the question of when one thinks human life begins. ... Which of these alternatives best expresses your views?"

	Men		Women	
Human life begins...	1973	1975	1973	1975
At conception	36	43	50	58
At quickening	19	15	23	16
At viability	15	14	12	11
Only at birth	19	20	8	10
Don't know/other	11	8	7	5

Source: Blake (1977a). Full text of question not given due to space limitation.

Question: "Some people feel that human life begins at the moment of conception. Others feel that human life does not begin until the baby is actually born. Do you, yourself, feel that human life begins at conception, at the time of birth, or at some point in between?" If last response, "At what point do you believe human life begins?"

	May, 1981
At conception	54
Three months or less/when baby develops features, heart starts beating*	8
When mother feels life in her	1
Between three months and birth	8
At birth	17
Don't know	5
No opinion	7

*Two categories and figures combined.
Source: The Gallup Report, Report 190, July 1981.

Question: "Just your own opinion, at what point do you think a fetus becomes a human being? Do you think a fetus becomes a human ...

	May, 1981
At conception, when sperm meets egg	41
During the first three months of pregnancy	30
During the last six months of pregnancy	12
When the baby is actually born	11
Don't know/no opinion/other	6

Source: ABC News/Washington Post Poll. Survey # 0034, June 8, 1981.

Question: "When do you think a fetus becomes a human being? Do you think a fetus becomes a human being ...

	1981
At conception, when sperm and egg meet	39
When the fetus's nervous system begins to function	11
When the fetus would be able to survive outside the mother's womb	9
When the baby is actually born	5
Or is this a question that can't really be determined one way or the other?	30

Source: Yankelovich, Skelly and White poll for Life Magazine, Nov. 1981.

Table 7. Public Opinion Regarding The Use of Tax Money To Finance Abortion (In Percentages)

Questions	Poll Date	Responses	
1. "Are you in favor of a law which permits a woman to have an abortion even if it has to be at government expense?" Source: Gallup poll as reported in Blake (1977a:56-57)	April 1975	Yes 35	No 57
2. "Do you think the government should help a poor woman with her medical bills if she wants an abortion?" Source: New York Times/CBS News Poll, New York Times, July 29, 1977, p. A2.	July 1977	38	55
3. "Until recently, because the U.S. Supreme Court has ruled that abortions up to three months of pregnancy are legal, the federal government has allowed Medicaid money to be used to pay for abortions for women who are poor and cannot afford to pay for them. ... Do you favor or oppose a ban on the use of federal Medicaid funds for abortions ..." Source: The Harris Survey, "Abortion Debate Continues," August 18, 1977. Because of its length, the full question wording could not be included here.	July 1977	Oppose Ban 44	Favor Ban 47
4. "Do you think the government should or should not help a poor woman with her bills if she wants an abortion?" Source: CBS News/ New York Times Poll as reported by NARAL (Jan. 1978).	Oct. 1977	Should 47	Shouldn't 44
5. Do you "agree with President Carter's view that government funds should not be used to finance elective abortions for the poor?" Source: Yankelovich, Skelly and White poll as reported by NARAL (Jan. 1978).	Nov. 1977	Disagree (na)	Agree 58
6. "Now I'd like you to tell me if you agree or disagree with the following statements: The government should help a poor woman with her medical bills if she wants an abortion." Source: CBS News/New York Times poll as reported in Public Opinion (1978) 1:35.	Jan. 1978	Should 46	Shouldn't 54
7. "Abortion is something that government should not pay for even if a woman seeking an abortion is very poor." Source: ABC News/Washington Post Poll, Survey #0034, June 8, 1981.	May 1981	Disagree 40	Agree 54
8. "Should federal or state funds be used to pay for abortions for women who are eligible for Medicaid?"	Nov. 1981	Should 38	Shouldn't 53
9. "Should federal or state funds be used to pay for abortions for women who are eligible for Medicaid and become pregnant by rape or incest?" Source for questions 8 and 9: Yankelovich, Skelly and White poll for Life Magazine, November 1981.	Nov. 1981	73	22

Table 6. Public Response to General Questions Involving a Woman's Right to Have or Make a Decision Regarding An Abortion in Consultation With Her Physician (In Percentages)

Questions	Poll Date	Responses		
1. "As you may have heard, in the last few years a number of states have liberalized their abortion laws. Do you agree or disagree with the following statement regarding abortion: The decision to have an abortion should be made solely by a woman and her physician." Source: Gallup poll commissioned by Planned Parenthood. The Gallup Opinion Index, Report 87, Sept. 1972.	June 1972		Agree 64	Disagree 31
2. "The right of a woman to have an abortion should be left entirely up to the woman and her doctor." Source: New York Times/CBS News Poll as reported in NARAL (1978).	Feb. 1976		67	26
3. "Should the right of a woman to have an abortion be left entirely to the woman and her doctor?" Source: CBS News/New York Times Poll as reported in NARAL (1978).	Oct. 1977		74	22
4."Any woman who is three months or less pregnant should have the right to decide, with her doctor's advice, whether or not she wants to have an abortion." Source: Harris Poll as reported in Index to International Public Opinion (1980)	Feb. 1979		73	25
5. "If a woman wants to have an abortion and her doctor agrees to it, should she be allowed to have an abortion or not?"	Aug. 1980	Should 62	Depends 15	Shouldn't 19
6. "The decision on whether to perform an abortion should rest with the consenting patient and should be performed by a licensed physician in conformance with good medical practice." Source: Market Opinion Research (1981).	Sept. 1981		Agree 91	Disagree 7

Table 9. Public's Response to Questions Regarding the Human Life Bill

Questions	Poll Date	Responses	
		Favor	Oppose
1. "The anti-abortion Senators in Washington have proposed a new law that says life begins at conception. Under that law, abortions would be considered murder. ... would you favor or oppose a law that would make all abortions murder?" Source: ABC News/Washington Post Poll (June, 1981).	May 1981	29	67
2. "The U.S. Congress is considering a law which would declare human life begins at conceptions, and therefore abortion at any time could be considered a crime of murder. Would you favor or oppose such a law?" Source: The Gallup Report, Report 190, July, 1981.	June 1981	42	51
3. "A new law has been proposed in the U.S. Senate that says that human life begins at conception. Under this proposed law, abortion would be a serious crime and could even be considered murder. Would you favor or oppose a law under these circumstances?" Source: Yankelovich, Skelly and White poll for Life Magazine, November, 1981.	Nov. 1981	32	59

Comments and Letters

Abortion Polls

De Boer's review of abortion polls (*POQ* 41:553–64) suggests that the Harris poll is a major barometer of public opinion regarding the Supreme Court's 1973 abortion decision. She lists seven major abortion questions asked by Harris since June 1972, with the following item having been repeated annually through 1977: "In 1973, the U.S. Supreme Court decided that state laws which made it illegal for a woman to have an abortion up to three months of pregnancy were unconstitutional, and that the decision on whether a woman should have an abortion up to three months of pregnancy should be left to the woman and her doctor to decide. In general, do you favor or oppose the U.S. Supreme Court decision making abortions up to three months of pregnancy legal?"

Given the national controversy over abortion, and the fact that this question has been repeated with no other questions tapping the nature of the Court's ruling accompanying it, I assume it is meant and is understood to be a general indicator of public reaction to the Court's decision. Since the Court ruled, however, that abortion may not be prohibited prior to viability (i.e., in the first *six* months), and is even permissible after viability (*U.S. Supreme Court Reports* 35 L Ed 2d No. 1:147–200), Harris's emphasis on the phrase "up to three months of pregnancy" is both curious and misleading. It is curious because the Court itself did not attach special significance to the first three months of pregnancy, nor is there any mention of the first three months in the laws of Texas and Georgia which were addressed in the decision. It is misleading because, although accurate as far as it goes, it tends to give those uninformed about the decision the impression that the Court did not legalize abortion *after* three months. The question, therefore, taps public opinion on only one clause in the Court's ruling, or perhaps on the question, "Do you believe that abortion should be legal up to three months of pregnancy?" It certainly does not measure opinions about the Court's *overall* decision.

Why has Harris continued to focus on the phrase "up to three

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months of pregnancy"? It may be that having asked a hypothetical question about abortion "up to three months" prior to the Court ruling, he continues to do so for the sake of comparability. But that would make sense only for a short time after the Court's ruling, since subsequently, we are presumably more interested in gauging opinion on what the Court *actually* said.

A second possible explanation is that Harris is unaware that the Court's decision legalized abortion after three months. To support this contention, we note the following. First, in May 1975, Harris posed this question: "The greatest controversy over abortions now centers on the second trimester—the second three months of pregnancy. In many states abortions are legal between the third and sixth months of pregnancy, on the grounds that all such abortions must take place in a hospital, with the mother's consent and her doctor's close supervision. . . . Do you favor or oppose legalizing abortions when a woman is three to six months pregnant?" (*POQ* 41:561). The second sentence of this item does not recognize the fact that the Court made abortion between the third and sixth months legal in *all* states.

Second, Harris posed this question in August 1977: "Until recently, because the U.S. Supreme Court has ruled that abortions up to three months are legal, the federal government has allowed Medicaid money to be used to pay for abortions for women who are poor and cannot afford to pay for them. . . . Do you favor or oppose a ban on the use of federal Medicaid funds for abortions . . .?" (*POQ* 41:564). The first sentence again suggests that Harris believes he is giving a general description of the Court's decision, rather than simply of one clause in it. There is no reason to focus on the first trimester otherwise, since the timing of abortions is unrelated to the Medicaid issue.

Third, Harris reports responses to the first trimester question as though it encompassed the essence of the Court's ruling. Comparing results in August 1977 to earlier responses, he states: ". . . a 53–40 percent majority of the public continues to favor legalized abortions as set down in the 1973 U.S. Supreme Court decision. . . . Public support for the 1973 decision legalizing abortion, however, . . . is down from a higher 59–28 percent a year ago to a level close to the 54–39 percent majority who favored the Supreme Court decision early in 1976" (*The Harris Survey*, August 18, 1977). I submit again that the Harris question does not measure support for "legalized abortions as set down in the 1973 U.S. Supreme Court decision," but rather for legalized abortion *in the first three months of pregnancy*. That a majority does not approve of the Court's ruling on the timing of abortions is evident in the Blake study (*Population and Development*

Review, 3:45–62), in Harris's own poll of May 1975 in which 68 percent opposed "legalizing abortions when a woman is three to six months pregnant" (*POQ* 41:561), and in a Gallup poll (*The Gallup Opinion Index* 121:11–13) in which only 10 percent thought abortion should be "legal under any circumstances" in the second trimester, which is essentially the Court's position.

Finally, a newspaper account of Harris's most recent report on the abortion issue reads, "By 42–40 percent a narrow plurality goes along with the (National Women's) conference's endorsement of 'legalized abortion up to three months' pregnancy' " (Akron *Beacon Journal*, February 16, 1978:D7). The latter phrase must have been inserted by Harris, since neither in its deliberations nor in its final report (*The National Plan of Action*, IWY Commission, 1978) did the Conference place any such time limit on its endorsement of abortion.

In summary, because it narrowly focuses attention on the first trimester of pregnancy, the Harris question is an invalid measure of public opinion of the Supreme Court's abortion ruling. Asking the question in its present form misleads uninformed respondents about the actual nature of the Court's ruling, and restricts the attention of informed respondents to one clause in that ruling. Therefore, reports based on this question misrepresent the extent of support for the Court's desision.

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Addendum

THE following acknowledgement was inadvertently omitted from "The Polls: Attitudes Toward Homosexuality" (POQ 42: 265–76):

Data of the National Opinion Research Center (NORC) are from the 1973 and 1974 General Social Survey, NORC, made available through the Roper Center, Storrs, Connecticut, and New Haven, Connecticut.

The Supreme Court's Abortion Decisions and Public Opinion in the United States

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JUDITH BLAKE

Between January 1973 and July 1976, the United States Supreme Court handed down three major decisions concerning abortion—two in 1973 and one in 1976. The 1973 decrees struck down most state laws restricting pregnancy termination and ruled that, until after the first trimester, the decision to have an abortion rests with the woman and her physician. The Court said that between the beginning of the fourth month of pregnancy and fetal viability (approximately six months gestation) state regulation should be concerned with measures designed to preserve the mother's health but should not be needlessly restrictive. After viability, the state was held justified in regulating and even proscribing abortion, except where necessary for the preservation of the life or health of the mother. The Court nullified state statutes limiting the performance of abortions to hospitals; invalidated abortion review committees; and abrogated restrictions on migration between states for purposes of abortion. In 1976 the Court specifically refused to legitimate action by interested parties—such as the woman's husband or parents—to veto her free access to abortion.

Implementation of these judicial rulings is turning out to be an arduous process, analogous in many ways to implementation of the earlier decisions of the US Supreme Court on school desegregation. The abortion decisions are beginning to exemplify the increasingly familiar problems involved in the use of judicial review as a means of effecting social change; mobilization of extreme opposition and steady erosion of the Court's intent by means of collateral deterrence.[1]

This article outlines some of the major problems involved in fulfilling the Supreme Court decisions on abortion and presents data on public support for voluntary pregnancy termination.

Organized Opposition to the Supreme Court Decisions

Who has been short-circuiting implementation, and what have they been doing? The most obvious actors have been anti-abortion ("right to life") groups that have burgeoned nationwide since the 1973 decisions. These groups have been remarkably effective in bringing political and social pressure to bear, both locally and in Congress. States have passed legislation that does not comply with the spirit of the 1973 decisions—legislation that heavily regulates abortion clinics; withholds Medicaid (government-financed medical insurance) funds for purposes of abortion; requires doctors to supply detailed statistical information (sometimes including the woman's name) for every abortion; makes spousal or parental consent a condition of abortion; and involves numerous similar efforts at collateral deterrence. The number of abortion-related bills in state legislatures has increased dramatically, as has the proportion of such bills enacted. For example, in 1972, 134 such bills were introduced and 4 enacted. As a result of the Court's decisions in 1973, 260 bills were introduced and 39 enacted, and in 1974 the comparable figures were 189 introduced and 19 enacted.[2]

A recent decision by the US Supreme Court upheld the right of privately administered hospitals to refuse to perform abortions.[3] A movement has gained strength to amend the Constitution in an effort to bypass the Court's decisions, and pressures are constantly being exerted on Congress to curtail the use of public funds for purposes of abortion.

It is evident that such efforts are succeeding in making it difficult to obtain a legal abortion. Although approximately one million legal abortions were performed in 1975, most of these (Christopher Tietze estimates about 70 percent) replaced operations whose status would have been illegal prior to the Court's decisions.[4] That is, most legal abortions replaced abortions that would have occurred anyway on an illegal basis. Consequently it is still true that many types of women who could not readily obtain illegal abortions, notably the poor, the very young, and those in nonmetropolitan areas, suffer severe handicaps in obtaining legal ones, even though they are nominally available. Services are concentrated in nonhospital abortion clinics, and the latter are confined to a few large metropolitan areas.[5] In the words of Weinstock, Tietze, Jaffe, and Dryfoos,

> The failure of most hospitals to provide abortion services in response to the Supreme Court's 1973 abortion decisions is largely responsible for this in-

> equitable distribution. The default of public hospitals, on which many poor persons traditionally depend for health care, undoubtedly deters many poor women from obtaining abortion services. Several states have enacted statutes to deny Medicaid reimbursements for abortions or to restrict it to medical emergencies. Although these statutes have been consistently overturned by the courts, there remains a chilling effect in states where they exist. In a few states, Medicaid reimbursement is known to be unavailable, while in others it is hedged with medical or procedural restrictions.[6]

Finally, the conviction in 1975 of Dr. Kenneth Edelin on manslaughter charges for aborting a fetus of more than 20 weeks gestation (overturned in 1977) and the prevention of scientific research on fetuses scheduled for abortion are direct spin-offs of increasingly organized "pro-life" groups.[7]

The Public and the Abortion Decisions

A less obvious, but nonetheless politically important element in undermining implementation is public opposition to the basic content and implications of the Court's position—opposition that antedated the 1973 decisions and that has continued since them.[8]

What currently is the evidence regarding public views on abortion in the United States? I shall use data on public opinion concerning abortion derived from questions that I have commissioned on numerous national Gallup surveys from the late 1960s up through 1977. I shall also use results from nationwide surveys conducted by the National Opinion Research Center (NORC) each year between 1972 and 1975, as well as tabulations from the 1965 and 1970 National Fertility Studies (NFS) commissioned by Charles F. Westoff and Norman B. Ryder. The Gallup and NORC surveys were performed on cross-sectional samples of voting age adults. The National Fertility Studies were of married women in the reproductive ages. The results presented are for all races.

The surveys analyzed here deal with numerous aspects of legalized abortion. One facet concerns public support for elective abortion—abortion for reasons of personal desire rather than health, financial, or other crises. On this topic, it is possible to present the results from all three sources, since all asked specific questions on elective abortion, although wording differed somewhat.

Additional tabulations relate to a number of subissues implicit or explicit in the Supreme Court's major 1973 and 1976 decisions: whether abortion should be permitted after the first three months of pregnancy; when respondents feel that "human life" or the "human person" begins; whether abortion should be allowed without the consent of the husband;

and whether the government should assume any part of the cost of an abortion. Finally, public reaction to possible constitutional amendments that would severely restrict abortion is discussed.

In assessing the results, the reader is enjoined to bear in mind that, among data bases, the sampling differed in some cases, the time periods were not exactly the same, and the questions were not always identical. I shall try to call attention to incomparabilities and analyze their effects on responses; however, the point of my analysis is not to interpret fine shades of difference among replies so much as to outline broadly where the public stands. In general, this is not a difficult task with regard to abortion since, as will be seen, there are major similarities of response level and trend among different data sets. Hence, although surveys regarding some public issues may produce erratic results, as Lipset has recently suggested,[9] systematic consideration of the data on abortion seems to provide encouraging evidence of reliability.

Elective Abortion and Public Opinion A controversial issue of the 1973 decisions concerned the Court's support for a woman's right to obtain an abortion without resort to such extenuating justifications as her health, probable malformation of the infant, rape, or financial and emotional stress. The decision that she does not want to continue the pregnancy is sufficient justification for a woman to seek medical help in procuring an abortion.

A variety of data are available concerning public views regarding elective abortion. Before discussing these data, which are summarized in Table 1, we should note that they stem from somewhat different questions.

On the Gallup surveys the question was:

> Do you think abortion operations should or should not be legal where the parents simply have all the children they want although there would be no major health or financial problems involved in having another child?

This question was asked after three prior questions concerning the mother's health, possible child deformity, and financial stress as justifications for abortion. The question posed the issue of elective abortion pointedly, calling attention to the difference between not wanting the child despite a lack of physical or financial stress and having such stress-related reasons for desiring to terminate the pregnancy. Also, the word "simply" carries the implication that the reason given is not—or may not be—sufficient. Thus, both the order in which the question was asked and the wording may have engendered a negative bias in respondents.

The National Opinion Research Center asked:

> Please tell me whether you think it should be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children?

Table 1
Attitudes of US Men and Women Toward Elective Abortion (Percent Distribution)

Source and Attitude	1965	May 1968	Dec. 1968	1969	1970	1972	1973	1974	1975	1977
Gallup surveys										
Approving		11	13	14	23	27	27	31		30
Disapproving		85	81	79	69	67	68	63		63
No opinion		4	6	7	8	6	5	6		7
Total		100	100	100	100	100	100	100		100
Total respondents		(1,611)	(1,517)	(1,560)	(1,525)	(1,513)	(1,550)	(1,583)		(1,549)
NORC surveys										
Approving						38	46	45	44	
Disapproving						57	51	50	52	
No opinion						5	3	5	4	
Total						100	100	100	100	
Total respondents						(1,613)	(1,504)	(1,484)	(1,490)	
National Fertility Studies										
Approving	8				21					
Disapproving	91				76					
No opinion	1				3					
Total	100				100					
Total respondents	(4,810)				(5,981)					

NOTE: The questions asked on the three major data sets differed somewhat. See discussion in the text.

SOURCES: Nationwide Gallup and National Opinion Research Center surveys of voting age adults and the 1965 and 1970 National Fertility Studies of married women in the reproductive ages.

This item appeared second in a list of questions on abortion beginning with the justification in terms of possible child deformity. The NORC question —both because of the order in which it was asked and because it did not point up any difference between stress and nonstress reasons—avoided a possible negative bias, but may have engendered a positive one. A number of respondents may have responded affirmatively on the grounds of implicit stress reasons for not wanting a child. In effect, respondents had no way of knowing that additional questions were going to be asked concerning these reasons (health or finances) and may have injected them into the implicit logic of their responses—a woman may not want any more children because she is ill or in financial difficulties.

The two National Fertility Studies asked:

> I'm going to read you a list of several possible reasons why a woman might have a pregnancy interrupted. Would you tell me whether you think it

> would be all right for a woman to do this if the couple didn't want any more children?

The elective-abortion justification was presented after those concerning the woman's health, the possible illegitimate status of the pregnancy, and financial stress. Instead of asking whether abortion should be legal, these studies asked if it would be "all right." This may have introduced a slight negative bias, since some people feel that, in a pluralistic society, many things should be legal even though given individuals do not consider them "all right."

We see, from the Gallup surveys reported in Table 1, that opposition to elective abortion has clearly declined over the period from the high of 85 percent in 1968 to 63 percent in 1974 and 1977. We may also note that the two surveys in 1968 showed virtually identical results (suggesting high reliability) and that the 1965 and 1970 findings of the National Fertility Studies were very close to those of the Gallup surveys during the same period. Although negative views have declined and positive ones increased over time, it seems clear that the largest changes took place in the late 1960s. Both the Gallup and the NORC surveys evinced relatively little change beginning with 1973.

Regardless of the data base, none of the results shows as many as 50 percent of respondents approving, and most surveys indicate levels of approval that are well below 50 percent. The major incomparability is between the NORC and Gallup surveys: NORC systematically shows higher proportions approving than Gallup. These differences are doubtless due to differences in the wording and order of the questions asked. If, as has been suggested, the Gallup series understates and the NORC series overstates approval of elective abortion, then such approval in the United States in the mid-1970s hovers around 40 percent.

Finally, in an effort to avoid order-effects in questioning and to pose the issue in another way, I commissioned the following question on Gallup surveys in 1972 and 1974:

> Do you believe that there should be no legal restraint on getting an abortion —that is, if a woman wants one she need only consult her doctor, or do you believe that the law should specify what kinds of circumstances justify abortion?

Tabulations of responses to this question are presented in Table 2. They conform with the estimate of around 40 percent approving elective abortion in the mid-1970s based on the NORC and Gallup time series.[10]

When we turn to other specific points relating to the decisions—allowance of abortion after three months of pregnancy, consent of interested parties such as the woman's husband, or use of government funds

Table 2
Responses to a Question Whether There Should Be No Legal Restraint on Abortion or Whether the Law Should Specify Circumstances that Justify Abortion (Percent Distribution)

Sex and Response	September 1972	September 1974
Men		
No legal restraint	40	41
Law should specify circumstances	52	50
No opinion	8	8
Total	100	100
Total respondents	(765)	(790)
Women		
No legal restraint	37	38
Law should specify circumstances	56	55
No opinion	7	7
Total	100	100
Total respondents	(781)	(793)
Men and Women		
No legal restraint	39	40
Law should specify circumstances	54	53
No opinion	7	7
Total	100	100
Total respondents	(1,546)	(1,583)

SOURCES: Gallup surveys of voting age adults, September 1972 and September 1974.

(like Medicaid) for abortions—public opinion diverges even further from the rulings of the Supreme Court.

Abortion After Three Months of Pregnancy In 1970 the National Fertility Study asked a national probability sample of approximately 6,000 American married women under age 45 the following question: "Are you in favor of a law which permits a woman to have an abortion even if she is more than three months pregnant?" In April 1975 I commissioned the same question on a Gallup Survey—a national probability sample that included both men and women of voting age and all marital statuses. Again, a negative bias may have arisen from the wording, since "even if" suggests the action may not be acceptable. Results of both studies are presented in Table 3.

Over the five-year period, there clearly was an increase in willingness to allow abortion after three months of pregnancy; however, as recently as 1975, over 70 percent of women (both in the total sample and among those under age 45 who were married) disapproved of abortion after the first trimester. Men were less disapproving and more positive, but approximately 60 percent of men disapproved nonetheless.

Table 3
Responses to the Question, "Are You in Favor of a Law which Permits a Woman to Have an Abortion Even if She Is More than Three Months Pregnant?" (Percent Distribution)

	Married, under Age 45			All Marital Statuses	
Response	Women 1970	Women 1975	Men 1975	Women 1975	Men 1975
Yes	12	18	27	17	27
No	84	72	61	73	58
Other	4	4	6	5	6
Don't know	3	3	6	5	9
Total	100	100	100	100	100
Total respondents	(5,981)	(327)	(259)	(799)	(800)

SOURCES: National Fertility Study, 1970, and Gallup Survey, April 1975.

In January 1973, during the week following the first two Supreme Court decisions, I commissioned two questions intentionally worded to give favorable responses:

> Some states have laws that say abortion cannot be performed after a woman has been pregnant a certain period of time. Do you think there should be some such time limit or do you think there should be no legal restriction concerning the time when abortion can be performed?
>
> [If there should be a limit]
>
> Taking into account that a woman may not know she is pregnant until three or four weeks after conception, after what month of pregnancy do you think it should be illegal to perform an abortion?

Thirty-five percent of men and 47 percent of women said that abortion should be limited to the first three months, while 16 and 17 percent respectively volunteered that they were against all abortion (Table 4). This conforms with the 1975 result of 58 percent of men and 73 percent of women answering negatively when asked whether abortion should be legal after the first three months of pregnancy (Table 3). Similarly, in 1973, 31 percent of men and 24 percent of women would allow abortion after the third month of gestation, compared with 27 percent of men and 17 percent of women in 1975. Given that the 1973 question called respondents' attention to the need for time in order to discover the fact of pregnancy, these results are remarkably similar. A minority of respondents in either survey would approve abortion beyond the third month of pregnancy.

Table 4
Views on Months of Gestation at Which Abortion May Be Permitted (Percent Distribution)

View	Men	Women
Abortion should never be performed (volunteered)	16	17
Abortion allowable only if pregnancy 3 months or less	35	47
Abortion allowable at 4 months pregnancy duration	6	8
Abortion allowable at 5 or more months[a]	6	5
There should be no legal restriction on timing of abortion	19	11
Other	4	4
No opinion[b]	14	8
Total	100	100
Total respondents	(735)	(773)

[a] Five months (40), six months (41), seven to nine months (3).

[b] Combined "no opinion" responses on both parts of the question.

SOURCE: Gallup survey of voting age adults, January 1973.

Why are respondents so concerned about confining abortion to the early months of pregnancy? One reason appears to be that they regard the fetus as a "human life," or a "human person," very early in the gestational period. The data in Table 5 for 1973 and 1975 on when "human life" begins stem from the following question:

> It is sometimes said that the morality of abortion rests on the question of when one thinks human life begins. For example, some people believe that it begins at conception, that is, when sperm and egg first meet. Others say that it begins only when the woman first feels movement inside her (what is sometimes called quickening), and still others say that human life has begun when the unborn baby could probably survive if it were born prematurely. Finally, there are those who hold that human life begins only with the actual birth of a baby. Which of these alternatives best expresses your views?
>
> 1. Human life begins at conception.
> 2. Human life begins at quickening.
> 3. Human life begins when the unborn baby could probably survive on the outside if it were born prematurely.
> 4. Human life begins only at birth.

A second type of question asked in 1975 attempted to present the respondent with the specific issue of when he or she would view the unborn as a "human person."

With regard to when "human life" begins, the majority of respondents dated it before birth, and in both 1973 and 1975 "at conception" was the modal response. There was a clear differential between the sexes, with men more likely to see life beginning at a later point than women. Respondents were, if anything, more conservative in 1975 than in 1973—perhaps a response to "right to life" propaganda on this specific issue.

Table 5
Responses to Questions on When Human Life Begins and When the Unborn May Be Considered a Human Person (Percent Distribution)

Time	Life Begins 1973	Life Begins 1975	Unborn Is a Person 1975
		Men	
At conception	36	43	33
At quickening	19	15	15
At viability	15	14	22
At birth	19	20	18
Don't know/other	11	8	12
Total	100	100	100
Total respondents	(735)	(794)	(800)
		Women	
At conception	50	58	51
At quickening	23	16	18
At viability	12	11	15
At birth	8	10	8
Don't know/other	7	5	7
Total	100	100	100
Total respondents	(773)	(800)	(799)

SOURCES: Gallup surveys, January 1973 and April 1975.

The question on the "human person" reduced somewhat the proportion of respondents who said "at conception" (especially among men), but left unchanged the proportion placing it before birth. In short, most men and women place both "human life" and personhood early in the gestational process, and this public definition of the situation may be important in coloring attitudes toward the timing of abortion. Moreover, it is a view that is both at odds with that of the Supreme Court and at variance with what the Court believed public opinion to be. For example, in 1973 the Court said,

> We need not resolve the difficult question of when life begins. . . . It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. *There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained.*[11]

Table 6 shows that even among non-Catholics, a plurality felt that human life begins at conception. Responses to the question on when the unborn may be considered a person showed a similar pattern by religion (data not shown).

Table 6
Responses by Religion to a Question on When Human Life Begins (Percent Distribution)

Time Life Begins	Men		Women	
	Catholic	Non-Catholic	Catholic	Non-Catholic
		1973		
At conception	49	31	61	45
At quickening	15	20	19	25
At viability	16	15	10	13
At birth	12	21	5	9
Don't know/other	8	13	5	8
Total	100	100	100	100
Total respondents	(200)	(535)	(230)	(543)
		1975		
At conception	52	41	75	52
At quickening	17	14	13	17
At viability	15	14	4	13
At birth	13	22	7	11
Don't know/other	5	9	1	7
Total	100	100	100	100
Total respondents	(200)	(594)	(212)	(588)

SOURCES: Gallup surveys, January 1973 and April 1975.

Abortion and the Husband's Consent In its 1973 abortion decisions, the Court did not confront the issues of spousal and parental consent.[12] However, the 1976 decision affirmed the woman's right to obtain an abortion regardless of spousal or parental approval (if she is a minor).

Although no information is available at this time concerning public views on parental approval, public attitudes toward the husband's consent may be considered here. First, we can look at results of a question, "Are you in favor of a law which permits a woman to have an abortion even if her husband is against it?", that was originally asked on the 1970 National Fertility Study and again on a Gallup survey in 1975. Table 7 shows that in 1975 only about one-third of respondents approved a woman's right to have an abortion when her husband opposed it. Close to 60 percent disapproved. As compared with 1970, however, this is an issue where considerable change has occurred—among married women under 45, approval increased from 15 to 35 percent. As perhaps might be expected, although men are generally more favorable toward abortion than women, in this instance they are less so.

Table 7
Responses to a Question
Whether a Woman
Should Be Allowed to Have an Abortion
if her Husband Opposes It (Percent Distribution)

	Married, under Age 45			All Marital Statuses	
Response	Women 1970	Women 1975	Men 1975	Women 1975	Men 1975
Yes	15	35	34	33	35
No	81	57	58	56	52
Other	4	5	4	6	6
Don't know	—	3	4	5	7
Total	100	100	100	100	100
Total respondents	(5,981)	(327)	(259)	(799)	(800)

SOURCES: National Fertility Study, 1970, and Gallup survey, April 1975.

Next we can look at the results (Table 8) of a question that was worded somewhat more mildly, "Do you think it should be lawful for a woman to be able to get an abortion operation without her husband's consent?", asked in 1972 and 1974 on Gallup surveys. This question also brought out a high rate of disapproval—less than the previous question in 1970 and slightly more than in 1975.

In sum, there is a very low rate of approval, even among women, for the woman's right to have an abortion without her husband's consent.

Abortion at Government Expense As has been noted already, a number of states have curtailed or forbidden the use of Medicaid funds, or other public monies, for purposes of abortion. Pressure on Congress to pass inhibiting legislation concerning this issue continues to be strong. Again, public opinion diverges from the views of the Court. In response to a question asked in the 1970 National Fertility Study and in the 1975 Gallup Survey, "Are you in favor of a law which permits a woman to have an

Table 8
Responses to a Question Whether It Should Be Lawful for a Woman to Be Able to Get an Abortion without her Husband's Consent (Percent Distribution)

	Men		Women	
Response	1972	1974	1972	1974
Under Age 45				
Should	22	24	24	31
Should not	68	66	68	61
Depends	6	8	7	6
Don't know, no opinion	4	2	1	2
Total	100	100	100	100
Total respondents	(377)	(411)	(406)	(410)
Total Sample				
Should	20	24	22	28
Should not	66	66	66	62
Depends	8	8	7	6
Don't know, no opinion	6	2	5	4
Total	100	100	100	100
Total respondents	(734)	(763)	(797)	(789)

SOURCES: Gallup Surveys, August 1972 and September 1974.

abortion even if it has to be at government expense?", 57 percent of respondents answered negatively in 1975 and 35 percent positively, with virtually no variation by age or sex. American women were somewhat less negative than in 1970, when 66 percent opposed government subsidy, but the five-year period clearly did not greatly change Americans' views. It is possible that a share of negative responses to the question relates to hostility toward government expense generally; however, the political implications are the same. Apparently, publicly financed abortion is, like food stamps, an unpopular government expense.

Effects on Public Opinion of the 1973 Supreme Court Decisions None of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important positive effect on opinion. The longest series—from 1968 through 1977 on elective abortion—shows a leveling off of opinion after 1970 and only a modest increase in approval by 1974 that remained unchanged by 1977. This increase can hardly be said to constitute a sharp rise in a long-term upward trend in approval antedating the Court's decisions.

One reason for the apparent lack of effect is that, even by 1975, less

Table 9
Approval of Abortion in Relation to Knowledge of the Supreme Court's 1973 Decisions

Knowledge of Supreme Court Decisions	Percent Approving Abortion								
	Without Husband's Consent			After Three Months Pregnant			At Government Expense		
	High School Incomplete	Complete High School or More	Total	High School Incomplete	Complete High School or More	Total	High School Incomplete	Complete High School or More	Total
				Men					
Knows made it easier to get abortion	38	47	45	22	36	33	30	46	42
Does not know of decisions, or wrong effect	19	32	26	15	26	21	19	30	25
Total	25	40	35	17	31	27	22	38	33
				Women					
Knows made it easier to get abortion	27	46	42	13	24	21	32	44	41
Does not know of decisions, or wrong effect	15	31	25	7	16	12	19	30	26
Total	20	39	33	9	20	16	24	37	33

SOURCE: Gallup Survey, April 1975.

than half of American adult respondents were informed about the 1973 decisions. This conclusion stems from response to the following questions:

> During the past three years, have you heard of decisions by the Supreme Court concerning abortion?
>
> [If yes,]
>
> As you understand these decisions, which one of these effects would you expect them to have had on a woman's ability to get a legal abortion if she wanted one?
>
> 1. Made no change.
> 2. Made it easier.
> 3. Made it harder.
> 4. Other.
> 5. Don't know.

Twenty-eight percent of men and 22 percent of women had never heard of the decisions, whereas 45 percent of men and 48 percent of women had heard of them and knew that their effect was to make it easier to have an abortion.[13] It seems logical to reason that widespread knowledge concerning the decisions might have induced more favorable views by the public. Indeed, among those who were informed on the 1975 survey, response was more positive concerning the questions on the husband's consent, abortion past three months of gestation, and abortion at government expense (Table 9). Moreover, this result remains even when educational level is controlled. We cannot be sure, however, about the causal direction involved. It may well be that people who were initially more favorable toward abortion were also more aware of Supreme Court decisions concerning it. Only a panel study could answer such a question definitively.

Attitudes Toward Proposed Constitutional Amendments Restricting Abortion If popular support for important aspects of the Court's decisions is weak, does this imply that the public would favor a highly restrictive constitutional amendment regarding abortion—an amendment to outlaw it altogether or allow it only if the pregnant woman's life is endangered?

A variety of data suggest that the public overwhelmingly approves abortion if the woman's health is in danger. From the middle 1960s to 1977 approval of this justification has been well over 80 percent, according to the Gallup and NORC surveys and the National Fertility Studies. Moreover, the consistency of results from all data sets is quite remarkable. However, during September 1976, when a New York Times-CBS national survey asked, "Do you favor an amendment to the Constitution which would make abortions illegal, or do you oppose such a law?", 32 percent were found to approve such extremely severe legislation—legislation that would not even allow abortion to save the pregnant woman's life. Opposition amounted to 56 percent. The remaining respondents did not express an opinion.[14]

The surprisingly high percentage favoring such an amendment in 1976 may reflect a deterioration of public approval, or it may reflect an assumption by some respondents that the question meant making abortion illegal except where the woman's health was endangered. The results of a recent Gallup survey are indicative of public views on an amendment outlawing abortion except for health reasons. In late February 1976 Gallup asked:

> A constitutional amendment has been proposed which would prohibit abortions except where the pregnant woman's life is in danger. Would you favor this amendment which would prohibit abortion or would you oppose it?

The nation was almost equally divided, with 45 percent favoring such an amendment and 49 percent opposing it. The remaining respondents did not express an opinion.[15]

This result, too, suggests an ambivalence in views concerning abortion since, in surveys taken prior to 1976, rape and child deformity as justifications for abortion were approved by almost as many respondents as the woman's health.[16] For example, in the 1975 NORC survey both rape and child deformity elicited 80 percent responding positively, compared with 88 percent for the woman's health.[17] In any event, the 1976 data serve to buttress our other information on the public's conservatism with respect to the abortion issue.[18]

And One Step Back?

Full implementation of the US Supreme Court's decisions on abortion will be complex, involving individuals and agencies ranging from the local to the national levels of the country. Moreover, the issues and rights embedded in the decisions are also intricate. Certainly they are not encompassed by the Court's constitutional reasoning concerning a woman's right to privacy. Indeed, some of the issues seem to involve irreconcilable differences such as cases in which a wife wishes to terminate a pregnancy and her husband strongly opposes it.

The existing combination of a highly organized and vocal opposition to abortion, plus an electorate that largely opposes much of the content of the Court's rulings, suggests that supporters of the decisions must anticipate a long fight in order to realize anything close to full implementation. Actually, just holding present ground is proving to be a constant battle. Hence, although it would be a gross exaggeration to suggest that access to abortion has not undergone extensive liberalization, it would be equally misguided to believe that the Court's intent is not widely and purposively frustrated. In fact, it is by no means clear whether the cause of elective abortion is better or worse off today than it would have been had states been allowed to continue to adopt liberalized abortion statutes without judicial prodding. For those interested in assessing the effectiveness of judicial review as a mechanism of social change, it is a question worth asking.

Notes

1. Collateral deterrence involves indirect means of noncompliance with a judicial ruling, such as, in the case of abortion, overregulation of clinics, withholding of Medicaid (government financed medical insurance) funds, passing statutes requiring that physicians supply elaborate statistical information (including the woman's name) concerning every abortion, reluctance by public hospitals to perform abortions, and similar stratagems. For examples, see Jeannie I. Rosoff, "Is support of abortion political suicide?," *Family Planning Perspectives* 7, no. 1 (January/February 1975): 13–22, and, by the same author, "Pregnancy counseling and abortion referral for patients in federally funded family planning programs," *Family Planning Perspectives* 8, no. 1 (January/February 1976): 43–46. Also, Edward Weinstock et al., "Abortion need and services in the United States, 1974–1975," *Family Planning Perspectives* 8, no. 2 (March/April 1976): 58–69.

2. *Family Planning/Population Reporter* 4 (February 1975): 14. Although, to my knowledge, no one has performed a comprehensive analysis of the legal effects of all of the proposed and enacted legislation, it seems to be agreed that a large share of it, perhaps the major share, is obstructive and unconstitutional. The complexity of such an analysis is illustrated by so-called "comprehensive" state abortion bills, parts of which comply with the Court's decisions and parts of which are definitely obstructionist. An interested reader may wish to scrutinize issues of the *Family Planning / Population Reporter* since the Court's 1973 decisions. The *Reporter* reviews state laws and policies in the population field.

3. Weinstock, et al., cited in note 1, p. 68.

4. Christopher Tietze, "The effect of legalization of abortion on population growth and public health," *Family Planning Perspectives* 7, no. 3 (May/June 1975): 123–127.

5. Weinstock, et al., cited in note 1; also, Willard Cates, Jr., and Roger W. Rochat, "Illegal abortions in the United States, 1972–1974," *Family Planning Perspectives* 8, no. 2 (March/April 1976): 86–92.

6. Weinstock, et al., cited in note 1, p. 67.

7. Barbara J. Culliton, "Fetal research: The case history of a Massachusetts law," *Science* 187 (24 January 1975): 237–241; also, by the same author, "Fetal research (II): The nature of a Massachusetts law," *Science* 187 (7 February 1975): 411–413; also "Fetal research (III): The impact of a Massachusetts law," *Science* 187 (28 March 1975): 1175–1176, and "Abortion and manslaughter: A Boston doctor goes on trial," *Science* 187 (31 January 1975): 334–335.

8. Judith Blake, "Abortion and public opinion: The 1960–1970 decade," *Science* 171 (12 February 1971): 540–549; also, by the same author, "Elective abortion and our reluctant citizenry," in *The Abortion Experience*, Howard J. and Joy Osofsky, ed. (Hagerstown, Maryland: Harper and Row, 1973): 447–467. See, also, Elise F. Jones and Charles F. West-

off, "Changes in attitudes toward abortion: With emphasis upon the National Fertility Study data," in *The Abortion Experience*, pp. 468–471.

9. Seymour Martin Lipset, "The waivering polls," *The Public Interest*, no. 43 (Spring 1976): 70–89.

10. Although not related directly to the issue of elective abortion, the results of the following question commissioned by Planned Parenthood on two Gallup surveys in 1972 are frequently cited: "As you may have heard, in the last few years a number of states have liberalized their abortion laws. To what extent do you agree or disagree with the following statement regarding abortion: The decision to have an abortion should be made solely by a woman and her doctor." Agreement in January 1972 was 57 percent and in June it was 64 percent. In another article ("Elective abortion and our reluctant citizenry," cited in note 8), I have devoted some pages to a discussion of the biases involved in this question. Essentially, it suggests abortion for medical reasons only, and indirectly stresses the importance of the woman's resistance to coercion by parents, a spouse or lover, welfare agencies, etc.: by default, it implies that no one has a legitimate interest in the woman's pregnancy but herself. These biases come about through the common fault of the "implied alternative." No explicit alternative is offered in the question, so respondents are free to fill in such alternatives as come to mind. Since no other forms of questioning have found a result of this type, we must suspect that affirmative answers were given by a number of respondents who were actually opposed to liberalizing the abortion laws.

11. See Roe v. Wade, *The United States Law Week* 41, (23 January 1973), 4227.

12. Roe v. Wade, cited in note 11, p. 4229, footnote 67.

13. Herbert H. Hyman, Charles R. Wright, and John Shelton Reed have accumulated and tabulated the results of a large number of American surveys containing questions designed to ascertain respondents' levels of information on a variety of public affairs topics. For the early 1970s, the level of information about abortion (47 percent) compares with proportions knowing of Nationalist China, knowing their congressman's name, or knowing the school board head's name. By contrast, 88 percent knew who was the governor of their state or had heard of the Arab-Israeli conflict; whereas only 24 percent knew the names of two Supreme Court justices. These data are derived from Hyman, Wright, and Reed, *The Enduring Effects of Education* (Chicago: University of Chicago Press, 1975), Table 4.1 (no page numbers).

14. *New York Times*, 10 September 1976.

15. *San Francisco Chronicle*, 18 March 1976.

16. See, for example, William Ray Arney and William H. Trescher, "Trends in attitudes toward abortion, 1972–1975," *Family Planning Perspectives* 8, no. 3 (May/June 1976): 117–124.

17. Arney and Trescher, p. 118.

18. They suggest, as well, that the decline in approval for all justifications taken individually, found in the 1975 NORC survey as compared with 1974, may have substantive, if not statistical significance. See, for example, Arney and Trescher, cited in note 16 p. 118.

Senator HATCH. Thank you, Dr. Adamek.

Dr. Bryant, we will now turn to you.

STATEMENT OF BARBARA BRYANT, GROUP VICE PRESIDENT, MARKET OPINION RESEARCH

Ms. BRYANT. Thank you, Senator Hatch and members of the subcommittee for this chance to testify.

I am Dr. Barbara Everitt Bryant, the group vice president of Market Opinion Research, a national survey research and opinion polling and consulting organization.

I am here this afternoon to present public opinion data from two sources on the issue of abortion. The first of these sources is a new survey completed by Market Opinion Research on public opinion about the abortion issue and proposed constitutional amendments and laws.

This research is based on 1,500 interviews conducted by telephone September 14–23, 1981, with random samples of registered voters in three areas chosen for their diversity. The areas were Springfield, Mass., and its suburbs, in the East; Des Moines, Iowa, and its environs in nine surrounding counties in the heart of the Midwest; and Seattle and Tacoma, Wash., and their suburbs in four counties, an obviously Western area.

My second source is a literature search and annotated bibliography prepared by Market Opinion Research under my direction, covering approximately 200 separate polls, magazine, and journal articles. It is more extensive than Dr. Adamek might have suggested, and since it is much too long to read I have submitted it to the subcommittee. It is about a 40-page annotated bibliography covering work from people on both sides of the abortion issue, very much from the national public opinion sources. It includes the listing of the works by Blake which have been cited.

Senator HATCH. Without objection, we will place that in the record.

Ms. BRYANT. Market Opinion Research has a wide variety of clients. This includes a major education study we did some years ago for Kent State University, from which Dr. Adamek is a professor.

I do think it appropriate to acknowledge here that the funding for the three-area survey and for the literature search did come, as you have cited earlier, from the National Abortion Rights Action League.

Turning first to our three-area survey, we find that 6 out of 10 voters feel that abortion is not an issue in which government at any level should be involved. Almost 9 out of 10 feel that abortion is a profoundly personal, private matter that should be decided by a woman in consultation with her doctor, her clergy, her family, or the significant others in her life.

We semantically measured that idea a second way. It is the way that Dr. Adamek cited. But the reason we chose that wording was that it does happen to be an official position of the American Medical Association.

We found on that that 93 percent agree that the decision whether to perform an abortion should rest with the consenting patient and should be performed by a licensed physician in conformance with good medical practice.

Approximately two-thirds agree that any woman who is pregnant should be able to decide whether or not she wants to have an abortion.

From our three-area survey we also made people answer in a forced choice manner whether they feel that abortion is a personal issue, a moral issue, a political issue, or a medical issue; 57 percent of the public having to make one choice said it is a personal issue. A substantial minority—28 percent—feel that it is a moral issue. But only 8 percent perceive it as a political issue, and only 4 percent as a medical issue.

As I said, we measured voter opinions about two proposed constitutional amendments. One would be an amendment to prohibit abortions. The other would be the amendment which you are considering, to give both the States and Congress the power to regulate or prohibit abortions.

We also measured voter opinions of the proposed human life law which says that the Congress finds human life begins at conception.

Seven out of ten voters in these markets oppose enacting a constitutional amendment prohibiting abortions. From our literature search—and Dr. Adamek from his literature search has found—we have found that nationally well above 60 percent oppose such an amendment.

While voters in Springfield, Mass., are divided over the amendment to give the power to both the Congress and the States, voters in Des Moines, Seattle, and Tacoma clearly opposed this. There is more opposition than support for the human life law.

The pattern of opposing or favoring these amendments or laws is similar for those who vote Democrat, Republican, and those who vote as ticket splitters. It is not a politically partisan issue.

Although voters have told us that they consider abortion a personal or moral issue and not a political one, approximately one-third of voters in these areas would not vote for a candidate for Congress whose position differed from their own on enacting an amendment to prohibit abortion.

Since more oppose such an amendment than favor it, Members of Congress or candidates who vote for enacting such an amendment would do so at some peril. They could lose a block of one-fifth to one-quarter of voters by favoring such an amendment.

Of particular importance in what I bring today is our review of public opinion literature and polls, which you have allowed us to submit into the record, and I thank you. As I said, this covers the work of many recognized polling organizations—Gallup, Harris, National Opinion Research Corp.—the three major network polls and many other journal articles.

From this review, I could state that public opinion about abortion has been remarkably stable across the past decade, despite the activities of interest groups and organizations campaigning to either ban abortions or to continue the legality accorded them by the U.S. Supreme Court's 1973 decision.

There are only a few of the many questions asked which are comparable enough technically in content to be trended, and we have trended those. They are in the expanded testimony which I have submitted. These have been asked across the decade by many different organizations.

Despite the fluctuations in support or opposition resulting from different polling organizations using similar questions in slightly different ways—and I agree with Dr. Adamek, wording can make a difference—a number of conclusions can be drawn.

More than 6 out of 10 Americans continue to oppose amending the U.S. Constitution to make abortions illegal or to ban abortions. At least one-quarter of the public feels abortions should be legal under any circumstances, while less than one-fifth would make them illegal under all circumstances. A majority—in the 55 percent range—support abortion under certain circumstances. When presented with specific circumstances, the percentage who would allow abortions is still higher.

More than three-fourths think the decision to have an abortion is for the woman and her doctor to decide; 80 to 90 percent approve of legal abortions for the hard reasons—when the pregnant woman's health is endangered, the pregnancy is a result of rape, and there is a strong possibility of a serious defect in the baby.

Market Opinion Research conducted the literature search on public opinion on abortion prior to developing the questionnaire for the three-market survey. The comparable questions trended—the results of many other public opinion measures—demonstrate that most Americans feel that whether a woman has an abortion is a matter for her to decide. She may want to make that decision in consultation with medical advice or with others close to her.

The public has been very consistent in recognizing that there are circumstances under which some individuals will choose to have an abortion while, in the same circumstances, another individual may not. A large majority support that right of individual choice. This is borne out by their having been a majority opposition over the past 6 years to any amendment to the Constitution which would make abortions illegal.

The questionnaire used in the three-market survey was designed to measure support or opposition to three current proposals for amendments and legislation being considered in the fall of 1981. Survey results demonstrate more opposition than support for all three, and there is little partisan difference in this opposition. Those who vote behaviorally as Democrats, ticket-splitters, or Republicans show similar patterns of opposition to the three proposals.

The three-market survey questionnaire was also designed, however, to test the depth of feeling about abortion being a personal issue. New questions never asked before were used to make this test. The results in these three markets with very different demographic and attitudinal characteristics confirm quite dramatically the belief that abortion is a personal issue and for some it is a moral issue, but it is not a political one.

The public feels that abortion is not an issue in which government should be involved at any level.

Senator Hatch, responding to the question you posed to us at the beginning, I submit that there is social consensus that abortion should be in the realm of private decisionmaking.

[The prepared statement of Dr. Bryant, response to a written question from Senator Hatch and additional material follow:]

PREPARED STATEMENT OF BARBARA EVERITT BRYANT

I am Dr. Barbara Everitt Bryant, Group Vice-President of Market Opinion Research, a national survey research and opinion polling consulting organization. I am here to present public opinion data on the issue of abortion from two sources:

1. A new survey completed by Market Opinion Research on public opinion about the abortion issue and proposed Constitutional amendments and laws. This research is based on 1500 interviews conducted by telephone September 14-23, 1981 with random samples of registered voters in three areas chosen for their diversity: Springfield, Massachusetts and its suburbs in two counties, an Eastern area; Des Moines, Iowa and its environs in nine surrounding counties in the heart of the Midwest; and Seattle and Tacoma, Washington and their suburbs in four counties, a Western area.

2. A literature search and annotated bibliography prepared by Market Opinion Research under my direction covering approximately 200 separate polls, magazine and journal articles, books and data sources concerning public opinion about abortion in the past decade, from 1972 to 1981.

Voter Attitudes About Government Involvement in the Abortion Issue

From our three area survey, we find that:

- 6 out of 10 voters feel that abortion is not an issue in which government at any level should be involved;
- Almost 9 out of 10 feel that abortion is a profoundly personal, private matter that should be decided by a woman in consultation with her doctor, her minister, and her family;
- Two-thirds agree that any woman who is pregnant should be able to decide whether or not she wants to have an abortion;
- Even more agree that the decision whether to perform an abortion should rest with the consenting patient and should be performed by a licensed physician in conformance with good medical practice. (See Table 1)

Table 1. Agreement/Disagreement With Statements About Abortion

	TOTAL VOTERS Springfield MA	TOTAL VOTERS Des Moines IOWA	TOTAL VOTERS Seattle/ Tacoma,WA
Abortion is not an issue in which government at any level should be involved.			
Strongly agree	47%	44%	45%
Agree	14	16	15
TOTAL AGREE*	61%	60%	60%
Somewhat disagree	16%	17%	15%
Strongly disagree	18	20	19
TOTAL DISAGREE*	34%	37%	34%
Abortion is a profoundly personal, private matter that should be decided by a woman in consultation with her doctor, her minister and her family.			
Strongly agree	80%	74%	79%
Agree	10	12	8
TOTAL AGREE*	90%	86%	87%
Somewhat disagree	3%	5%	3%
Strongly disagree	5	7	8
TOTAL DISAGREE*	8%	12%	11%
Any woman who is pregnant should be able to decide whether or not she wants to have an abortion.			
Strongly agree	54%	47%	57%
Agree	14	17	13
TOTAL AGREE*	68%	64%	70%
Somewhat disagree	9%	10%	8%
Strongly disagree	20	23	18
TOTAL DISAGREE*	29%	33%	26%
The decision on whether to perform an abortion should rest with the consenting patient and should be performed by a licensed physician in conformance with good medical practice.			
Strongly agree	85%	79%	83%
Agree	8	11	6
TOTAL AGREE*	93%	90%	89%
Somewhat disagree	--	3%	2%
Strongly disagree	4%	6	5
TOTAL DISAGREE*	4%	9%	7%
BASE:	(499)**	(500)**	(499)**

*Missing percent neutral or don't know.

** Possible sampling error for random samples of 500 in each market is ±4.5% at the 95% confidence level.

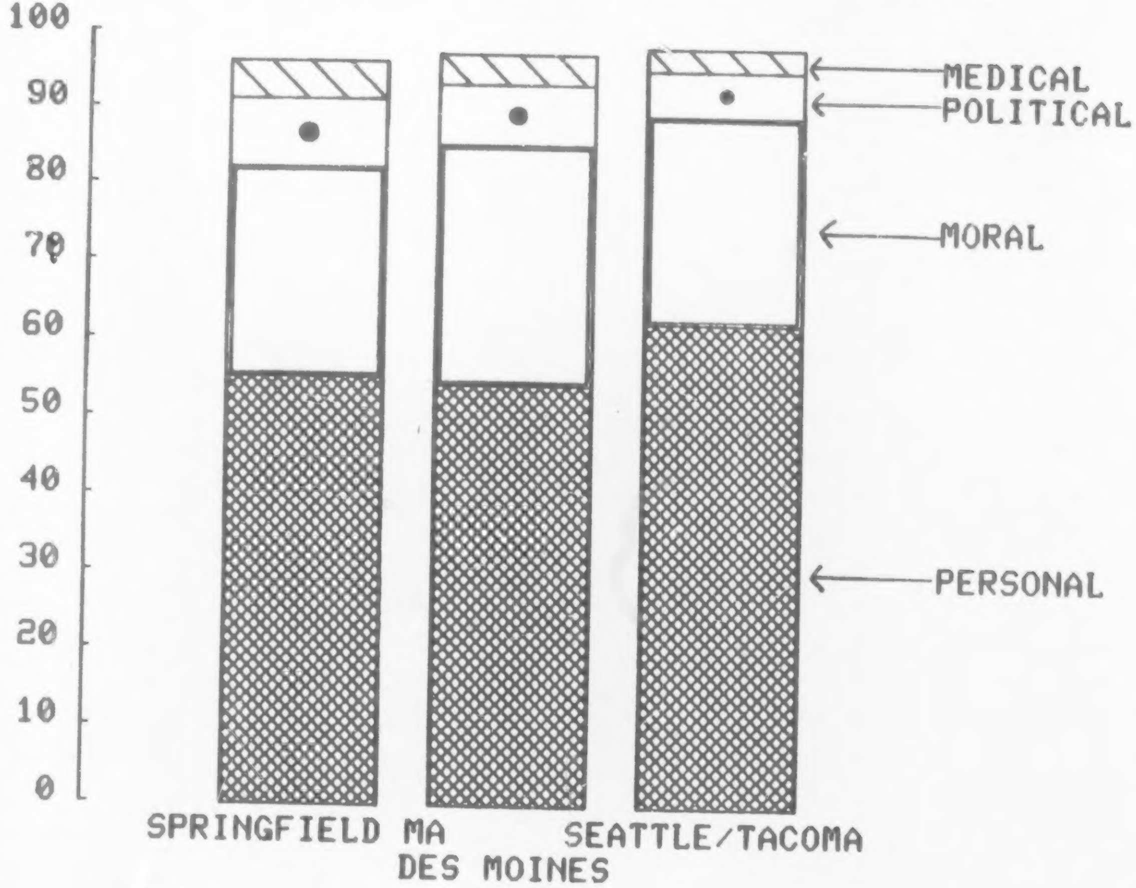
From our three area survey, we also find that a 57% majority of the public feels that abortion is a personal issue. A substantial minority (28%) feel that it is a moral issue. Only 8% perceive it as a political issue (See Table 2 and Figure 1) and 4% as a medical issue.

Table 2

Do you think abortion is mostly a political issue, moral issue, medical issue or personal issue?

	TOTAL VOTERS Springfield MA	TOTAL VOTERS Des Moines IOWA	TOTAL VOTERS Seattle/ Tacoma,WA
Political issue	9%	8%	6%
Moral issue	27	31	27
Medical issue	5	4	3
Personal issue	55	54	62
Don't know/refused	4	3	2
BASE	(499)	(500)	(499)

FIG 1--HOW ABORTION IS PERCEIVED AS AN ISSUE



Voter Attitudes Toward Specific Anti-Abortion Legislation

We measured voter opinions about two proposed Constitutional amendments--the amendment to prohibit abortions and the amendment to give both the states and Congress the power to regulate or prohibit abortions. We also measured voters opinions of the proposed human life law. The results are shown on Table 3.

Seven out of 10 voters in these markets oppose enacting a Constitutional amendment prohibiting abortions. From our literature search we found nationally well over 60% oppose such an amendment. While voters in Springfield are divided over a states rights amendment, voters in Des Moines and Seattle/Tacoma clearly oppose one. There is more opposition than support for the human life law. The pattern of opposing or favoring these amendments or law is similar for those who vote Democrat, Republican, and those who vote as ticket splitters (Table 4 and Figures 2A,2B,2C).

Voter Attitudes Toward Legislators Who Support A Ban On Abortions

Although voters have told us that they consider abortion a personal or moral issue and not a political one, approximately one third of voters in these areas would not vote for a candidate for Congress whose position differed from their own on enacting an amendment to prohibit abortion.

Since most oppose such an amendment, members of Congress or candidates who vote for enacting such an amendment would do so at their peril. They could lose a block of one-fifth to one-quarter of voters by favoring such an amendment (see Table 5 and Figure 3).

Table 3

Three proposals about abortion have been brought up in Congress. For each, please tell me whether you favor or oppose it.

	TOTAL VOTERS Springfield, MA	TOTAL VOTERS Des Moines, IOWA	TOTAL VOTERS Seattle/Tacoma, WA
Enacting a Constitutional Amendment prohibiting abortions (AMENDMENT TO PROHIBIT)			
Favor	26%	21%	17%
Oppose	72	75	79
Don't know	1	4	3
Refused	1	--	1
	100%	100%	100%
Enacting a Constitutional Amendment which said that both Congress and the states have power to regulate or prohibit abortions. The stricter law would apply if federal and state laws differed. (STATES RIGHTS AMENDMENT)			
Favor	45%	36%	26%
Oppose	41	54	59
Don't know	13	10	14
Refused	1	--	1
	100%	100%	100%
Passing a law that says: "The Congress finds that the life of each human being begins at conception." (HUMAN LIFE LAW)			
Favor	37%	44%	36%
Oppose	50	49	54
Don't know	10	7	10
Refused	3	--	--
	100%	100%	100%
BASE:	(499)	(500)	(499)

MARKET OPINION RESEARCH

Table 4.

Favor or Oppose Amendment/Law by Past Voting Behavior

	SPRINGFIELD, MA			DES MOINES, IOWA			SEATTLE/TACOMA, WA		
	Democrat	Ticket/ Splitter	Republican	Democrat	Ticket/ Splitter	Republican	Democrat	Ticket/ Splitter	Republican
Amendment to Prohibit Abortions									
Favor*	23%	30%	21%	17%	26%	20%	12%	17%	21%
Oppose*	75	68	78	79	71	77	86	82	74
"States Rights" Amendment									
Favor*	42%	47%	48%	33%	38%	35%	23%	28%	27%
Oppose*	42	43	39	58	49	58	63	58	59
"Human Life" Law									
Favor*	35%	41%	30%	43%	45%	43%	27%	39%	42%
Oppose*	52	47	59	50	46	55	63	54	46

* Don't know and refused omitted.

FIG 2A--AMENDMENT TO PROHIBIT OPPOSITION BY VOTING BEHAVIOR

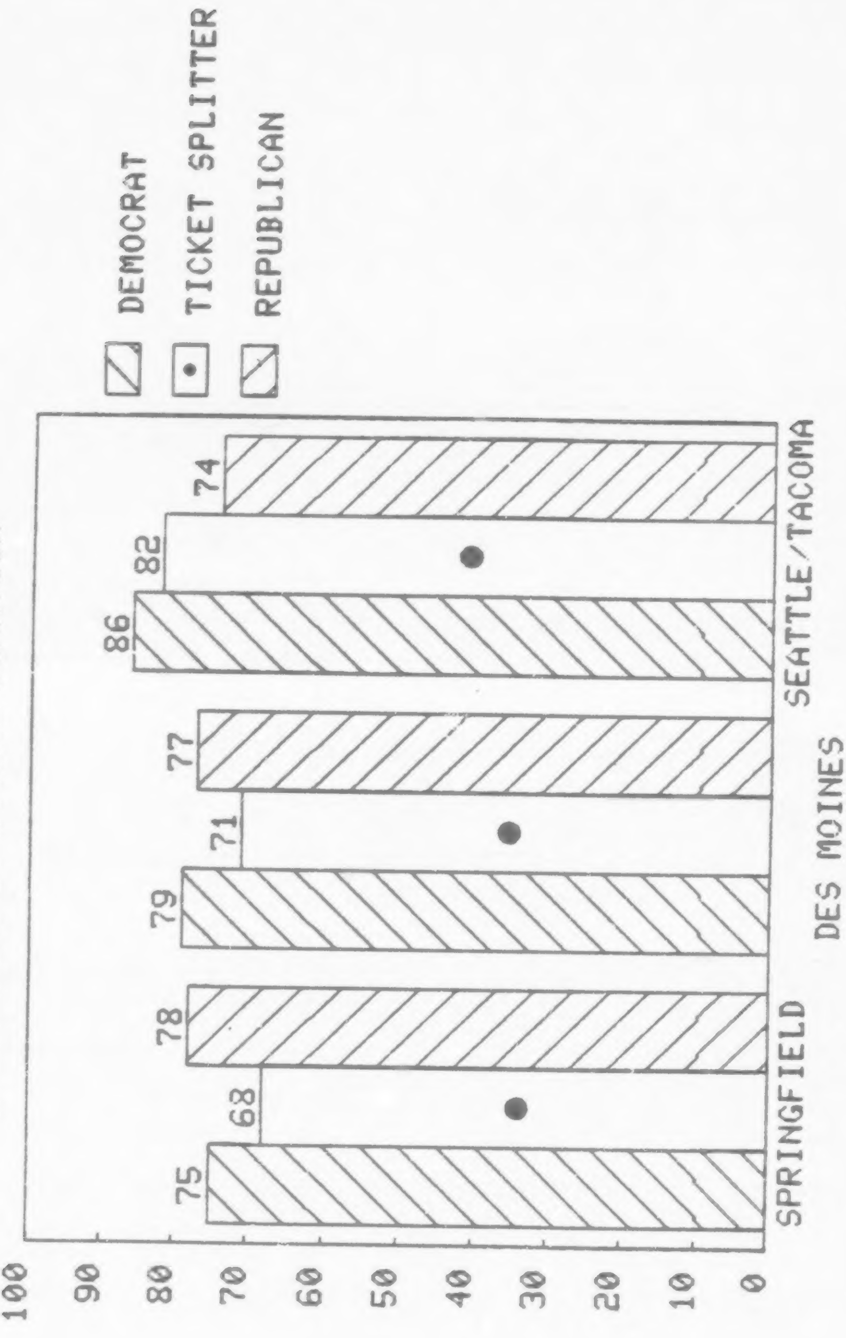


FIG 2B--STATES RIGHTS AMENDMENT
OPPOSITION BY VOTING BEHAVIOR

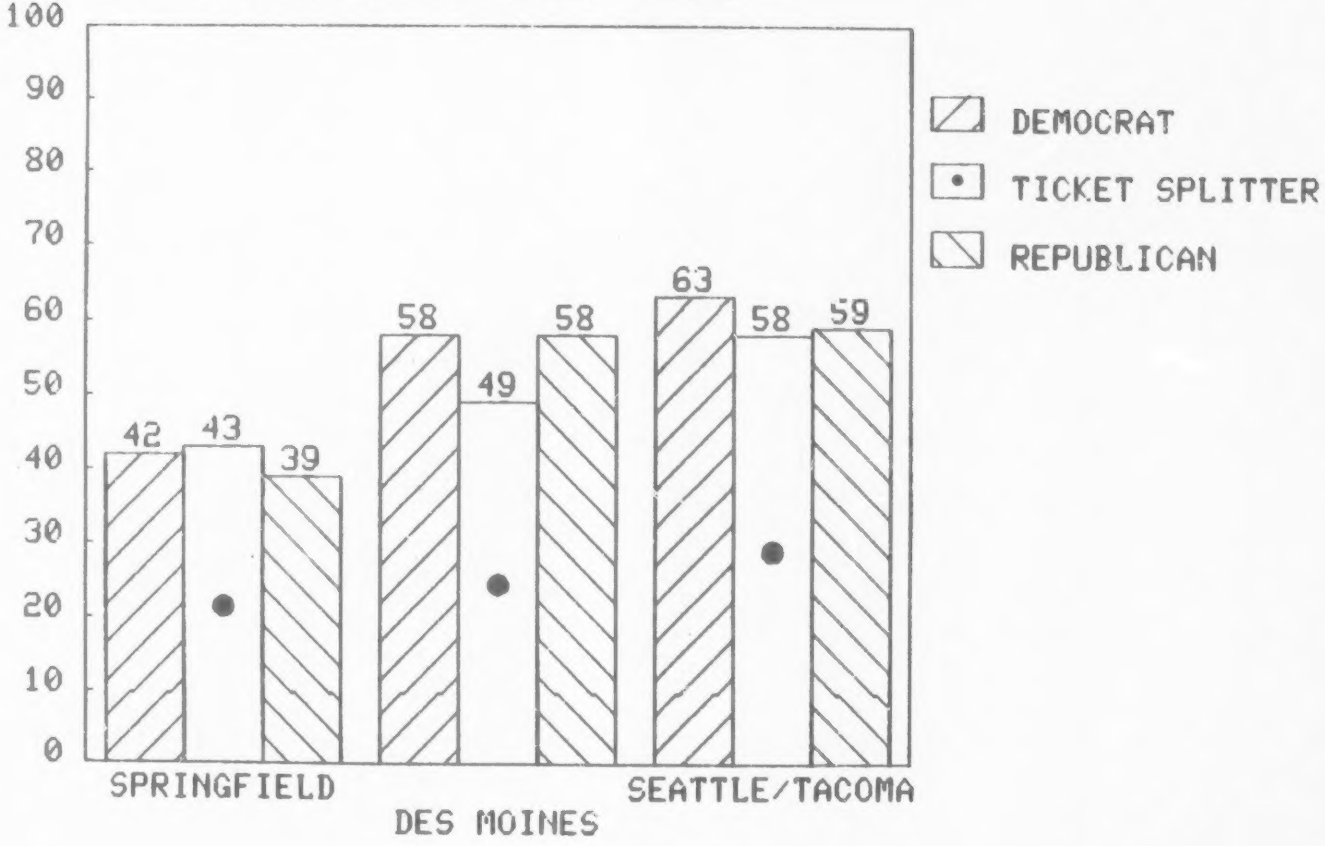


FIG 2C--HUMAN LIFE LAW
OPPOSITION BY VOTING BEHAVIOR

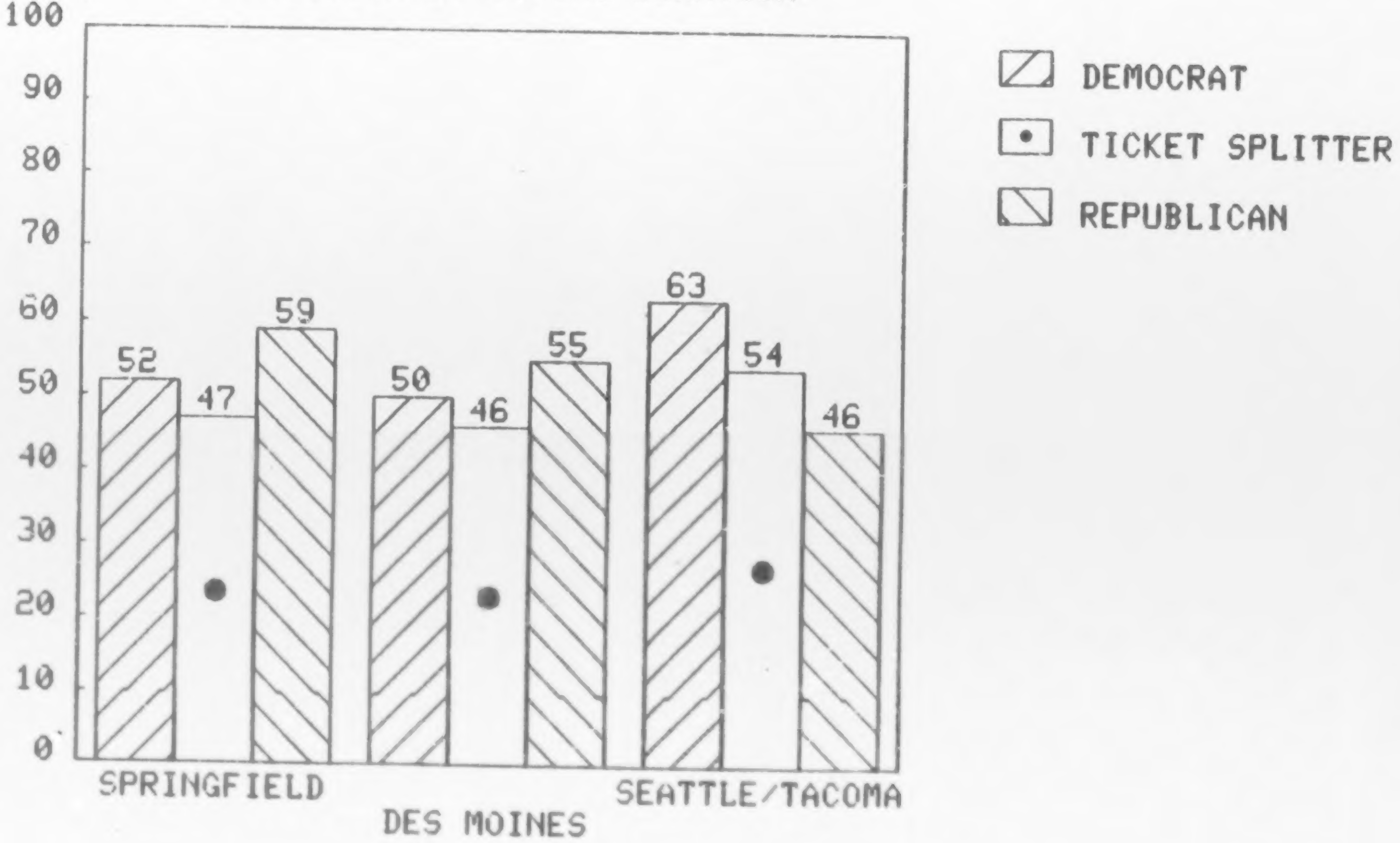


Table 5

Vote for Congressional Candidate by Stand on Amendment to Prohibit Abortion

Favor Amendment to Prohibit Abortions.

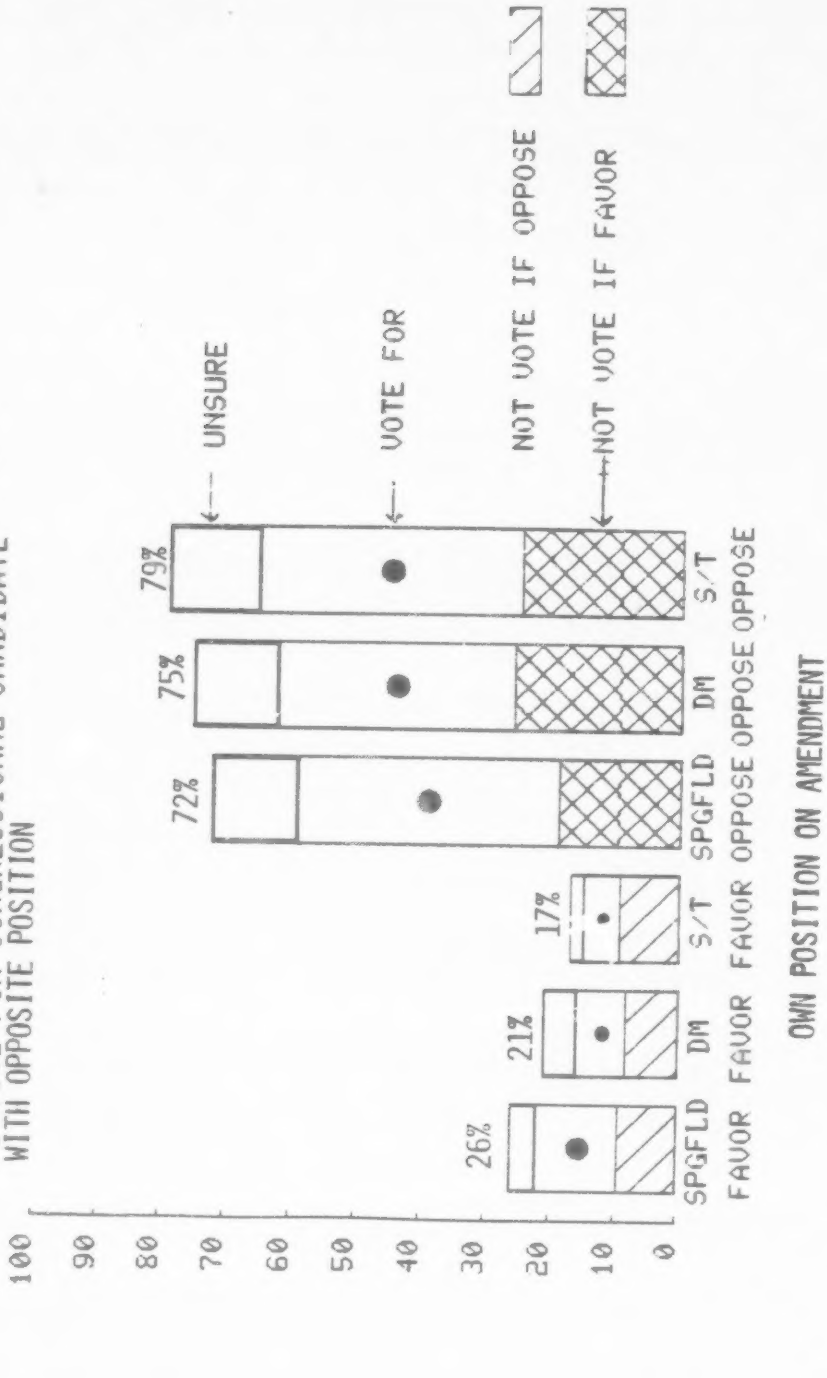
	Springfield MA	Des Moines IOWA	Seattle/ Tacoma, WA
Would not vote for Congressional candidate who opposed amendment to prohibit	9%	8%	9%
Would vote for Congressional candidate who opposed amendment to prohibit	13	8	6
Unsure of effect on voting	4	5	2
TOTAL FAVOR	26%	21%	17%

Oppose Amendment to Prohibit Abortions.

Would not vote for Congressional candidate who favored amendment to prohibit	19%	26%	25%	*
Would vote for Congressional candidate who favored amendment	40	36	40	
Unsure of effect on voting	13	13	14	
TOTAL OPPOSED	72%	75%	79%	

* Box is percent of voters who oppose an amendment to ban abortions and would not vote for a candidate who favored such an amendment.

FIG 3--POSITION ON AMENDMENT PROHIBITING ABORTIONS VS VOTE FOR CONGRESSIONAL CANDIDATE WITH OPPOSITE POSITION



Literature Search on Public Attitudes About Abortion 1972-1981

From our review of public opinion literature and polls, I can state that public opinion about abortion has been very stable across the past decade, despite the activities of interest groups and organizations campaigning to either ban abortions or to retain the legality accorded abortions by the U.S. Supreme Court's 1973 decision. Key poll questions which are reasonably comparable in content, and which have been asked across most of the decade between 1972 and 1981, are trended in Table 6.

Despite the fluctuations in support or opposition resulting from different polling organizations asking similar questions in slightly different ways, a number of conclusions can be made:

- More than 6 out of 10 American adults (about 62%) continue to oppose amending the U.S. Constitution to make abortions illegal/ban abortions. At least one quarter of the public feels abortions should be legal under any circumstances, while less than one-fifth would ban all abortions. A majority in the 55% range support abortion under certain circumstances. When presented with certain specific circumstances, the percentage who approve of abortions is still higher.
- More than three-fourths think the decision to have an abortion is for the woman and her doctor to decide.
- Eighty to ninety percent (80-90%) approve of legal abortions when: the pregnant woman's health is endangered; the pregnancy is a result of rape; and when there is a strong possibility of a serious defect in the baby.

Table 6. (Comparable Survey Questions (Question wordings differ) 1972-1981

A. Do you favor or oppose an amendment to the Constitution which would make abortions illegal? (Also worded: prohibit abortions/ban legal abortions)

	1975	1976	1976	1976	1977	1977	1978	1980	1980	1980	1980	1980	1981	1981	1981
Favor amendment to make abortions illegal	27%	29%	26%	45%*	34%	23%	34%	34%	32%	29%	35%	34%	22%	29%	27%
Oppose	64	58	66	49	52	70	51	61	58	62	57	62	71	62	67
No opinion	9	13	8	6	14	7	15	5	10	9	8	4	7	8	6
SOURCE:	(11)	(4)	(5)	(1)	(11)	(5)	(11)	(2)	(4)	(4)	(4)	(2)	(5)	(6)	(5)

* Makes exception if woman's life in danger.

B. Do you feel that abortion should be legal under all circumstances, legal only under certain circumstances, or illegal under all circumstances?

	1975	1977	1978	1979	1979	1980	1981	1981	1981	1981	1981	1981
Legal all circumstances	21%	22%	26%	19%	22%	25%	25	27%	25%	38%	23%	40%
Legal certain circumstances	54	55	47	64	54	53	54	58	60	51	52	50
Illegal all circumstances	22	19	23	13	19	18	15	12	10	8	21	10
No opinion	3	4	4	4	5	4	6	2	5	4	4	--
SOURCE:	(1)	(1)	(13)	(17)	(1)	(1)	(17)	(14)	(15)	(16)	(1)	(3)

SOURCES:

1 - The Gallup Poll/National
2 - The Harris Survey/National
3 - ABC Poll/National
4 - CBS Poll/NY Times/National
5 - NBC Poll/AP/National
6 - Market Opinion Research/National

7 - Knight Ridder/21 Cities
8 - Bureau of Social Science Research/Wash.,D.C.
9 - Virginia Slims/Roper Organization/National

11 - Cambridge Survey Research/National
12 - NORC General Social Survey/National

13 - Market Opinion Research/Michigan women
14 - Market Opinion Research/Springfield,MA area
15 - Market Opinion Research/Des Moines,IO area
16 - Market Opinion Research/Seattle/ Tacoma, WA area
17 - Dresner & Tortorello for NARAL/National

Table 6, continued. Comparable Survey Questions (Question wordings differ) 1972-1981

C. Right (Decision) of woman to have an abortion for her and her doctor to decide.

	1974	1975	1976	1976	1977	1979	1980	1980	1980	1981	1981
Agree	72%	77%	67%	81%	77%	68%	76%	76%	78%	75%	78%
Disagree	16	20	26	15	22	28	20	20	18	21	18
No opinion	12	4	7	4	4	4	4	4	4	4	4
SOURCE:	(9)	(8)	(4)	(7)	(4)	(4)	(9)	(5)	(5)	(5)	(5)

† All circumstances
†† Certain circumstances

(continued next page)

SOURCES:

1 - The Gallup Poll/National
2 - The Harris Survey/National
3 - ABC Poll/National
4 - CBS Poll/NY Times/National
5 - NBC Poll/AP/National
6 - Market Opinion Research/National
7 - Knight Ridder/21 Cities
8 - Bureau of Social Science Research/Wash.,D.C.
9 - Virginia Slims/Roper Organization/National
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14 - Market Opinion Research/Springfield,MA area
15 - Market Opinion Research/Des Moines, IO area
16 - Market Opinion Research/Seattle/Tacoma, WA area
17 - Dresner & Tortorello for NARAL/National

Table 6, continued. Comparable Survey Questions (Question wordings differ) 1972-1981

D. Percent of adults approving of legal abortion in various circumstances.

	1965	1972	1973	1974	1975	1975	1976	1976	1977	1978	1980	1981
If the woman's health is seriously endangered by the pregnancy	73%	87%	92%	92%	88%	91%	89%	91%	90%	91%	90%	92%
If she becomes pregnant as a result of rape	59	79	83	86	80	84	80	84	84	83	83	88
If there is a strong chance of a serious defect in the baby	57	79	84	85	80	83	82	84	85	82	83	87
If the family has a very low income and cannot afford any more children	22	49	53	55	51	53	51	53	53	47	52	--
If she is not married and does not want to marry the man	18	43	49	50	46	48	48	50	50	41	48	--
If she is married and does not want any more children	16	40	48	47	44	46	45	46	46	40	47	--
For any reason	na	na	na	na	na	na	na	na	38	33	41	--
Average approval for the six specified reasons	41	63	68	69	65	67	66	68	68	64	67	--
SOURCE:	(12)	(12)	(12)	(12)	(1)	(12)	(1)	(12)	(12)	(12)	(12)	(18)

SOURCES:
1 - Gallup Poll/National
12 - NORC (National Opinion Research Center)/General Social Survey/National
18 - Yankelovitch, Skelly & White for LIFE

Summary

Market Opinion Research conducted the literature search on public opinion about abortion prior to developing the questionnaire for the three market survey. The comparable questions shown trended in Table 6 and results of many other public opinion measures demonstrated that most Americans feel that whether a woman has an abortion is a matter for her to decide. She may want to make that decision in consultation with medical advice or with others close to her.

The public has been very consistent in recognizing that there are circumstances under which some individuals will choose to have an abortion while in the same circumstances another individual may not. A large majority support that right of individual choice. This is borne out by their having been majority opposition over the past six years to any amendment to the Constitution which would make abortions illegal.

The questionnaire used in the three market survey was designed to measure support or opposition to three current proposals for amendments and legislation in the fall of 1981. Survey results demonstrate more opposition than support for all three. There is little partisan difference in this opposition. Those who vote behaviorally as Democrats, ticket splitters or Republicans show similar patterns of opposition to the three proposals.

The three market survey questionnaire was also designed, however, to test the depth of feeling about abortion being a personal issue. New questions never asked before were used to make this test. The results in these three markets with very different characteristics confirm quite dramatically the belief that abortion is a personal issue and, for some, a moral issue. It is not a political one. The public feels that abortion is not an issue in which government should be involved at any level.

STATEMENT OF SENATOR ORRIN G. HATCH ON MARKET OPINION RESEARCH POLL TAKEN FOR NATIONAL ABORTION RIGHTS ACTION LEAGUE

I WOULD RESPECTFULLY OFFER THE FOLLOWING COMMENTS AND CRITICISMS OF THE NARAL POLL DONE BY MARKET OPINION RESEARCH:

(1) SAMPLING-- THE POLL IS NOT A NATIONAL SAMPLING. IT WAS TAKEN IN MERELY THREE COMMUNITIES ACROSS THE COUNTRY-- SPRINGFIELD, MASSACHUSETTS; DES MOINES, IOWA; AND SEATTLE, WASHINGTON. THESE CITIES ARE NOT REPRESENTATIVE OF THE NATION AS A WHOLE. FOR EXAMPLE, AT THE SAME TIME THAT THE NATIONAL ELECTORATE SENDS TO WASHINGTON MEMBERS OF CONGRESS 55 TO 60 PERCENT OF WHOM SUPPORT FUNDING LIMITATIONS ON ABORTION SUCH AS THE HYDE AMENDMENT, ONLY TWO OF THE SEVEN CONGRESSMEN FROM THESE THREE COMMUNITIES-- OR 28 PERCENT-- HAVE SUPPORTED THIS LIMITATION. MOST OTHER POLLS ON THE ISSUE OF ABORTION HAVE INVOLVED NATIONAL SAMPLINGS.

(2) INCONSISTENT-- THE POLL IS UTTERLY INCONSISTENT WITH VIRTUALLY EVERY OTHER POLL THAT I HAVE SEEN ON THE ABORTION ISSUE, INCLUDING THOSE CITED IN THE APPENDIX ITSELF TO THE NARAL POLL. FOR EXAMPLE, A GALLUP POLL OF JUNE 1980 FOUND SUPPORT FROM ONLY 25% FOR THE PROPOSITION THAT ABORTION OUGHT TO BE LEGAL "UNDER ANY CIRCUMSTANCES". THE WASHINGTON POST POLL OF JUNE 1981 FOUND STRONG SUPPORT FROM ONLY 24% FOR THE PROPOSITION THAT A WOMAN SHOULD BE ENTITLED TO GET AN ABORTION FOR ANY REASON. A POLL DONE FOR THE PUBLICATION OF PLANNED PARENTHOOD ITSELF-- FAMILY PLANNING PERSPECTIVES-- IN THE OCTOBER, 1980 ISSUE OF CONCLUDES THAT ONLY 24 TO 28 PERCENT OF THE POPULATION BELIEVE THAT ABORTION SHOULD NEVER BE PROHIBITED.

(3) INTERNALLY INCONSISTENT-- ACCORDING TO THE POLL, 90 PERCENT SEE ABORTION AS A "PROFOUNDLY PERSONAL MATTER THAT

SHOULD BE DECIDED BY THE WOMAN", WHILE 93 PERCENT BELIEVE THAT THE DECISION ON WHETHER TO PERFORM AN ABORTION SHOULD REST WITH THE "CONSENTING PATIENT". DESPITE THESE FINDINGS, EVEN THE POLL ITSELF STATES THAT 21 PERCENT WOULD FAVOR A CONSTITUTIONAL AMENDMENT TOTALLY PROHIBITING ABORTIONS, AND 36 PERCENT WOULD FAVOR AN AMENDMENT SUCH AS THE ONE THAT I HAVE PROPOSED. WHAT IS THE SIGNIFICANCE OF THE FIRST QUESTIONS EVEN FROM THE PERSPECTIVE OF THE POLL ITSELF?

(4) QUESTION SENSITIVE-- IN RESPONSE TO THE QUESTION THAT IT POSED FOR ITSELF, "WHAT DO THE AMERICAN PEOPLE THINK ABOUT ABORTION?", THE NEW YORK TIMES, IN SUMMARIZING ONE OF ITS OWN POLLS ON ABORTION, SAID "IT DEPENDS ON HOW YOU ASK THEM THE QUESTIONS." FIRST, THEY ASKED WHETHER OR NOT PEOPLE FAVORED AN AMENDMENT TO THE CONSTITUTION "PROHIBITING ABORTIONS". THE RESPONSE WAS 29 PERCENT IN SUPPORT AND 62 PERCENT IN OPPOSITION. THEN THE TIMES ASKED WHETHER OR NOT PEOPLE FAVORED AN AMENDMENT TO THE CONSTITUTION "PROTECTING THE LIFE OF THE UNBORN CHILD". 50 PERCENT WERE IN SUPPORT AND 39 PERCENT IN OPPOSITION.

LET ME READ A SAMPLE QUESTION FROM THE SURVEY: "ABORTION IS A PROFOUNDLY PERSONAL, PRIVATE MATTER THAT SHOULD BE DECIDED BY A WOMAN IN CONSULTATION WITH HER DOCTOR, HER MINISTER, AND HER FAMILY. DO YOU STRONGLY AGREE, AGREE, SOMEWHAT DISAGREE, OR STRONGLY DISAGREE?" ANOTHER ONE-- "THE DECISION ON WHETHER TO PERFORM AN ABORTION SHOULD REST WITH THE CONSENTING PATIENT AND SHOULD BE PERFORMED BY A LICENSED PHYSICIAN IN CONFORMANCE WITH GOOD MEDICAL PRACTICE. DO YOU STRONGLY AGREE, AGREE, SOMEWHAT DISAGREE, OR STRONGLY DISAGREE?"

IN VIRTUALLY EVERY POLL THAT I HAVE SEEN, THERE ARE SUBSTANTIAL DIFFERENCES DEPENDING UPON HOW THE QUESTIONS

ARE PHRASED. WE KNOW, FOR EXAMPLE, THAT QUESTIONS THAT REFER TO WOMAN MAKING THEIR DECISIONS "WITH THEIR DOCTORS" WILL ELICIT POSITIVE RESPONSE, WHILE QUESTIONS THAT REFER TO ABORTION CLINICS-- WHICH IS MORE COMMONLY THE CASE-- WILL ELICIT OTHER RESPONSES.

(5) SITUATION SENSITIVE-- AS THE GALLUP ORGANIZATION HAS NOTED, THE DISPARITY IN RESULTS AMONG POLLS ON THE ISSUE OF ABORTION DEMONSTRATES "HOW SENSITIVE APPROVAL OF ABORTION IS TO VARYING CIRCUMSTANCES." IN THIS REGARD, NONE OF THE QUESTIONS ASKED WHETHER OR NOT ABORTION WAS TO BE PERMITTED FOR "HEALTHY" OR "NORMAL" UNBORN BABIES, WHETHER OR NOT ABORTION WAS TO BE PERMITTED BEYOND THE FIRST TRIMESTER, WHETHER OR NOT ABORTION WAS TO BE PERMITTED FOR PURPOSES OF FAMILY PLANNING, WHETHER OR NOT THE ABORTION WAS TO BE PERFORMED OVER THE OBJECTION OF THE HUSBAND OR OVER THE OBJECTION OF A MINOR'S PARENT. IT IS ONLY WHEN THE PUBLIC IS ASKED THESE KINDS OF CONCRETE QUESTIONS THAT SUPPORT FOR A WOMAN'S "RIGHT TO CHOOSE" IN THE ABSTRACT DROPS PRECIPTIOUSLY.

FOR EXAMPLE, A MAY 1979 GALLUP POLL QUESTIONED PEOPLE ABOUT THEIR SUPPORT FOR ABORTION UNDER VARIOUS SPECIFIC CIRCUMSTANCES. 59 PERCENT APPROVED OF ABORTION DURING THE FIRST TRIMESTER IN THE CASE OF RAPE; ONLY 19 APPROVED OF IT DURING THE THIRD TRIMESTER. 44 PERCENT APPROVED OF ABORTION BECAUSE OF FETAL DEFORMITY DURING THE FIRST TRIMESTER; ONLY 28 PERCENT SUPPORTED IT DURING THE THIRD TRIMESTER. SIMILAR DROPS IN SUPPORT OCCUR THE MORE DETAILED A QUESTION IS ABOUT THE PARTICULAR CIRCUMSTANCES THAT WOULD PERMIT LEGALIZED ABORTION.

(6) SEQUENCE-- HAVING SET THE TONE FOR THE INTERVIEW WITH THESE SORTS OF QUESTIONS, I BELIEVE THAT LATER QUESTIONS WOULD INVITE RESPONSES THAT WOULD NOT HAVE BEEN INVITED BY A DIFFERENT

INTERVIEW TONE. A SIMILAR DIFFICULTY OCCURRED IN A MID-1970'S STUDY ON ABORTION WHICH ASKED A QUESTION ABOUT LEGALIZED ABORTION IMMEDIATELY AFTER A QUESTION WAS ASKED ABOUT CHILD DEFORMITY AS A JUSTIFICATION FOR ABORTION.

(7) LIMITATIONS OF POLLING-- FINALLY, I WOULD NOTE THAT THE POLL DEMONSTRATES THE INHERENT LIMITATIONS OF POLLING ITSELF. ONE QUESTION ASKS RESPONDENTS WHETHER OR NOT THEY VIEW ABORTION AS A "MORAL" ISSUE, A "MEDICAL" ISSUE, A "PERSONAL" ISSUE, OR A "POLITICAL" ISSUE. AS HIGH AS MY RESPECT IS FOR THE BASIC WISDOM AND COMMONSENSE OF THE PUBLIC, I WOULD SUGGEST THAT THIS QUESTION IS FAR MORE APPROPRIATE TO ASK OF A "PHILOSOPHER KING". PERHAPS THE RESPONDENTS IN SPRINGFIELD UNDERSTAND THIS QUESTION AND CAN DISTINGUISH BETWEEN, FOR EXAMPLE, "MORAL" AND "PERSONAL" ISSUES, BUT I AM NOT SURE THAT THIS IS VERY EASY TO DO. I WOULD RESPECTFULLY SUGGEST THAT THE RESPONSE TO THIS AND SOME OF THE OTHER QUESTIONS IS ABOUT WHAT ONE WOULD EXPECT WHEN CONSTITUTIONAL ISSUES ARE BOILED DOWN INTO ONE SENTENCE.

Response to statement of Senator Orrin G. Hatch on Market Opinion Research poll taken for National Abortion Rights Action League

per request from Senator Orrin Hatch to Dr. Barbara Everitt Bryant and accompanying copy of Senator Hatch's statement sent December 22, 1981.

1) SAMPLING

The Market Opinion Research poll was presented in testimony as the survey of voters in three very diverse metropolitan market areas of the U.S.: Springfield, Massachusetts, a Catholic-majority Eastern area; Des Moines, Iowa in the heartland of the Midwest; and Seattle-Tacoma in the fast growing Northwest. It was never purported to be a national sample survey. A second part of the Market Opinion Research for NARAL involved a literature search of existing public opinion polls, most of them national. All statistics offered in the testimony clearly identified which came from national surveys and which came from each area of the three market survey.

The fact that agreement and disagreement with many of the attitudinal statements tested was a substantially the same level in the three different markets, however, gives Market Opinion Research confidence that, while percentages might vary somewhat in a national sample, the order of magnitude of agreement or disagreement would be similar nationally. In particular agreement with an attitudinal statement such as:

> Abortion is a profoundly personal, private matter that should be decided by a woman in consultation with her doctor, her minister and her family. (86-90% agreement in three markets)
>
> For comparison, our testimony showed that a somewhat similar statement "The right (or decision) to have an abortion is for a woman and her doctor to decide" showed 67-81% agreement across 11 national polls made by 5 other recognized polling organizations between 1974 and 1981. The order of magnitude of agreement with these two statements nationally and in the three markets is similar and consistent, given the differences in their wordings.

2) INCONSISTENT

The three market survey is consistent with other polls on the abortion issue. Senator Hatch cites the Gallup 1980 data (which we presented on Table 6B of our testimony) that 25% feel that abortion should be legal under any circumstances and a Washington Post 1981 figure of 24%. In our three markets this figure was 27% in Springfield, MA, 25% in Des Moines (very similar figures). Seattle-Tacoma area attitudes are more pro-personal decision, 38% favoring legality under any circumstances. As pointed out, our markets were chosen for their diversity. Seattle-Tacoma proved to be the most pro-choice of the three. Table 6B of our testimony also demonstrated that Market Opinion Research showed 26% "legal under any circumstances" response in a statewide survey of Michigan women in 1978, almost identical to the Gallup figure. Majority opinion in our survey and in Gallup and other surveys is consistently (at the 53-60% level) that abortion should be legal under certain circumstances.

3) INTERNALLY INCONSISTENT AND QUESTION SENSITIVE

Both of these sections of Senator Hatch's statement relate to question order. Any trained survey research is conscious of the effects of question order. The New York Times article which Senator Hatch cites is included in the "Newspaper" section of the literature search bibliography presented as part of our testimony, as is a more extensive Public Opinion Quarterly article on this subject by Howard Schuman of the University of Michigan's Institute of Social Research listed in our bibliography's "Journal" section.

Any trained survey researcher is also aware that survey respondents will give a response to an early question, but when attitudes are probed more extensively this response will not totally reflect the entire attitudinal set held by that respondent. That is why in a survey such as the one presented here measures of an issue are made in multiple ways.

For purposes of testifying, we were asked to condense our findings to no more than a 10-minute statement plus a somewhat longer written statement which could be put in the written testimony. To do this and emphasize the key findings meant that testimony is not in the same order in which questions were asked of survey respondents.

The question order on the survey instrument was carefully determined so that measures on the proposed Constitutional amendments or on the proposed law that life begins at conception came prior to the presentation of any attitudinal statements with which respondents were asked to agree or disagree.

In the various three markets, 17-26% of respondents responded on earlier questions that they would favor an amendment prohibiting abortions and 26-45% responded they favored the proposed amendment to give both Congress and the states power to regulate or prohibit abortions. However, on later probing with an extensive battery of attitudinal statements, many of these respondents who favored the amendment showed that they might not favor these amendments if they fully understood their consequences.

Senator Hatch asks what was the purpose of posing the attitudinal questions. Their purpose was for probing attitudes in a multi-faceted, in-depth manner -- in fact to test whether responses to the questions on favoring or opposing proposed amendments and law were based on firmly held opinions.

The amendment to give both the Congress and states power to regulate or prohibit abortion was proposed only shortly before our survey. It had received very little publicity in most parts of the country. For many respondents the survey question was the first time they had been asked to consider it. Therefore, we wanted to know far more about public attitudes on abortion than questions measuring only the proposed amendments would provide.

The later attitudinal probing, which followed asking of questions about the amendments, demonstrated consistent, firmly held opinions among the majority, but some inconsistencies amony a minority. That minority expressed more feeling that abortion is a personal, private decision than their initial answers to the questions about the amendments suggested.

5) SITUATION SENSITIVE

Our data totally supports Senator Hatch's contention that opinions on abortion are situation sensitive. That's why majorities oppose enacting Constitutional amendments or laws to prohibit abortion as such regulations are not situation sensitive. The public opinion data we reviewed nationally over a 10 year period and obtained in three localities recently shows that most Americans would leave decisions on abortion flexible and subject to personal and medical decisions and moral judgments. The public would not force abortions on those who consider them immoral. However, most would allow others who feel they must have an abortion to do so in a variety of situations.

6) SEQUENCE

Senator Hatch has presumed that the order in which findings were presented--which was done for reasons of condensing key findings into a brief time for testimony--was the same as the order of the interview. As stated in response to sections 3 and 4, questionnaire order (sequence) was carefully arranged with measurement of support or opposition to proposed amendments or law made well prior to presentation of various attitudinal statements.

7) LIMITATIONS OF POLLING

As survey researchers, we are continually reminded of the innate good sense and sophistication of the American voter. We feel that most members of the public know very well whether they perceive an issue as political, moral, personal, or medical. We strongly disagree that asking whether an issue is a personal, moral or political one is a question which can only be asked of philosopher kings. The overwhelming voter opinion in three diverse market areas is that abortion is either a personal or a moral issue. Only 3% were unable to give their viewpoint on this.

PUBLIC OPINION ABOUT ABORTION: AN ANNOTATED BIBLIOGRAPHY

1975 - November 1981

(with some earlier references)

Prepared for:

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE

by

Market Opinion Research

Barbara E. Bryant, Ph.D.
Barbara C. Kelley, M.L.S.

This bibliography represents a compilation of published work on public opinion and public attitudes about abortion during the period 1975-1981. It is comprehensive and representative, but not all inclusive.

This bibliography only reflects public opinion. It does not include news articles on legislative proposals; proposed amendments; biological issues and implications; legal issues; women's rights; etc., although there is often discussion of these issues in an article representative of public opinion.

PUBLIC OPINION POLLS

As the following tables show, public opinion about abortion has been very stable across the past decade, despite the activities of interest groups and organizations campaigning to either ban abortions or to retain the legality accorded abortions by the U.S. Supreme Court's 1973 decision.

Key poll questions which are reasonably comparable in content, and which have been asked across most of the decade between 1972 and 1981, are trended in the following tables. Some of the fluctuations in percentages responding one way or the other can be attributed to differences in question wording, for example asking whether one favors or opposes an Amendment to the Constitution in terms of whether it would "make abortions illegal," "prohibit abortions" or "ban legal abortions". The intent of these questions is similar but the shades of difference in meaning bring slightly different results.

Despite the fluctuations in support or opposition resulting from asking similar questions in slightly different ways, a number of conclusions can be made:

A three-fourths majority of the American public now, and throughout the past decade, has felt that abortion should be legal under certain circumstances. These circumstances include the pregnant woman's health being endangered, the pregnancy being as a result of rape, and when there is a strong possibility of a serious defect in the baby. Somewhere between 22% and 40% of the public would allow a woman an abortion under almost any circumstances.

Slightly more than 6 out of 10 American adults (about 62%) oppose amending the U.S. Constitution to make abortions illegal/ban abortions.

A majority (in the 55% range) favor the 1973 Supreme Court decision making abortions legal during the first three months of pregnancy.

The public is divided over the issue of using federal/Medicaid funds to pay for abortions for poor women. Opposition slightly edges out support.

Until a more general social consensus is achieved, I believe that the proposed federalist amendment, Senate Joint Resolution 110, Represents an approach that will allow this social consensus to be developed. It represents an approach that will permit this extremely difficult issue to be dealt with through the democratic, legislative processes, rather than being transformed by the Court into a constitutional issue unreachable by the large majority of the people who do not favor the social policies that have been generated by the Court. It represents an approach by which some semblance of balancing of rights can occur, a balancing process rejected entirely by the Supreme Court.

I welcome our witnesses today and look forward to their testimony. Because of the regrettable constraints of time, we will have to limit each of our witnesses today to 5 minutes. The way that will work is the green light will go on, at 4 minutes the yellow light, and at 5 minutes the red light, and I will have to ask that, wherever you are in your statement, you discontinue at that time.

In addition, we will order at the beginning of these hearings that the entire, complete, written statement of each witness be inserted in the record as though fully delivered, so that I do not have to order that after each witness.

We are very pleased this morning to have as our first witness the Honorable Vin Weber, Representative of the State of Minnesota. We appreciate the leadership he has given in this particular area, and we admire him greatly.

We are looking forward, Vin, to hearing from you. We will take your testimony at this time.

STATEMENT OF HON. VIN WEBER, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. **Weber**. Thank you, Mr. Chairman. I appreciate very much the opportunity to testify this morning.

Let me also begin by saying that I have had an opportunity to work with you and your staff on the hearings and to watch the hearings develop. I think you are to be commended for holding truly comprehensive and balanced hearings on the issue of abortion.

Senator **Hatch**. Thank you very much.

Mr. **Weber**. You have really explored every facet of the issue. I believe that the conclusions that you have just stated will be held up in view of the testimony presented before this subcommittee.

I have to preface my remarks this morning by saying that I do not speak as a lawyer or a philosopher, as many of the people who have come before this subcommittee have. I speak as a long-time supporter and activist in the right to life movement, beginning with my involvement in Minnesota Citizens Concerned For Life and as a Member of Congress.

As you may know, prior to *Roe* v. *Wade* many States restricted abortions totally or allowed certain exceptions. Thirty-one States banned abortions outright, with the other 19 setting restrictions. Six allowed abortions in the case of rape, five in the case of incest, and four in the case of child deformity.

While the right to life movement worked for more restrictive language in those States that had allowed abortion in certain exceptions, the whole abortion issue was one of containment and control.

However, as legal scholars have pointed out before this subcommittee and in many scholarly journals, the Supreme Court's decision in *Roe* v. *Wade* struck down all abortion laws and gave us the situation we are in today, the philosophy and public policy of abortion on demand until birth.

Since 1973 there have been virtually no restrictions on abortion. That is, a woman can conceivably have an abortion at any place, at any time, and for any reason. *Roe* v. *Wade*, as I mentioned earlier, did change the direction of the abortion controversy. The status quo became the unlimited use of abortion, so much so that over 1.5 million children are destroyed every year in America.

The right to life movement found itself for the first time seeing the views of their millions of supporters undermined by one Court decision, a decision which many legal experts even today consider to be bad law.

On January 22, 9 years will have passed, with over 12 million abortions being committed in America since *Roe* v. *Wade*. Instead of having the controversy resolved, the situation looks worse. For example, in my own State of Minnesota, the State legislature, with the overwhelming support of Minnesotans, passed legislation to require parental notification for minors who wished to have an abortion. However, because of the *Roe* v. *Wade* decision and the muddied and cloudy issues surrounding it, the legislation has not taken effect. The will of the people has not been allowed to prevail.

But the examples do not end there. Countless States and many Members of Congress have tried to pursue avenues to end abortion on demand within this Nation. However, as long as *Roe* v. *Wade* is on the books as the law of the land, there will be no antiabortion legislation, no saving of innocent lives.

What course do people who believe abortion to be the taking of life, as I do, have, in light of the consequences of *Roe* v. *Wade?* I believe we have one. I believe that this subcommittee, by strongly supporting Senate Joint Resolution 110 and vigorously working for its passage in the Senate and then in the House of Representatives, can once and for all overturn *Roe* v. *Wade*, end the abortion on demand philosophy as public policy in America, and look for a day when abortions will no longer be a commonplace fact of life.

You might ask at this point, why is Senate Joint Resolution 110 the legislation this Congress should pursue to end abortion on demand? The answer is simple. First, this legislation, which I should mention has been introduced by you, Senator Hatch, and by Congressman Ashbrook in the House of Representatives, completely and without doubt overturn *Roe* v. *Wade*.

The amendment's first sentence, "The right to an abortion is not secured by this Constitution," clearly spells out that a woman, for reasons of privacy or other, is not entitled by law to the right to have an abortion, to take a human life. In its effect on *Roe* v. *Wade*, the amendment is precise and straightforward.

Second, although the amendment overturns *Roe* v. *Wade*, it would not endanger any civil liberties expressed by the Constitution. The intent of the amendment, to empower the legislative branch to establish policy on the abortion controversy, does not endanger the sanctity of our judicial institutions.

Third, this amendment would provide for a national standard of protection for innocent life, legislation which would be mandated by the people if they chose to do so. Critics both internal and external to the prolife movement criticize any proposal which would establish certain States as unrestricted abortion havens. This would not be allowed under the amendment, for both the Congress and the States shall have the power to regulate or restrict abortions.

Fourth, the issue of personhood, which many legal scholars continue to discuss, write, and speculate about, is not addressed by Senate Joint Resolution 110. This will of course incite opposition from some prolife activists. However, with the status quo as abortion on demand and with 1.5 million abortions occurring each year, we cannot wait for the perfect amendment or bill which establishes personhood. The lives of the unborn being taken every day far outweigh any further delay.

Let me now turn from the advantages of supporting Senate Joint Resolution 110 to the politics of its possible passage. Within the prolife movement itself you will be hearing today from many spokesmen for the prolife movement.

I believe there is an emerging consensus in support of this approach. Most major national organizations representing the majority of the grassroots of the prolife movement have come out in support of this legislation.

One group, the National Council of Bishops, representing virtually every Catholic diocese in the country, has already appeared before this subcommittee to voice its support. Another major group representing the 50-plus State and District of Columbia right to life organizations has also recently supported Senate Joint Resolution 110. I believe that you will be hearing the testimony of the National Right to Life Committee later this morning in that regard.

Besides these major groups, which in my mind are almost entirely the millions of antiabortion people who actively participate in this issue, there are other groups who support this legislation. Many of these groups will be heard later this morning, but I would like to point out a few in particular. I apologize to any group that I miss. Lutherans for Life, Baptists for Life, American Citizens Concerned for Life, Feminists for Life, and the National Committee for a Human Life Amendment.

My point is that with the majority of groups supporting this legislation, it has the best opportunity to pass through this Congress.

Additionally, let me add that my own State of Minnesota represented here today supports this approach. The district which I represent in central and southwest Minnesota embraces this legislation to end abortion on demand.

The question before this subcommittee becomes, what chance does this amendment have for passage by the House and Senate? I would be dishonest if I did not say that it will be tough to pass this amendment or any amendment, though easier with this than any other approach I know. However, I am optimistic that both Members of the Senate and House will hear their constituents asking for an end to abortion on demand, an end to the indiscriminate destruction of millions of babies, and support this legislation.

Further, those who do not support this amendment will have to tell their people that they personally support the right to have an abortion by any woman at any place, at any time, and for whatever reason. Even for those Members who are the most strident proabortion people, this will be a tough issue to resolve.

Let me end my testimony here by reflecting just for a moment on what abortion has become in our society and what human life has come to mean as a result of abortion on demand.

Abortion has become a technique used for family planning. Millions of people find it inconvenient to have a child, or they wish to better plan their families, a sort of social engineering. Of the 1.5 million abortions each year, few are performed for the reasons so often used to defend the abortion on demand philosophy—cases of rape, incest, or to save the life of the mother. For many it is just too plain troublesome to have the child.

I believe we cannot continue to call our society civilized if this is the way of living that becomes so ingrained in our culture, and I commend you, Senator, for taking really the most revolutionary step toward ending that abortion-on-demand philosophy as public policy in America.

Senator HATCH. Thank you so much, Congressman. We appreciate your testimony, as well as your leadership.

Our next witness will be the Honorable Louis Stokes, Representative of the State of Ohio.

Louis, we are happy to have you with us and look forward to hearing your testimony. Of course, your full statement will be placed in the record also.

STATEMENT OF HON. LOUIS STOKES, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. STOKES. Thank you very much, Mr. Chairman.

First, I would like to thank you for this opportunity to testify before your subcommittee. This is an important issue about which a number of segments of our society are concerned. I am here today because I believe I can add a unique perspective to this emotional, complex debate.

As a member of the Congressional Black Caucus, I am here today to offer my views on the impact of illegal abortion on segments of the black community in this country.

Throughout my years in Congress I have worked for policies which will preserve the American family—all American families, rich or poor, black or white. Most recently I have fought budgetary cuts in programs which I believe are fundamental to the preservation of low-income families.

Today, I am here in opposition to any legislation which would outlaw abortion. I feel that my opposition to legal abortion is one more fight for the preservation of the American family, because I am defending the family's right to make its own decision about this intensely personal and important matter.

We must not forget whom we are talking about when we discuss families and women who may choose to terminate a pregnancy. We are talking about persons. We are talking about human lives. And when we are dealing with the low-income or oppressed, we are talking about human beings doing their best to survive in a hostile environment.

My work, Mr. Chairman, to improve the quality of all people's lives and to preserve the family often boils down to one fundamental concept—self-determination. Many of our basic liberties advance the opportunity for human beings self-determination. When our Founding Fathers guaranteed Americans the right to say what they think, read what they like, and worship as they please, the builders of our Nation were laying a basis for self-determination.

Black women and black families have as much right as anyone else in this country to self-determination. Yet, I believe that prohibiting legal abortion will deny black women and families this right in one of the most private, personal areas—reproduction.

In the course of outlawing abortion, few legislators realize the disproportionate impact such a ban would have on black women. Over one-third of the abortions performed each year are performed for minority women. Minority women have a higher abortion ratio than white women. Thus, if abortion is made illegal, a higher percentage of black women and their families will be forced to deal with carrying an unwanted pregnancy to term or finding an illegal abortionist.

Thirty-seven percent of black women rely on medicaid for adequate health care. Low-income women will not be able to travel for safe, legal abortions in other States or countries. Instead, low-income women, a disproportionate percentage of whom are minority women, will have to choose the cheap, unsafe, illegal abortionist.

Or, if they are forced to carry a pregnancy to term, low-income women will be forced to risk detrimental health impact. It must be noted that poor women suffer disproportionately from diseases such as malnutrition, heart disease, and hypertension, all of which render full-term pregnancies dangerous to women's health.

A disproportionate number of black families are headed by the mother who is also the sole support. Thus, it is black families and children who suffer when the head of the household must deal with an unwanted pregnancy and must decide to go to the illegal abortionist or carry the pregnancy to term, no matter what the health risks. If a black woman dies or becomes seriously ill as a result of an illegal abortion or suffers negative health impact from carrying a pregnancy to term, the woman's family and children will suffer.

Regardless of the disproportionate negative impact an abortion ban would have on the national black community, I am also opposed to constitutional amendments banning abortion, because they would violate civil liberties of all Americans.

In theory and in practice, American citizens do have the right to overturn the Supreme Court's decision in *Roe* v. *Wade*. However, I believe that this decision should remain in force. There is a longstanding constitutional principle in this country of permitting individuals to make personal choices about their private lives and their families. There is also a long history of limiting the power of government to overrule in individuals' lives.

Even though the Constitution does not explicitly mention a right to privacy under the 14th amendment, the Supreme Court has found that this right to privacy protects the right to use contraception, the right of parents to raise and educate children, and the right to marry. The Court's decision in *Roe* v. *Wade* is wholly consistent with the theory of privacy and the traditional practice of choosing when to bear children.

Mr. Chairman, the rights of the fetus are not recognized by the courts or by the Constitution. I believe that this policy should remain. Giving the fetus rights and banning abortion nationwide threaten to diminish all of the constitutional rights of privacy I mentioned above.

The proposed constitutional amendments before this subcommittee are far different from reversing the Court's decision in *Dred Scott,* thereby giving black Americans the rights of citizenship. These proposed amendments create new rights for the fetus at the expense of privacy rights for citizens. The expansion of citizenship to black Americans did not diminish or destroy the constitutional rights of other nonblack Americans. What other amendments have been passed by this Congress that diminished rather than added to the sum total of individual rights held by Americans?

There is certainly no doubt in my mind that advocates of fetal rights have a right to propose an amendment to the Constitution. The question is, should the United States Congress place such an amendment before the States at this time? I say no, despite the continuing moral divisions over the abortion issue.

I interpret the abortion controversy in this country as one which is of limited concern to most Americans. I base by interpretation on the numerous polls indicating that most Americans support abortion in some cases. I believe that if we were to send a constitutional amendment to the States we would create rather than resolve tremendous controversy. We would throw the State legislatures into chaos.

In closing, I would like to share with you the words of a black woman about this issue. These quotes are taken from an article Bebe Moore Campbell wrote in Essence magazine.

> There is nothing moral about giving birth to children we cannot care for. Forced sterilization and genocide aren't the same as choosing to have an abortion . . . the sad truth is that children who cannot be fed or cared for cannot help but be unwanted and there are plenty of unwanted black children. . . .
>
> It is precisely because women take lives sacredly—our own as well as our children's—that some of us choose not to bring into the world those we can't take care of. . . . Our mothers and grandmothers do not talk much about their illegal abortion. But we have only to look at their lives to see that the number of unwanted children a black woman has controls her life and health more than any "white only" sign ever did.

I urge this subcommittee to defeat all attempts to overturn the Supreme Court's decision in *Roe* v. *Wade* by constitutional amendment.

Senator HATCH. Thank you so much, Congressman Stokes. We appreciate your testimony. It has been eloquent on your particular point of view.

Mr. STOKES. Thank you very much.

Senator HATCH. Thank you.

Our next witness was to have been Representative Anthony Beilenson of California, but I do not see Representative Beilenson here, so we will now call on Dr. Jack Willke, president of the National Right to Life Committee.

Dr. Willke, we are very happy to have you here.

STATEMENT OF JACK WILLKE, PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE

Dr. **Willke**. Thank you very much, Senator Hatch. It is a real privilege to be here. I am Dr. Jack Willke, president of the National Right to Life Committee, and I speak here today as its representative.

The National Right to Life Committee is made up of 50 State affiliates. These contain the almost 2,000 local chapters in our Nation. Each local chapter in your city or county is a unit. The chapters in a congressional district of a State elect a district delegate to represent them on the State right to life board. Each State's right to life organization is thus made up of all of the chapters in that State, and its board is comprised of their elected delegates.

A mature State organization has a central office with employees and is engaged in a wide variety of activities, educative, lobbying, legal, and political. Each State group elects officers, including a delegate, to represent it at the national level. It is these 51 people, elected to represent the 50 States and the District of Columbia, who comprise the board of the National Right to Life Committee.

NRLC has a large office and staff here in Washington handling the administrative needs of its affiliates, educating, lobbying, and publishing, as well as being engaged in legal and political activities.

I detail this only to demonstrate to you that the National Right to Life Committee is an organization of totally unique magnitude. In fact, it is 51 groups, almost any one of which is larger and represents more people than almost any of the groups who have testified before you in these hearings.

Back in 1974 our board prepared and endorsed the proposed wording for an amendment to the U.S. Constitution that, if adopted, would reverse the *Roe* v. *Wade* decision. This National Right to Life Committee amendment in this Congress has been sponsored by Senator Jake Garn, Senate Joint Resolution 17, and Congressman James Oberstar, House Joint Resolution 125.

After a full year of study, the NRLC board on October 4, 1981 endorsed a somewhat revised version of this amendment. This new amendment, we believe, answers a number of problems and objections that have arisen concerning the original wording. If adopted, it would, in one sweep, reverse *Roe* v. *Wade* and at the same time return full civil rights and equal protection by law to all Americans, postborn and preborn.

Rather than take the time to detail this, Senator, I have an auxiliary paper, an analysis by our legal counsel, which I would ask the privilege of submitting as part of this testimony.

Senator **Hatch**. Without objection, we will permit that.

Dr. WILLKE. I also have a second paper, of which I am coauthor, which details the effect of that amendment on birth control drugs and devices. I would like to also submit that.

Senator HATCH. Without objection, we will accept that as well.

Dr. WILLKE. On December 12—last week—our National Right to Life Committee board met in Chicago. It considered for a full day Senate Joint Resolution 110, the Hatch-Ashbrook amendment that is before this subcommittee. It endorsed the Hatch amendment.

With this endorsement our 50-State group has committed itself to a two-amendment strategy. Step 1 is Senate Joint Resolution 110. Step 2 is the new National Right to Life Committee amendment approved in October. We see them as supplementary to each other.

The first strikes the Court-created right to private killing and transfers jurisdiction over abortion from the Federal judiciary to the legislative bodies which respond to the wishes of the electorate. The second would guarantee equal protection, not just for the preborn, but for the newborn, the handicapped, and the elderly.

We believe that if the entire prolife movement unites behind your legislative authorization amendment, Senate Joint Resolution 110, it has a chance at passage in this Congress.

The second step amendment, current wisdom dictates, does not have enough support for passage in this Congress. We all hope that within a few years, with a little more education, more political action, we will be able to pass it. But in the meantime, Senate Joint Resolution 110 can begin the reversal of abortion on demand in our culture.

Those who favor the current public policy claim that a great majority of the public supports their position. Yet, interestingly enough, they violently object to allowing the elected representatives, who represent the people of this Nation in its State and congressional legislatures, to even consider the question. Considering the difficulty of a ratification process for an amendment to the Constitution, and considering their claim to majority support, one wonders what are they afraid of.

We believe that if Congress passes your legislative authorization amendment, it will become the focal point of a very healthy and very necessary public debate which will do much to increase public awareness regarding the brutal reality of abortion.

We believe that the amendment will be ratified by three-fourths of the States, and we believe that then the American people, through their elected representatives, will choose a public policy far more protective of unborn human life than the current public policy, which is abortion on demand until birth.

It saddens me that certain people of minority communities would insist that this so-called privilege of violence against the children of their own people continue. I would submit that Jesse Jackson has called this black genocide, for there are two to two-and-a-half babies of minority race women killed in abortion proportionately to every white one.

Finally, I would like to close speaking for a moment as director on the National Right to Life Board from the State of Ohio. I am pleased to state that the prime sponsor for Senate Joint Resolution 110 in the House is one of our own Congressmen, John Ashbrook, and that the prime sponsor for the new NRLC amendment in the House—House Joint Resolution 380—is also one of our own Congressmen, Tom Luken.

The New NRLC amendment is being introduced in the Senate by Sen. Jesse Helms—Senate Joint Resolution 137.

One final statement about the mandatory amendment when it comes: Much is said about what it would do to birth control drugs and devices. Very briefly, it would not outlaw the pill, it would not outlaw the morning-after pill, it very probably would not forbid the intrauterine device. There is no way that anyone in the Right to Life movement would ever want to put a woman in jail. At the very extreme might well be the jailing of the abortionist. Further than that, the details are in my paper.

I thank you very much, Senator.

Senator HATCH. Thank you so much, Dr. Willke. We appreciate your being with us today.

[Material supplied follows:]

October 7, 1981

NRLC'S HUMAN LIFE AMENDMENT

by James Bopp, Jr., Esq.
General Counsel
National Right to Life Committee

On October 4, 1981, the Board of Directors for the National Right to Life Committee unanimously endorsed a life protective version of the Human Life Amendment. This action culminates a year and one-half of study by NRLC including an indepth examination and recommendation by a committee of lawyers and professionals, reported in the National Right to Life News on January 27, 1981, and considerable comment and debate within and without NRLC. The version adopted by NRLC is as follows:

Human Life Amendment

> Section 1. The right to life is the paramount and most fundamental right of a person.
>
> Section 2. With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization.
>
> Section 3. No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring as long as such law requires every reasonable effort be made to preserve the life of each.
>
> Section 4. Congress and the several States shall have power to enforce this article by appropriate legislation.

This amendment was unanimously adopted by the Board, the first Human Life Amendment unanimously endorsed by NRLC.

I. HISTORY OF NRLC'S HLA

In January, 1974, NRLC endorsed a version of the Human Life Amendment. This amendment was recommended by its Legal Advisory Committee following a year of study and discussion of various amendment proposals. A special drafting sub-committee of legal scholars, under the chairmanship of Martin McKernan, Jr., Esq., of New Jersey, began working on the problem of drafting such Amendment late in 1973, shortly after the Supreme Court decisions in Roe v. Wade, 410 US 113 (1973), and Doe v. Bolton, 410 US 179 (1973). In June of 1973, a Legal Advisory Committee was formed by the National Right to Life Committee under the chairmanship of Dennis J. Horan, Esq. of Chicago. This Committee was charged with developing a strong Human Life Amendment which the National Right to Life Committee could propose to Congress and work towards adoption. This Legal Advisory Committee had the assistance and advice of several outstanding legal scholars and lawyers including Prof. Robert M. Byrn of Fordham University, Prof. David W. Louisell of the University of California at Berkeley, Prof. Victor R. Rosenblum of Northwestern University, Prof. Charles E. Rice of Notre Dame University, Prof. Walter J. Trinkaus of Loyola University at Los Angeles, Robert Green, Esq. of Kentucky, and Prof. Joseph Witherspoon of the University of Texas, the latter two having been consultants to the Committee. In their work, the Committee studied carefully the leading proposals for Human Life Amendment, then pending in Congress, and eventually recommended its own version to the National Right to Life Committee Board of Directors which it adopted. The version adopted by the National Right to Life Committee in 1974 is as follows:

NRLC Amendment

> SECTION 1. With respect to the right to life, the word "person", as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> SECTION 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

This Amendment has been submitted to the 97th Congress as S. J. RES. 17 by Senator Jake Garn of Utah and as H. J. RES. 125 by Congressman

James Oberstar of Minnesota. This Amendment has received 29 cosponsors in the Senate and 56 in the House.

In June of 1980, Dr. J. C. Willke of Ohio, newly elected President of the National Right to Life Committee, appointed a committee of lawyers and doctors to reexamine the National Right to Life Committee's recommended version of a Human Life Amendment adopted in 1974. Since 1974, several new versions of amendments have been introduced in Congress and considerable scholarly consideration has been given to NRLC's Amendment. Dr. Willke felt that the time had come for NRLC to reexamine its Amendment to insure that it was the best vehicle to accomplish NRLC's fundamental purpose: to reverse the U. S. Supreme Court decisions in Roe v. Wade and Doe v. Bolton, their antecedents and progeny and to restore full legal protection to the right to life of unborn children.

The Committee appointed by Dr. Willke included James Bopp, Jr., Esq., General Counsel for the National Right to Life Committee, as Chairman, Prof. Joseph Witherspoon, University of Texas Law School, Prof. Robert Byrn, University of Fordham Law School, Prof. Charles Rice, University of Notre Dame Law School, and Dr. Matthew Bulfin, President of the American Association of Pro-Life Obstetricians and Gynocologists. The Committee was charged to examine carefully NRLC's version of the Human Life Amendment and determine whether or not modifications of it were required in order to maximize the legal protection of the unborn under its terms.

The Committee met on three different occasions in the fall of 1980. At these meetings, the Committee carefully considered the medical and legal foundations for NRLC's current version of the Human Life Amendment and examined proposed changes in it. To assist them in their work, the Committee solicited comments from more than seventy pro-life groups and dozens of individual legal and medical scholars. In addition, the Committee invited oral testimony from Nellie Gray, Esq., President of March for Life, Carl Anderson, Legislative Aid for Senator Jesse Helms, Dennis Horan, Esq., Chairman of ABA's Right-to-Live/Right-to-Die Committee, and Dr. John

Masterson, Professor of Obstetrics and Gynocology at Loyola University of Chicago. In addition, many individuals and groups responded to the request of the Committee for comments to its issues which the Committee felt it must explore in order to accomplish its work.

In addition to its concern for insuring maximum protection of the unborn through a constitutional amendment, the Committee sought to form a concensus within the right to life movement around one version of a Human Life Amendment. Since this aim was not fully achieved, the Committee attempted to narrow the disagreements within the movement and to define those disagreements as clearly as possible. Based upon this work, the Committee recommended,on January 23, 1981, certain changes specified below in the National Right to Life Committee's recommended version of the Human Life Amendment.

Specifically, the Committee formulated a Human Life Amendment by making several substantial changes in NRLC's version, the most important of which is to provide that the right to life is superior to all the rights granted under the Constitution. The Committee was able to unanimously agree on Sections 1, 2 and 4 of the Amendment. All Committee members agreed that the formulations of Sections 1, 2 and 4 were preferable to any previous versions of a Human Life Amendment. Sections 1, 2 and 4 were as follows:

Human Life Amendment

> Section 1. The right to life is the paramount and most fundamental right of a person.
>
> Section 2. With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization.
>
> Section 4. Congress and the several States shall have power to enforce this article by appropriate legislation.

The Committee members, however, were not able to agree on the proper formulation of Section 3. This Section was intended to provide two essential elements in the formulation of the Human Life Amendment, the prohibition against private taking of the lives of the unborn and the creation of a basis for a private cause of action to protect unborn children when State and Federal governments refuse to do so. Section 3, therefore, would reverse the second essential holding of Roe v. Wade, that a woman has the right to take the life of her unborn child. The majority of the Committee, consisting of members Bopp, Witherspoon, Byrn and Bulfin, supported the following Section 3:

> Section 3. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of a pregnant woman; but this law must require every reasonable effort be made to preserve the life and health of the unborn person.

A minority of the Committee, consisting of Prof. Rice, supported the following language:

> Section 3. The right to life of an unborn person is protected by the Constitution against infringement by any person.

At the October, 1981, meeting of the National Right to Life Committee's Board of Directors, the Committee's recommendations were formally taken up. Since June, considerable comment was received by NRLC on the HLA Committee's work. In addition, many state and local right to life groups conducted indepth studies of the recommendations. On September 11 and 12, the National Right to Life Educational Trust Fund conducted a seminar, co-sponsored by St. Louis University, to professionally examine proposals for a human life amendment. As a result, the Board of Directors appointed a committee to determine if the difference of opinion on Section 3 could be resolved. Geline Williams, Chairman of NRLC Board of Directors, appointed the following Board members to the committee: Nellie Gray, Esq. of Washington, D.C., Carolyn F. Gerster, M. D. of Arizona, Charles J. Onofrio, Esq. of Colorado, Jack Wiltrakis, Esq. of Connecticut, Matthew Bulfin, M. D. of Florida, and Roger Mall of Iowa. James Bopp, Jr., Esq., NRLC's General Counsel, was appointed advisor to the committee. As a result of their work, the committee unanimously recommended a revised version of Section 3 which was adopted by the Board. The intent of NRLC's version of a Human Life Amendment is to fully reverse Roe v. Wade and Doe v. Bolton and restore full legal protection to the unborn.

II. THE HOLDINGS OF ROE V. WADE

In Roe v. Wade, the Supreme Court first declared that one of the "liberties" constitutionally protected against state infringement by the Fourteenth Amendment is the right of privacy which "encompasses a woman's decision whether or not to terminate her pregnancy." Finding this to be a "fundamental" constitutional right, the Court declared that state laws infringing upon this right cannot be sustained unless they are necessary to effectuate a compelling state interest.

Having clarified the standard of judicial review, the Court then proceeded to determine whether the states had a "compelling" state interest to support abortion restrictions. The first argument it considered was that the unborn were "persons" and that states had a compelling interest in protecting their lives. The Court rejected that argument and concluded that the unborn are not "persons." In reaching this conclusion, Justice Blackman, who wrote the opinion for the Court, (1) analyzed the text of the Constitution and the usage of the word "person" therein, (2) referred to the history of less restrictive abortion practices throughout the major portion of the nineteenth century (when the Fourteenth Amendment was enacted), and (3) noted that the Court's conclusion that the unborn are not constitutional "persons" was in accord with the results reached by state courts and lower federal courts that had addressed the issue.

The Court went on to consider whether there were any other potentially "compelling" state interests that would justify criminal abortion prohibitions. The Court examined two primary arguments: (1) that the state's interest in protecting maternal health is a compelling justification for abortion restrictions, and (2) that, even if the unborn are not persons, they are at least human beings and the state interest in protecting the life of human beings is compelling. The Court concluded that the interest in human life was not compelling throughout pregnancy, but it became a compelling interest after viability.

There are, therefore, two distinct holdings of the Court: (1) a woman's right to privacy included her decision on whether or not to terminate her pregnancy, and (2) state's interest in unborn life is not sufficiently compelling to permit regulation of abortion before viability. The holding which resulted in abortion on demand is the finding of a constitutional right in the woman. Without it, states could still protect unborn life since it is a legitimate state interest even under Roe v. Wade, albeit not a compelling one. By illustration, a government may protect eagle eggs from destruction even though they don't have a compelling interest to do so. After all, an eagle does not have a constitutional right to destroy its egg, nor does anyone else.

III. OBJECTIVES OF NRLC'S HUMAN LIFE AMENDMENT

The goal of the amendment is to restore full legal protection to the unborn. There are, however, limitations to the protection which can be afforded the unborn under a constitutional amendment. As a result, subsequent state and federal laws will be necessary to fashion remedies and criminal and civil actions against abortion. There is, however, much that can be done by a constitutional amendment. In order to maximize the protection afforded by this amendment, the following objectives guided NRLC's work:

1. To restore to unborn children of human parents the constitutional status and protection of persons, with respect to their right to life, under the 5th and 14th Amendments, which right was specifically destroyed by the Supreme Court decisions in Roe v. Wade and Doe v. Bolton;

2. Specifically to protect for all persons the fundamental right to life;

3. To insure to all human beings, irrespective of their age, health, function, or condition of dependency, the constitutional status and protection of persons, with respect to their right to life under the 5th and 14th Amendments, which right was seriously jeopardized for at least some of these human beings by the principles enunciated by the Supreme Court on January 22, 1973;

4. To insure that the lives of unborn children be protected at every stage of their biological development from the first stage of fertilization of the femal ovum by the male sperm through all subsequent stages;

5. To protect the lives of unborn children not only against action of the State and Federal Governments but also against the action of private individuals, such as pregnant women and physicians, upon whom the Supreme Court conferred the constitutional right to obtain and perform abortions on demand, respectively;

6. To establish that the right to life of persons is the paramount and most fundamental right protected by the Constitution superior to all other constitutional rights such as the right to privacy;

7. To provide the basis for a private cause of action to protect the lives of unborn children in those States and localities where Federal, State or local governments will not act to insure their protection;

8. To permit the medical procedures necessary to treat a cancerous uterus, ectopic pregnancy and severely traumatized uterus in a pregnant woman when the treatment is necessary to prevent the death of the woman even if the treatment results in the termination of the pregnancy, these operations not being abortions in the legal sense;

9. To preserve and protect to the same extent the life of each human being regardless of state of health or condition of dependency;

10. When two or more human beings are in the situation in which their lives are mutually endangered during a pregnancy, to insure that all ordinary means and reasonable efforts are used to preserve and protect the life of each and every human being so endangered; and

11. To give to both the Congress and the several States the power to enforce the Amendment by appropriate legislation.

All of these objectives for a constitutional amendment are met by

NRLC's recommended version. Thus, full legal protection of the unborn would be restored to the unborn under the United States Constitution upon the amendment's adoption.

IV. DISCUSSION OF THE HUMAN LIFE AMENDMENT

> Section 1. The right to life is the paramount and most fundamental right of a person.

This section accomplishes objective 6 by specifically establishing that the right to life is superior to any other right guaranteed by the Constitution. This section is inspired by the Paramount Human Life Amendment, introduced in Congress by Senator Helm as S. J. RES. 19, which had as its principal thrust the concept that the right to life must be superior to any other right guaranteed by the Constitution, such as the right to privacy, in order to insure that the courts will give priority to the right to life of the unborn when they seek to balance it against the right to privacy of the woman. By making the right to life superior to any other right, the court, in employing its traditional balancing test, would only balance this constitutional right against the right to life of another person.

> Section 2. With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization.

This section restores personhood to the unborn, with respect to the right to life, at every stage of development including fertilization, and protects all human beings in their right to life regardless of age or handicap. This section accomplishes objectives 1, 2, 3, and 4 by restoring personhood to the unborn, recognizing the right to life in all persons, insuring to all human beings their protection as persons regardless of age, illness or handicaps and insuring that the unborn are protected regardless of their stage of development.

Roe v. Wade and Doe v. Bolton removed the protection of status as a person from the unborn. In restoring this protection, this section insures protection of the unborn as a person from the commencement of fertilization since there is no stage of the biological development of the unborn that would be outside the protection of this Amendment. This language retains the very language that had been utilized by physicians since at least the 1850s to describe the needed protection for fetal life. See, e.g., Horatio R. Storer, M. D., Criminal Abortion in America (Philadelphia: J. B. Lippincott & Co., 1860) pp. 10, 100, 107: "...the foetus (is) already, and from the outset, a human being, alive, however early its stage of development and existing independently of its mother. . . .it is not rational to suppose . . . that life . . . dates from any other epoch than conception. . . . medical men, in all obstetric matters, are the physical guardians of women and their offspring. . . . (Protection of the unborn child is required) at every stage of gestation. (emphasis added)" See, also, Henry Miller, M. D. "Address (of President of American Medical Association at 1860 Annual Meeting)", Transactions of the American Medical Association, Vol. XIII (June 1860) pp. 58-59: "from the moment of conception, a new being is engendered, in whose constitution, microscopic though its parts may be, lies unfolded the substratum in which inheres potentially all that pertains to man. . . . In every stage of its development, it is as much an independent being as are its parents. With such enlightenment as this, what virtuous woman . . . would be accessory to so foul a deed as the destruction of her offspring. . .? (emphasis added)"

The Supreme Court in Roe v. Wade and Doe v. Bolton also separated the traditional concept of human being from the concept of persons. Thus, although a being might be a human being, that fact alone did not entitle that being, without more, to the constitutional protection of human persons. With this ruling, the Court destroyed the traditional common sense and scientific view equating the concept of human being and the concept of human personhood.

In addition, this separation of the two concepts destroyed the very work of the framers in the 14th Amendment. Those framers were very cognizant that these two concepts had been separated in the actual administration of the Constitution of the United States by the Supreme Court in Dred Scott v. Sandford, 60 US 393 (1856), and it was their clear, demonstrable purpose to prevent for all time thereafter any separation of these two concepts. The author of the first section of the 14th Amendment, Congressman John A. Bingham of Ohio, stated how it was to operate: "Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man?" And of the due process clause of the 5th Amendment, he stated: ". . . No person, no human being, no member of the family of man shall, by virtue of federal law or under the sanction of the federal authority. . . be deprived of his life, or his liberty, or his property, but the law of the land." See Alfred Avins, The Reconstruction Amendments' Debates (1967) page 274, 36-38. The basic error of the Supreme Court in Roe v. Wade is thus corrected. By combining this provision of Section 2 with its recognition that the 5th and 14th Amendments guarantee a right to life in all persons, the Amendment strikes at the very roots of the Supreme Court's tragic error in Roe v. Wade.

This Amendment is also more precise and full in its protection of human beings as persons by providing that illness, age or incapacity are not relevant criteria to determine whether or not human beings are persons. Thus, the Amendment is explicit in providing that biological existence of a human being is sufficient to affirm personhood and thus the constitutionally protected right to life.

Section 2 would declare, therefore, the unborn to be a person entitled to the right to life as guaranteed in the United States Constitution. The right to life is guaranteed against actions of the federal government by the 5th Amendment which provides that "(n)o person shall. . . be deprived of life, liberty, or property, without due process of law." Similarly, the 14th Amendment provides that "(n)o state shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The 5th and 14th Amendments, therefore, are the provisions of the Constitution guaranteeing the right to life which are dealt with in this Amendment.

As a result of the adoption of this Amendment, states and the federal government would be prohibited from taking the lives of unborn children "without due process of law." The courts would determine what the requirements of "due process of law" would be under future court decisions. The states and the federal government are, however, not taking the lives of unborn children. Except to the extent that some abortions are performed in government facilities or paid at government expense, most abortions are private ones with no state involvement whatsoever. For those abortions performed in government facilities or funded by government, the courts would determine what are the guidelines of "due process of law." This may only entail committee approval for an abortion or it may result in more extensive protection even to a prohibition against abortion performed in government facilities or funded by government except to prevent the death of the mother.

In addition, by application of the equal protection clause of the 14th Amendment, a state would be required to provide some degree of effective protection to the unborn if the killing of born persons is illegal. Under this standard, a legislature could recognize degrees of evil and are not required to treat things which are different in fact or opinion as though they were the same. Thus, a state need not provide abstract symmetry, and may recognize degrees of evil. A class of offenders or a family of offenses, therefore, may receive special treatment.

It is clear that under this Amendment the state must provide some degree of protection to the unborn. In providing this degree of protection, the state would be free to determine what degree of punishment would be provided for illegal abortions. Thus, all illegal abortions would not be murder in the first degree but could be punished as a felony or even a misdemeanor. Before 1965, when the trend toward permissive abortion laws began, fifty of the fifty-one jurisdictions in the United States made the procurement of non-life saving abortions a felony. New Jersey, the lone exception, made it a high misdemeanor. Abortion, in some states, was murder when the woman died as a result of the abortion. In that instance, twenty-two states increased the punishment by characterizing the death as either murder, manslaughter, or assault with intent to murder. States, therefore, would be forced to extend some degree of criminal protection to the unborn against illegal abortions. While the states would have some discretion, the penalty would have to be of sufficient severety to effectively protect the lives of the unborn.

> Section 3. No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring as long as such law requires every reasonable effort be made to preserve the life of each.

This section reverses the second holding of Roe v. Wade that a woman has a constitutionally protected right of privacy to decide whether or not to terminate her pregnancy by directly protecting every unborn person from being deprived of its life by another person. In this respect, the proposal is modeled upon the 13th Amendment which provides direct protection to a human being from being subject to slavery or involuntary servitude by any other person or by any government. By so doing, this section enables the federal government, as well as the states, to enforce its terms against the action of private parties, by appropriate legislation under Section 4.

In addition, this amendment avoids the possibility of the Court acting to engraft exceptions upon the amendment's anti-abortion policy by leaving it up to each state or to Congress whether to create an exception to the policy of this amendment and, in the event a state or Congress does act to create an exception, by limiting that exception to one permitting only those medical procedures required to prevent the death of the mother. This language precludes either a state or Congress from engrafting any exception upon the basic policy of the amendment except one narrowly restricted to preventing the death of the mother or her child.

By use of the phrase "required to prevent the death of the pregnant woman or her unborn offspring" in its life-saving exception, this amendment uses a phrase which is more specific and definitive and less subject to court misconstruction. It avoids the word "life" which has been previously expanded to include health. This section prevents the state from permitting health abortions since the states may "only" authorize, if they wish, abortions "required to prevent the death of the pregnant woman." In addition, in creating this exception, the states or Congress may only permit it to be raised as a defense. In any criminal or civil action for violation of this provision, the defendant would be allowed to assert that the abortion was justified only if it was necessary under the terms of the exception.

In the situation where a state or Congress might allow for medical procedures necessary to prevent the death of the mother or her child, the state must also require that all reasonable efforts be expended to preserve the life of the other. Thus, if an abortion is necessary to prevent the death of the mother, the physician must act in all reasonable ways to preserve the life of the unborn child. In addition, this amendment makes clear that medical procedures necessary to prevent the death of the unborn child are also allowable, as long as every reasonable effort is made to preserve the life of the pregnant woman. Thus, each life involved in a pregnancy, mother and child, is given equal consideration and treatment.

Section 3, therefore, accomplishes many of the objectives of full restoration of legal protection to the unborn. Section 3 protects the lives of unborn children against both state and private action, Objective 5, provides the basis for a private cause of action to protect unborn lives, Objective 7, permits maternal life-saving procedures, Objective 8, protects all human beings equally, Objective 9, and ensures that, when one life is endangered in a pregnancy, reasonable efforts are used to protect all others, Objective 10.

> Section 4. Congress and the several States shall have power to enforce this article by appropriate legislation.

This section gives both Congress and the several States the power to enforce this amendment. This section closely resembles the enforcement clause in the 18th Amendment which was the only Amendment which gave concurrent enforcement power to both the state and federal governments. This Section is intended to accomplish Objective 11 by giving back to Congress and to the several states the power to enforce the Amendment.

CONCLUSION

NRLC's version of a life protective type human life amendment offers full legal protection to the lives of the unborn. Under its provisions, the holdings of Roe v. Wade are fully reversed. The unborn child's right to life, and the state's compelling interest in protecting it, could not be balanced against a woman's right to privacy to decide whether or not to have an abortion since this right to privacy would be abrogated. In addition, the circumstance where abortion would be permitted would be restricted to those necessary to prevent the death of the mother or her child. A state, therefore, would not permit health abortions which are equilavent to abortion on demand. This amendment meets all the objectives to restoration of full legal protection to the lives of the unborn.

THE EFFECT OF THE NATIONAL RIGHT TO LIFE COMMITTEE HUMAN LIFE AMENDMENT ON BIRTH CONTROL DRUGS AND DEVICES

By

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and
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Considerable controversy has arisen recently, fueled by opponents of the Human Life Amendment, on the effect of the passage of a Human Life Amendment on birth control drugs and devices. This paper analyzes the effect of the passage of the Human Life Amendment endorsed by National Right to Life Committee on birth control drugs and devices based upon the medical conclusions reached in our examination of the physiological function of certain birth control drugs and devices.

SUMMARY OF FINDINGS

The Human Life Amendment, in and of itself, will have a very limited effect upon birth control drugs and devices. First, all birth control drugs and devices that are contraceptive rather than abortive in their actions will not be effected in any way. These include the condom, diaphragm, spermicidal foam, and some forms of the pill. Secondly, as a practical matter, the Human Life Amendment, without supportive legislation, will only protect human beings known to be in existence. Those birth control drugs or devices whose action is, in whole or in part, abortifacient will not be directly effected by the passage of a Human Life Amendment if their action occurs prior to positive evidence of pregnancy. These could include forms of the contraceptive pill such as the low dose estrogen combination type, mini and DES, as well as the IUD. The effect of a Human Life Amendment, in and of itself, therefore, would have no effect on almost all birth control drugs and devices and would only impact those which are used after there exists positive evidence of pregnancy.

After the passage of a Human Life Amendment, however, a federal or state law or FDA regulation could be passed to prohibit the sale, manufacture and possession of birth control drugs and devices whose sole action is abortifacient, that have no legitimate non-abortive use and are not used to perform life saving abortions. These could include the mini pill and IUD if medical opinion was conclusive that their action is solely abortive. Such a law certainly would outlaw first trimester prostaglandin suppository, the only function of which is to abort. In addition, a federal or state law or regulation could be passed to limit the use of certain birth control drugs and devices to their non-abortive uses. In addition to the three indicated above, any use of the regular contraceptive pill or DES which was solely abortive in action, if such could be determined, could be regulated. The passage of a Human Life Amendment, however, does not mandate the passage of any particular type of statute regulating birth control drugs and devices. This is a matter for subsequent legislation or regulation.

A Human Life Amendment will, however, clearly limit all birth control methods, when there is positive proof of pregnancy, to non-abortive or life saving uses. Surgical non-life saving abortion, therefore, will be clearly outlawed by a Human Life Amendment. This is the direct effect of a Human Life Amendment. Its direct effect does not include the regulation of birth control drugs and devices.

THE I.U.D.

What is the mechanism of action of the IUD? It would seem at this time that medical opinion has crystallized to a near unaniminity. The presence of this foreign body within the cavity of the uterus produces a foreign body reaction. This is a local, sterile (usually), inflammatory reaction, which alters the normal body fluids within the uterus. It changes what had been a friendly environment, for the migration of sperm and the subsequent implantation of the new human being, to an unfriendly environment. Some have described the intra-uterine fluid produced as containing "sterile pus.". This unfriendly fluid environment can have an influence on the sperm migrating into the uterus and tubes, and quite clearly does have an influence on later implantation.

Not too much has been said or written to indicate that the sperm are incapacitated in their passage through the uterus, for if they were, fertilization could not occur. Most of the research done tells us the same thing. A substantial number of sperm do pass through the uterine cavity, proceed out to the ovary, and fertilization can and does occur.

What is quite plain is that, following fertilization, the process does not proceed to a normally implanted pregnancy. What are the mechanisms postulated as to why she does not "get pregnant"? Overwhelmingly, almost all medical studies have demonstrated various mechanisms that prevent implantation into the nutrient lining of the womb, due to the foreign body and inflammatory reaction caused by the IUD. However, the end result, in almost every case, when fertilization does occur (an occasional pregnancy is carried to full term and delivery with the IUD still in the uterus), it is followed by a process that ends in the destruction of the developing new human in the uterus through his or her inability to implant. This can be accurately described as an abortion. Clearly, almost all current evidence indicates that the IUD's major effect is to act to prevent implantation.

The fact that it is described as a "contraceptive" agent is because of a change in the meaning of words by the Food and Drug Administration and the American College of Obstetrics and Gynecology a decade ago, when they redefined the word "conception" to mean implantation. Under these semantic gymnastics it is a "contraceptive," but everyone familiar with the function understands thoroughly that its action is that of an abortifacient.

One other relevant medical comment should be made. In all likelihood, the IUD may be withdrawn from the market in the not-too-distant future because of its serious side effects. The "sterile pus" mentioned above does not always remain sterile. At times it becomes infected, resulting in varying degrees of inflammation of the female organs and at times sterility. All practicing physicians in the United States were notified several years ago that if they were to insert one specific type of IUD, the Dalcon Shield, into a woman, it was their legal obligation to inform her that this might make her permanently sterile. To protect from a possible later malpractice suit, such consent should be in writing. In the face of such concern, this specific type of IUD was removed from the market. Whether or not other types of IUDs will remain on the market indefinitely is an open question. It is at least possible that they may be removed for medical reasons before any law can do so.

THE PILL

The "pill" consists now of over 30 different varieties of chemical combinations of the synthetic equivalent of the female hormones estrogen and progesterone, as well as the so-called "mini-pill" which contains progesterone alone. Understanding that there are different degrees of actions with different pills, that one has more of this effect and the other has more of that effect, they can, to some extent at least, be described generically.

The combination pills basically exert three actions in "preventing" pregnancy. The first effect of the contraceptive pill is to prevent ovulation or release of the ovum from the ovary. This has been described as "freezing" of the ovary. Even if the sperm do reach the ovary, fertilization cannot occur because the ovum has not been released. This action is accurately described as temporary sterilization, but in common usage it is usually spoken of as "contraceptive" action.

The first contraceptive pill, Enovid, contained ten milligrams of estrogen-like hormone. It was believed that its physiologic function was almost totally that of temporary sterilization. Enovid-5 was then marketed, to be followed by Enovid E (2.5 mg.). Since that time lower and lower doses of estrogen have been presented to the consumer so that now doses of 0.5 mgm. and 0.35 mgm. are commonly used. The well known reason for the reduction of the estrogen dosage was to try to minimize the threat of blood clot complications. Paralleling the reduction of the estrogen dosage, however, there has been the development of break-through ovulation, as the lower doses have apparently not been successful in completely suppressing ovulation.

With break-through ovulation it is now generally accepted that actual fertilization occurs at times in those taking these pills, but as described below, these women do not ordinarily "get pregnant."

The second action is one of thickening of the mucous plug at the cervical opening. This normally occurs at the beginning and at the end of a menstrual cycle, with the plug melting away at mid-cycle, and being replaced by an egg white like substance containing nutrient fluids, which are "friendly" to the passage of sperm. The combination pill prevents this from occuring at mid-cycle, maintaining the plug, and as such probably exerts true "anti-fertilization" action by preventing entrance of the sperm.

The third function of the combination pill is an anti-implantation or anti-nidatory action. When this is the function that is dominant in that particular month, there is sperm passage, there is fertilization and migration of the new human through the tube and into the uterus, but implantation does not occur. This is because the action of the pill has "hardened" the lining of the uterus, created a hostile environment, and the multicelled tiny human being cannot implant. This function is one of an abortion at one week of life. There is no definitive medical agreement as to what percentage of times this function occurs, in which woman and with which pill.

THE MINI-PILL

This is a form of birth control pill, different from the combination of estrogen and progesteroneabove, which is commonly known as the "mini-pill." This contains only a small dose of progesterone. It is taken daily, 30 days a month, rather than the 21-7 schedule for the combination pill. It allows a menstrual flow to occur monthly while the pill is being taken. There is considerable controversy as to whether or not its action is primarily in preventing implantation, as other mechanisms of action have been suggested, but general scientific opinion at this time is in substantial agreement. It would seem that it does allow a substantial amount of breakthrough ovulation, and presumably at times fertilization. When fertilization occurs it "prevents" pregnancy by an anti-implantation action. This action is best described as an abortifacient effect.

THE MORNING-AFTER PILL

DES or Diethlstilbesteral is a synthetic estrogen. Given in high dosage, in the days immediately following intercourse, it is known as the morning-after pill. What is its function? This is best illustrated by giving two examples.

In the first, a woman is raped at midnight Saturday and is given DES at 2 a.m. in a hospital emergency room. Within a few hours there is a high level of estrogen in her blood. Her body was programmed to ovulate 24 hours later at midnight Sunday. The high level of estrogen blocks that ovulation, fertilization does not occur, and she does not get pregnant. This effect is one of temporary sterilization.

In the second case, rape also occurs at midnight Saturday and the medication is given at 2 a.m. This woman, however, has ovulated several hours before the rape. The ovum waited. It was fertilized. She also does not "get pregnant" but the mechanism of action is quite different. The drug had "hardened" the lining of the womb. About one week after fertilization, the multicelled tiny boy or girl could not implant and died. This mechanism was an abortion.

Which mechanism occurs in any specific case may well not be known, but the sterilizing action will probably occur two or three times for every abortive action.

Other medications, such as a shot of progesterone are often used in place of DES, as well as other forms of estrogen. Without going into detail, one can say that their mechanism of action is substantially the same.

PROSTAGLANDINS

As is well known, these substances cause the onset of strong uterine contractions and delivery of whatever size baby the uterus contains. If used before viability, this is the equivalent of abortion.

The first form licensed, Prostin F2 alpha, carried a directive from the FDA that limited its use to the induction of mid-trimester abortion only. Subsequently, Prostin A2 and 15M have been licensed. These have now been authorized for use for several therapeutic medical conditions (uterine inertia, non-malignant Hydatidaform mole and missed abortion).

HUMAN LIFE AMENDMENT

On April 11, 1981, the National Right to Life Committee Board of Directors reaffirmed its support for the version adopted by NRLC's Board of Directors in 1974. This version reads as follows:

> SECTION 1. With respect to the right to life, the word "person", as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> SECTION 2. No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

This amendment has been introduced in Congress by Congressman Oberstar and Senator Garn and has gained more than thirty co-sponsors in the Senate and sixty in the House.

NRLC's Human Life Amendment has three primary effects. First, by the adoption of Section 1, an unborn child will be treated as a person under those portions of the 5th and 14th Amendments which prohibit the federal government and states from depriving a person of life without due process of law and guarantees the equal protection of laws to all persons. Thus, states, under the equal protection clause of the 14th Amendment, would be required to extend protection against intentional homicides of unborn children. A state could not exclude the unborn as a class of person from the law's protection of life. Thus, if the state provided for penalties for the taking of the lives of born persons, some effective form of protection would have to be extended through the criminal law to the lives of the unborn.

In providing this degree of protection, the state would be free to determine what degree of punishment would be provided for illegal abortions. Thus, all illegal abortions would not be murder in the first degree but could be punished as a felony or even a misdemeanor. Before 1965, when the trend toward permissive abortion laws began, fifty of the fifty-one jurisdictions in the United States made the procurement of non-life saving abortion a felony. New Jersey, the lone exception, made it a high misdemeanor. Abortion, in some states, was murder when the woman died as a result of the abortion. In that instance, twenty-two states increased the punishment by characterizing the death as either murder, manslaughter, or assault with intent to murder. As a result of the adoption of Section 1 restoring personhood to the unborn, therefore, states would be forced to extend some degree of criminal protection to the unborn against illegal abortion. While the states would have some discretion, the penalty would have to be of sufficient severity to effectively protect the lives of the unborn.

The adoption of Section 2 would have the effect of prohibiting the private taking of the lives of the unborn and the creation of a basis for a private cause of action to protect unborn children when state and federal governments refuse to do so. Thus, under the rationale of existing Supreme Court cases, a person with appropriate standing, such as the parent of an unmarried minor daughter or a spouse, could seek injunctive relief against the performance of an abortion upon their daughter or spouse. In addition, under certain circumstances, a guardian ad litem for an unborn child could be appointed who could then seek to civilly enjoin an abortion from taking place. In addition, appropriate action could be taken to prevent a state from depriving an unborn of life unless it is necessary to prevent the death of the mother.

Section 3 provides authority for state and federal governments to enforce the provisions of Sections 1 and 2.

Thus, Section 1 and 2 speaks affirmatively to the protection of persons, unborn persons and human beings. Thus, a person, unborn person or human being must be shown to be in existence for the provision of the amendment to protect it. This is also true with respect to the protection afforded born persons by the criminal law. State homocide statutes require that the death of a human being must be proved before a prosecution could be proved. The death of a person is the corpus delecti of the crime. Similarly, the corpus delecti under the amendment is the death of an unborn child.

Section 1 and Section 2, therefore, would have an affect only when there is proof that an unborn person is actually in existence. Thus, the unborn child would be protected by NRLC's Human Life Amendment only when there is positive proof of pregnancy. Without positive proof of pregnancy, a state is not required by Section 1 to extend protection to the unborn nor may a civil action be brought on behalf of an unborn to prevent an abortion.

The passage of NRLC's Human Life Amendment, however, would permit states and the federal government to protect unborn life before there is positive proof of pregnancy. Thus, a subsequent state or federal law or regulation could be passed which limited the use of drugs or devices to non-abortive or life saving uses. Such a statute, upon the passage of a Human Life Amendment, could not be attacked upon the basis decided in Roe v. Wade, that a woman had a right to privacy to decide whether or not to have an abortion. With this decision fully reversed by NRLC's version of the Human Life Amendment, a state may exercise its compelling interest in unborn lives by regulating abortifacients.

CONTRACEPTIVES

Contraceptives, understood as contra-fertilization drugs or devices preventing fertilization, prevent a new human life from beginning. Abortion kills a new human life after it has begun. Contraception, therefore, is any device or drug which prevents fertilization of the female ovum by the male sperm. An abortifacient is any device or drug which artificially interrupts the natural biological development of the unborn child after the process of fertilization has begun. The Human Life Amendment is intended to protect the right to life of the unborn at every stage of biological development beginning with fertilization. The Human Life Amendment, however, does not extend before this point. Thus, any and all truly contraceptive agents such as the condom, diaphragm, spermicidal foam, and almost all forms of the regular contraceptive pills would be absolutely unaffected in any way by the passage of a Human Life Amendment.

ABORTIFACIENTS

There are many drugs and devices which in part or in whole have abortifacient actions. Depending upon the time in the gestation of the unborn child in which they are used and whether or not they have other legitimate non-abortive uses, the HLA may affect them. In addition, the Human Life Amendment may affect an abortifacient in different ways through criminal and civil law. Finally, subsequent state or federal statutes may be passed which impact upon their use.

PROSECUTION FOR USE OF ABORTIFACIENTS UNDER EXISTING LAW

As discussed above, the Human Life Amendment would, pursuant to the equal protection clause of the 14th Amendment, require some degree of protection under the criminal law be extended to the unborn if the state penalizes the intentional killing of born persons. Thus, if the state wishes to protect the lives of the born, it must protect the lives of the unborn.

In order for a prosecution to be brought, however, three facts would be required to be proved beyond a reasonable doubt. First, that a crime has been committed, i.e. the corpus delicti. Here, the prosecution must prove beyond a reasonable doubt that a homicide actually took place, that there was an unborn child alive and in being prior to the abortive act. Thus, positive evidence of pregnancy would have to be shown and the jury would have to be convinced beyond a reasonable doubt that an unborn person existed and was alive prior to the abortive act. Second, the prosecution would have to prove that the abortive act was committed and that an unborn child's life was actually taken. Thus, it must be proven beyond a reasonable doubt that the abortive act successfully terminated the pregnancy with a result of the death of the unborn child. Third, the abortive act must have been committed with the specific intent to cause the death of the unborn child. If the abortive act was unintended, negligent, or with the intent other than to deprive the unborn of life, a prosecution would not be legally proper.

PROSECUTION FOR USE OF ABORTIFACIENTS UNDER NEW STATE STATUTES

Historically the states have treated abortion separately from their homicide statutes. Every jurisdiction in the United States prior to 1973 had a separate abortion statute. These statutes had two separate primary focuses.

Most statutes punished abortive acts, to-wit, acts done with the intent to produce an abortion regardless of whether an abortion actually resulted. In these instances, however, the states required that the person charged with the crime had knowledge or belief that the woman was actually pregnant whether, in fact, she was pregnant or not. With this knowledge or belief of the pregnancy on the part of the defendant, the statutes punished an act committed by the defendant with the intent to produce a miscarriage.

Other states punished only actual abortions. Under these statutes, it must be proved beyond a reasonable doubt that the woman was actually pregnant and that the acts committed resulted in the death of the child.

In either case, therefore, knowledge or belief of the pregnancy or actual existence of the pregnancy must be proved. In either case the prevailing statutory schemes permitted the abortion or abortional act at least when the abortion or abortional act was necessary to preserve the life of the mother.

PRIOR STATE LAWS DIRECTLY EFFECTING ABORTIFACIENTS

Before 1973, state legislation frequently sought to regulate the traffic in abortifacients by prohibiting their manufacture, transportation, distribution, furnishing, sale or keeping or exposing for sale, giving away or lending. Before 1965, eighteen states so regulated abortifacients in one or more of these ways. There are very few cases under these statutes reported before 1973 since, as long as the substance sold or transported had a legitimate medical or commercial use (and most did), it was not in fact covered by this legislation.

NEW STATE OR FEDERAL LAWS DIRECTLY EFFECTING ABORTIFACIENTS

While the Human Life Amendment does not directly effect abortifacients absent a positive proof of pregnancy, a federal or state law could be passed directly effecting abortifacients. It is likely that this type of statute would provide as follows:

1. Some mechanism would be created whereby a factual determination would be made whether or not any device or drug is an abortifacient.

2. If a device or drug is solely an abortifacient and had no legitimate non-abortive or life saving use, the statute could prohibit the use, manufacture, possession, transportation and sale of such a device.

3. If the device or drug had a legitimate non-abortive use or was used in life saving abortions, the statute would license its use in those circumstances and penalize its illegal use, if such function could be separated.

Under such a statutory scheme, it is likely that the mini pill and IUD could be prohibited. The first trimester prostaglandin suppository drug would be prohibited. In addition, limits could be placed on the use of DES and some forms of contraceptive pills. It is clear, however, that the vast majority of regular contraceptive pills would not be affected in any way since their effect is solely or largely contraceptive rather than abortifacient.

CONCLUSION

In conclusion, without subsequent state or federal laws, the Human Life Amendment does not effect any form of birth control drug or device except the first trimester prostaglandin suppository when there is positive evidence of pregnancy. All other birth control drugs and devices are uneffected. Subsequent state and federal laws, however, may limit the use of certain birth control drugs and devices to their non-abortive or life saving use. A few birth control drugs and devices could be prohibited if it can be proven that they are solely abortifacient and have no legitimate or life saving use. Such action, however, would have to be taken by state or federal statute since the Human Life Amendment, in and of itself, has no direct impact upon these drugs and devices without positive evidence of pregnancy.

EFFECT OF HLA ON BIRTH CONTROL DRUGS AND DEVICES AND ABORTION METHODS	BIRTH CONTROL DRUGS AND DEVICES							ABORTION METHODS				
	Condom	Diaphragm	Spermicidal Foam	Contraceptive Pills				Prostaglandin Drugs			Saline Amniocentesis	Hysterotomy
				Regular	DES	Mini	IUD	Supp.	Inst.	D&C		
1. Is it primarily contraception or abortifacient?	Contra	Contra	Contra	Contra	Contra	AB	AB	AB	AB	AB	AB	AB
2. Does it have any possible abortifacient action?	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3. Does it have a legitimate non abortive use?	Yes	Yes	Yes	Yes	Yes	?	No	No	Yes	Yes	No	Yes
4. Could it be used to perform a life saving abortion?	No	No	No	No	No	No	No	No	Yes	Yes	Yes	Yes
5. Is its primary use before or after positive proof of pregnancy?	Before	Before	Before	Before	Before	Before	Before	After	After	Both	After	After
6. Will non-life saving use become criminal by passage of HLA?	No	No	No	No	No	No	No	Yes	No, unless pos. proof of pregnancy		Yes	Yes
7. Will HLA alone prohibit or limit its use to non-abortive or life saving use?	No	No	No	No	No	No	No	Yes	Yes, with pos. proof of pregnancy		Yes	Yes
8. Can a subsequent state or federal law limit its use to non-abortive or life saving use?	No	No	No	No, Because Unable To Biologically Limit To Non-Abortive Action				Yes	Yes	Yes	Yes	Yes
9. Can a subsequent state or federal law prohibit its use completely?	No	No	No	No	No	?	Yes	Yes	No	No	No	No

Senator HATCH. Our next witness is listed as the former Congresswoman from New York, Bella Abzug. Is Bella here?

[No response.]

Senator HATCH. Apparently not, so we will go to our next witness, Darla St. Martin, the associate director of Minnesota Citizens Concerned for Life.

Darla, welcome to the subcommittee.

STATEMENT OF DARLA ST. MARTIN, ASSOCIATE DIRECTOR, MINNESOTA CITIZENS CONCERNED FOR LIFE

Ms. ST. MARTIN. Thank you.

Senator Hatch, our Nation was founded on the principle that all human beings are equal and that each has certain basic human rights. These ideals were embodied in our Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life.

America has at times fallen short of these ideals, yet through the years the trend has been toward civil rights and greater human justice and equality. Each generation of Americans has worked for these ideals by recognizing the basic rights of more and more people.

But this trend is now being reversed. On January 22 the U.S. Supreme Court struck down the protective abortion laws in all 50 States and gave America abortion on demand right up to birth. It ushered in a new era of discrimination with new victims.

The same Supreme Court decision laid the foundation for depriving other groups of their legal rights when it stated that only "viable" human beings who have the "capability of meaningful life" may, but need not be, protected by the State, *Roe* v. *Wade*, 1973.

Thus, a crucial step was taken to destroy human equality under the law. If life must be meaningful to be protected, then someone, some group or person, is going to have the power over helpless persons to decide whether or not their lives are meaningful.

The old discrimination based on race, sex, and social or economic factors is disappearing, but as it dies a new discrimination is rising based on prejudice against persons whose lives may create problems for individuals or society, the unwanted unborn or newborn child, the elderly, critically ill, or handicapped person.

When those who favor abortion argue that a woman must be allowed an abortion because the child might be unwanted, unloved, unhealthy, or because a baby would create personal problems, they have already accepted these as legitimate reasons for killing, at least for the unborn. They have rejected the principle that problems must be solved with respect for all the people involved.

The new discrimination is even worse than the old, because it is directed against those too young, too old, or too physically ill or handicapped to defend themselves. Those who support abortion, whether they realize it or not, support a whole new view of human beings, one which rejects the basic principle of democracy that each human being has human rights, value, and dignity. The idea that we can dispose of human beings who are unwanted, unloved, unhealthy, or handicapped in the same tidy way we would junk a useless old car threatens the lives and rights of us all.

The basic question is, "Do all human beings have an unalienable right to life?" If they do not, then no matter how well it is camoflaged, America has reverted to a savage law where the strong, the clever, and those with power have the power of life or death over their more defenseless fellow human beings. Once our society is no longer guided by the principle of human rights for all, it is just a question of who is given human rights and when. The human right of each of us is less secure.

If the new discrimination is accepted, then the very foundation of American democracy, the ideal that we are all equal under the law and deserve rights, dies. We can no longer ignore the fact that our country has come to a crossroads.

Senator Orrin Hatch has presented us with an ingenious new constitutional amendment. The Hatch amendment, Senate Joint Resolution 110, would restore the power to protect the unborn to the State legislatures in addition to giving Congress the power to legislate a national standard of protection for unborn children.

Senate Joint Resolution 110 would effectively reverse the 1973 *Roe* v. *Wade* decision. It is a necessary first step in the restoration of right to life of unborn children and the ending of the new discrimination. The Minnesota Citizens Concerned for Life, representing 23,000 members and 150 chapters, is one of hundreds of grass roots right-to-life groups across this country that urge Congress to enact the Hatch amendment without delay. The right to life of all human beings must be restored if democracy as we know it is to survive in the United States of America.

Senator HATCH. Thank you so much. We appreciate your statement.

Our next two witnesses will be Linda Tarr-Whalen of the National Education Association and Ruth Jordan of the Coalition of Labor Union Women.

We are happy to welcome both of you to our subcommittee this morning. We will certainly be interested in hearing your testimony.

If we could start with you, Ms. Tarr-Whalen, then we will go to Ms. Jordan.

STATEMENT OF LINDA TARR-WHALEN, NATIONAL EDUCATION ASSOCIATION

Ms. TARR-WHALEN. Good morning, Senator Hatch.

Senator HATCH. Good morning. It is nice to have you here.

Ms. TARR-WHALEN. Mr. Chairman, the National Education Association is pleased to have this opportunity to present testimony to the Subcommittee on the Constitution. I am Linda Tarr-Whalen, the director of government relations.

The National Education Association considers reproductive freedom of choice a constitutional right of every woman and is strongly opposed to any amendment to the Constitution or a statute which would limit or eradicate this right. We believe that this position is sound on privacy grounds, on economic grounds, on civil rights, and legal grounds.

The NEA is an independent organization open to all educational personnel, with a current membership of over 1.6 million members and affiliates in every State in the United States. Our members are committed to the protection of the right to choose and disagree with the proposition that States and/or the Congress can legislate matters of constitutional rights.

NEA's representative assembly of 7,000 delegates has affirmed in its resolution a dedication to the elimination of all aspects of discriminatory practices against women. The association supports the right of reproductive freedom for all women. The association urges all branches of government to give high priority to making available methods of family planning to women and men unable to take advantage of private facilities.

NEA believes that the decision about abortion is an economic one for millions of American working women and their families. Whether or not a woman chooses to have a child is a matter for her, her family, and her doctor to decide, not the Government. That decision will have an enormous impact on the standard of living of her family and the ability of the woman to continue working and to make progress on the job.

America's working women are very profamily. In fact, their families survive because of their efforts. More of them are working now than ever before, and the greatest increase is in the parents of preschool-age children.

We as an organization find it particularly ironic that these proposals, called prolife, come at a time when life for the poor seems so cheap and when the welfare of working women and their families is so vulnerable. Inadequate child care, nutrition programs, and many other social programs are currently being cut, showing, rather, a disregard for living children.

We believe that reproductive freedom is one of the most fundamental human and civil rights. The constitutional consequences transcend the right to choose abortion. To declare the fetus a person threatens first amendment guarantees of religious liberty, a freedom to believe and to differ in one's belief, and the separation of church and State. The enforcement of this concept threatens the right to privacy broadly as it affects medical care, contraceptive usage, and freedom from Government surveillance of one's associations and the invasion of one's home.

We acknowledge that abortion is a highly charged emotional issue for a substantial minority of the American population who genuinely believe that abortion is immoral and sinful. We support their right to stand by their belief. However, we do not grant them the right to decide and dictate for all Americans whether or not they may undermine the privacy, the protection of privacy, and to exercise their fundamental right of choice.

Senator HATCH. Linda, could I interrupt you? I notice that Congressman Chris Smith of New Jersey is here.

There is a vote in progress on the House floor. Chris, if you want to run over and then come right back, we will try and get you right on to save you time.

Mr. SMITH. Thank you, Mr. Chairman.

Senator HATCH. I am sorry to interrupt you.

Ms. TARR-WHALEN. That is all right.

Therefore, Senator, the National Education Association strongly opposes the passages of Senate Joint Resolution 110 and S. 158, all proposals that would constrict the availability of abortion and other reproductive health care, and all proposals to define the point at which human life begins.

Reproductive freedom does not frame a moral debate as to what decisions individuals should make and does not call for a moral judgment for or against abortion. We remain steadfast in our defense of the right of reproductive freedom for women. This is the right and compassionate thing to do. Although reproductive freedom is part of a constitutionally protected right to privacy, a right that cannot be exercised is no right at all. NEA opposes Government action which restricts the right of women and their families to make very personal decisions privately.

Thank you, Senator Hatch.

Senator HATCH. Thank you.

Ms. Jordan?

STATEMENT OF RUTH JORDAN, COALITION OF LABOR UNION WOMEN

Ms. JORDAN. Thank you, Senator Hatch. We welcome the opportunity to testify. My name is Ruth Jordan, and I am testifying for the Coalition of Labor Union Women.

The Coalition of Labor Union Women, CLUW, is an organization which represents members of collective bargaining organizations concerned about national and economic issues which affect working women. Its national chairperson is Joyce Miller, who is also a member of the Executive Council of the AFL-CIO and a vice president of the Amalgamated Clothing and Textile Workers Union.

CLUW's membership has endorsed a prochoice position. Our concern over the issue of abortion has grown over the past several years as antiabortion forces have attempted to limit the choices of all women and introduce their beliefs into the collective bargaining area. We have become alarmed and have testified against efforts to legislate against negotiated health care plans which provide for abortion.

As you know, Senator, members of CLUW, the American Federation of Government Employees, and other Federal unions representing Government workers have gone to court and successfully blocked efforts by the OPM to cancel out long-existing benefits for Federal workers and their dependents. We are concerned because four States already prohibit public employee health plans from covering abortions, and in some States private employee plans have become affected also.

Increasingly, private health coverage is excluding abortion as a medical option. CLUW and other unions consider this effort to be an intrusion into the area of collective bargaining and a dangerous precedent which places legislators in the negotiating picture. For the Coalition of Labor Union Women, the issue of abortion is not only one that can be limited to a scientific or moral question.

Frankly, for us the issue is first and foremost an economic question.

Tens of thousands of working women, wives, mothers, and single heads of families, believe pregnancy and choice can make the difference between economic survival or disaster for their families. Some feminists describe the conservative agenda as keeping women "barefoot and pregnant." We would not go so far. We in CLUW would, however, characterize it as part of a strategy to maintain women as a marginal, expendable workforce, an issue we think far more serious for the Nation's economic life and strength.

We believe the working woman and her family are the only ones who should decide whether or not the family should grow, because that decision directly affects the economic wellbeing of that family. Like the previous witness, I would say that it is not the domain of a Government official, a Congressman or even, sir, a Senator. CLUW and three other unions, the International Ladies Garment Workers, the National Education Association, and the Newspaper Guild, have all passed prochoice resolutions.

I would like to say that nearly two-thirds of all working women are single, widowed, divorced, separated, or who have husbands who earn less than $7,000 a year. They work because of economic need, and we believe we speak for many of them, including those who are not in bargaining units, because we understand the issues that impact working women.

We think it is particularly unseemly at this time, when many of the working poor are being cut off from basic, essential medical care because of cutbacks in medicaid, infant and maternal nutrition programs, Social Security aid, to tell these women that they must continue to bear children because the State believes it is morally right to do so. It is particularly unseemly, sir, when the State does not take on the moral obligation to provide even for their child's medical care or for the delivery of those children.

We believe the abortion issue is mostly economic, because it unjustly legislates morality of the poor and the powerless. The wealthy have always been able to avoid the consequences of moral legislation. They can take a trip to Mexico to obtain a divorce when it is illegal, or they can take a trip to another nation where abortion is easy to get. The poor do not have that option.

Many have suggested that if the issue is left to the States the decision will somehow be more democratic. I would like to tell you my own experiences as a young woman growing up in a devoutly Catholic neighborhood in New York City, where abortion was forbidden by both law and religion, where contraceptives were banned, and where adultery was the only basis for divorce.

Well, sir, I can tell you that women sought and received illegal abortions at either tremendous fees or tremendous physical risk. Contraceptive devices were illegally fitted with little difficulty in finding doctors to do the job, and marriages of many years were annulled on the grounds that they were unconsummated, a clear fraud. That sort of illegality and dishonesty cannot lead to a reverence for life or a reverence for law, and we urge the Senate to avoid such consequences.

Finally, we must say that we find it particularly ironic that these proposals to legislate against abortion and overturn a decision of the Supreme Court come from Members of Congress who have steadfastly refused to provide decent child care for preschoolers. They are the people who would support a subminimum wage that would entice teenagers to compete against their mothers and fathers in the workplace, and the people who are so worried about the rights of the fetus have not raised a finger to enforce strong standards that would protect workers from lead poisoning, that would prevent sterility of men who work in lead-dangerous situations, and most particularly protect the lives and fetuses of pregnant workers who work in dangerous lead situations.

These are not unrelated issues. We urge that before the Senate attempts to legislate on a moral basis they commit themselves to protecting the lives and welfare of America's working women and children.

Finally, I would like to say that we would join the 45 other national organizations who respectfully urge, Senator Hatch, that you wait to mark up Senate Joint Resolution 110 until after the Christmas recess.

Senator HATCH. Thank you both so much.

[The prepared statement of the National Education Association on Reproductive Freedoom follows:]

PREPARED STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION ON REPRODUCTIVE FREEDOM

Mr. Chairman, the National Education Association is happy to have an opportunity to present this testimony to the Subcommittee on the Constitution. We would like to make a few observations on an issue which is of increasing concern to our membership.

The National Education Association considers reproductive freedom of choice the constitutional right of every woman and is strongly opposed to any amendment to the Constitution or statute which would limit or eradicate this right.

NEA is an independent organization open to all educational personnel with a current membership of over 1.6 million members and affiliates in every state. Our members are committed to the protection of the right to choose and disagree with the proposition that states and/or Congress can legislate matters of Constitutional right. NEA's Representative Assembly of 7,000 delegates has affirmed in its resolutions a dedication to the elimination of all aspects of discriminatory practices against women. The Association supports the right of reproductive freedom for all women. The Association urges all branches of government to give high priority to making available all methods of family planning to women and men unable to take advantage of private facilities. (Resolution attached)

NEA believes that the decision about abortion is an economic one for millions of American working women and their families. Whether or not a woman chooses to have a child is a matter for her, her family, and her doctor to decide, not the government. That decision will have an enormous impact on the standard of living of her family and the ability of a woman to continue working and to make progress on the job.

A single parent, the head of a household, or the major provider is the only one who can make the decision whether her family should grow. If she and her husband are both wage earners, then it is their decision together, a family decision based on their economic need, their religious beliefs, and their attitudes. Again, that is not the domain of some government official.

America's working women are truly pro-family. Their families survive because of their efforts. More of them are working now than ever before and the greatest percentage of increase in their participation has occurred among women with pre-school age children. Most women work because of economic need. Nearly two-thirds of all working women are single, widowed, divorced, or separated, or have husbands whose incomes are less than $7,000 a year. We find it particularly ironic that these latest proposals come at a time when the welfare of these working women and their families is most vulnerable. Inadequate child care for pre-schoolers or after-school care for older children and minimal levels of infant and maternal nutrition programs prevail.

We believe that reproductive freedom is one of the most fundamental human and civil rights.

The constitutional consequences transcend the right to choose abortion. To declare the fetus a person threatens First Amendment guarantees of religious liberty, of freedom to believe and to differ in one's beliefs, and of separation of church and state. The enforcement of this concept threatens the right to privacy broadly as it affects medical care, contraceptive usage, and freedom from government surveillance of one's associations and invasion of one's home.

We acknowledge that abortion is a highly charged emotional issue for a substantial minority of the American population who genuinely believe that abortion is immoral and sinful. We support their right to stand by their beliefs. However, we do not grant them the right to dictate to all Americans whether or not they may undermine the protection of privacy or exercise the fundamental right of choice, a right which dramatically impacts their family life.

Therefore, the National Education Association strongly opposes the passage of S.J. Res. 110, S. 158, all proposals that would constrict the availability of abortion and other reproductive health care; and all proposals to define the point at which "human life" begins.

Any of these proposals would, if enacted, severely restrict reproductive freedom in this country. Abortion would, or could, become a federal or state crime, in contradiction to the fundamental right proclaimed by the Supreme Court in its 1973 rulings in Roe v. Wade and Doe v. Bolton.

Additionally, if enacted, these proposals would jeopardize the constitutionality established balance of powers among the judicial, legislative, and executive branches of government by denying lower federal courts the opportunity to rule on substantive issues that occur within their normal bailiwick.

Reproductive freedom does not frame a moral debate as to what decision individuals should make and does not call for a moral judgment for or against abortion. We remain steadfast in our defense of the right of reproductive freedom for women. This is the right and compassionate thing to do.

Although reproductive freedom is part of a constitutionally protected right to privacy, a right that cannot be exercised is no right at all. NEA opposes government action which restricts the right of women and their families to make very personal decisions privately.

H-5. Equal Opportunity for Women

The National Education Association insists that all persons, regardless of sex, be given equal opportunity for employment, promotion, compensation, including equal pay for comparable worth, and leadership in all activities.

The Association supports the proposed Equal Rights Amendment to the U.S. Constitution, which states "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The Association urges its affiliates to support ratification of the amendment. It also supports the enactment and full funding of the Women's Education Equity Act.

The Association believes that the Equal Employment Opportunity Commission must have "cease and desist" authority to act in all cases of discrimination based on race, creed, color, age, national origin, and sex, and supports the EEOC guidelines which state that sexual harassment is a form of sex discrimination.

The Association urges governing boards and education associations to eliminate discriminatory practices against women in employment, promotion, and compensation. Personnel policies must include maternity leave, paternity leave, leave for adoption of a child, child-care leave, and professional leave, which encourages women to participate in professional growth experiences and to prepare for administrative and executive positions.

The Association further urges professional associations at all levels to adopt policies that ensure women equal access to elective, appointive, and staff positions.

The Association urges the establishment of Women's Education Committees in local and state associations as a vehicle for implementation of equal opportunity for women.

The Association believes that sexism and sex discrimination must be eliminated from the curriculum.

The Association endorses the use of nonsexist language by the united teaching organization.

The Association supports the right of reproductive freedom for all women. The Association urges all branches of government to give high priority to making available all methods of family planning to women and men unable to take advantage of private facilities.

Senator HATCH. Our next witness will be Jean Doyle, project director of Citizen's Lobby.

If any of the Congressmen come in that want to testify, I may interrupt witnesses because of their exceedingly demanding schedules. So if you will understand and realize that we are not trying to be rude; we are just trying to accommodate Members of Congress. Please help us to be able to do that.

At this time, if Jean Doyle is here, we will call on her.

[No response.]

Senator HATCH. If not, we will go to Beth Lief, who is from the NAACP, Legal Defense Fund.

Beth, we are happy to have you with us.

STATEMENT OF BETH LIEF, LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. LIEF. Thank you, Mr. Chairman, for the opportunity for the NAACP's Legal Defense and Educational Fund to be present its views today.

My name is Beth Lief. I am an assistant counsel to the NAACP Legal Defense and Educational Fund, a nonprofit organization dedicated to assisting black persons to secure their constitutional and statutory rights through the prosecution of lawsuits.

For many years attorneys associated with the legal defense fund have represented parties before the Supreme Court in *Brown* v. *Board of Education* and other cases which have recognized and protected fundamental constitutional rights and freedoms.

I have submitted written remarks which I request to have put in the record. I will limit my oral remarks today to three major points, two of which are specifically addressed to Senate Joint Resolution 110 and one of which applies with equal force to all four proposals. Let me say at the outset, however, that the legal defense fund is unalterably opposed to any constitutional amendment which abrogates a recognized individual or minority right.

SENATE JOINT RESOLUTION 110

Turning to Senate Joint Resolution 110, I would like to address two major arguments put forward by proponents of this amendment: First, that it democratizes" the abortion issue—that is, that it "returns" the issue to the people to determine through their legislatures; and, second, a related issue, that the amendment is a federalism amendment which returns the issue to the States. I submit, Mr. Chairman, that the first argument misconceives the nature of the abortion question and that the second is factually inaccurate.

FUNDAMENTAL RIGHTS SHOULD BE PROJECTED FROM MAJORITY EXCESSES

Turning first to the democratization issue, the great genius of our Government is that it is not solely one of majority rule, but rather that it is a constitutional democracy that balances the wishes of the majority with the rights of individuals and minorities.

The Bill of Rights and later amendments, notably the 13th, the 14th, and the 15th amendments, were specifically designed to protect individual and minority rights against the excesses of legislative and majority desires. As the Supreme Court stated in *West Virginia Board of Education* v. *Barnett*, fundamental rights may not be submitted to vote. They depend on the outcome of no election. Fundamental rights, therefore, do not depend, as you suggest, on social consensus.

Senate Joint Resolution 110 would reverse this balance for the first time in the history of our country and authorize Congress or any State to pass by simple majority vote a law to restrict or totally prohibit a hitherto recognized constitutional right. The right of a woman to determine whether or not to terminate a pregnancy is not, as some witnesses have suggested, mere social policy. It is a fundamental right enshrined in the 9th and 14th amendments to the U.S. Constitution.

Fundamental rights and liberties should not be subject to revocation by simple majority vote. Disagreement about the correctness or wisdom of the Supreme Court's recognition of this fundamental right, however strongly felt, does not justify pampering so dangerously with our constitutional framework.

SENATE JOINT RESOLUTION 110 IS NOT PRO FEDERALISM OR STATES' RIGHTS

Second, Senate Joint Resolution 110 is neither a States rights amendment nor one that conforms to the constitutional pattern of federalism. The second and third sentences of Senate Joint Resolution 110 read:

> The Congress and the several States have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern.

These sentences give Congress power it has never before held, to restrict and prohibit abortions. According to this sentence, if Congress were to pass a law, for example, prohibiting all abortions except in the instance of rape or incest, that law, by normal operation of the supremacy clause, would override all State statutes and presumably State constitutions, thereby limiting the capacity of the people of the several States, through the content and interpretation of their constitutions, to exercise their views.

Far from being a States rights amendment then, Senate Joint Resolution 110 leaves States with far less power than they had prior to the decision of the Supreme Court in *Roe* v. *Wade*.

The proponents of Senate Joint Resolution 110 claim that the choice of how or whether to regulate the ability to obtain an abortion is left to the States, but that choice, we submit, is illusory. States may not pass any law regarding abortion. They may only pass one that restricts or prohibits the right to an abortion. This is a bald instance of Congress dictating to the States in the area of what proponents themselves suggest should be local policy.

SENATE JOINT RESOLUTION 110 OBSTRUCTS GOAL OF SUPREMACY CLAUSE

Finally, the proviso in the proposed amendment turns the supremacy clause on its head. By allowing different rules in different States, as long as they are stricter than those passed by Congress, the amendment invites traffic by women across State lines who are seeking liberal abortion and the variation of such traffic on an annual basis, depending on what State legislatures might do.

This prospect presents a nightmare for health facilities, for insurance, and for health personnel. But, in addition, from a constitutional framework, it thwarts the precise goal of the supremacy clause, uniformity of law and equality of the administration of laws.

The final point that I would like to make today goes to all four proposals, and that is that the controversy at issue here is not just the decision in *Roe* v. *Wade*, but the attempt to amend the Constitution in order to obliterate a right which the Supreme Court has held to be fundamental and deserving of strict constitutional protection. If such an amendment were passed, it would be the first time in our Nation's history that the process of amending the Constitution was used in this way.

I submit that the fundamental principles of our Constitution have endured precisely because the amendment process has not been used to address controversial and highly political concerns but only to remedy basic defects in our constitutional structure.

I thank you for allowing we to testify.

Senator HATCH. Thank you. We are happy to have your record made here today.

[The prepared statement of Beth Lief follows:]

PREPARED STATEMENT OF BETH LIEF

Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to testify today on constitutional issues raised by the proposed constitutional amendments on abortion.

My name is Beth Lief. I am an assistant counsel of the NAACP Legal Defense and Educational Fund, Inc. The Legal Defense Fund is a non-profit corporation established to assist black persons to secure their constitutional and statutory rights through the prosecution of lawsuits. For many years attorneys of the Legal Defense Fund has represented parties before the Supreme Court, in cases like Brown v. Board of Education, which have recognized and protected fundamental constitutional rights and freedoms.

The Legal Defense Fund is unalterably opposed to any constitutional amendments which abrogate fundamental constitutional rights as a disruption of the crucial balance between individual rights and majoritarian sentiment; and an erosion of the traditional role of the judiciary to interpret and defend minority and individual freedom. All four proposed constitutional amendments to revoke the right recognized in Roe v. Wade are such amendments, and present a dangerous precedent for future manipulation of the Constitution to achieve controversial and highly political ends. Although the remarks which follow apply in general to the four proposals, they are specifically addressed to S.J. Res. 110, the amendment proposed by Senator Hatch.

I. Individual or Minority Rights and Majority Will

S.J. Res. 110 reads as follows:

> "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern."

In his remarks when S.J. Res. 110 was introduced, Senator Hatch stated that it was his intention to return regulation of abortion to the will of the people. This suggestion not only misconceives the nature of our government but, in addition, is not the result which the amendment will achieve.

Ours is not solely a government of majoritarian rule but rather a constitutional democracy which shields minorities and fundamental rights from the excesses of legislative and majority desire. As James Madison wrote in The Federalist Papers:

> "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential spectators, and snares to the more-industrious and less-informed part of the community." 1/

The Bill of Rights, as well as the Thirteenth, Fourteenth and Fifteenth Amendments were thus designed to protect individual and minority rights against encroachment by majoritarian rule. The Supreme Court has recognized that:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts . . . fundamental rights may not be submitted to vote; they depend on the outcome of no election." 2/

S.J. Res. 110 seeks to upset this balance between individual rights and majoritarian rule by, for the first time in our history, authorizing Congress or any state to pass by simple majority vote a law which restricts or prohibits totally a hitherto recognized constitutional right. Disagreement about the existence of a particular right, however strongly felt, does not justify tampering so dangerously with our constitutional framework.

According to the wording of S.J. Res. 110, the majority would not be free to protect a woman's right to determine whether or not to terminate her pregnancy. If the proponents of S.J. Res. 110 seek truly to allow the legislature to decide the extent to which abortions are legal, the proposed amendment should afford Congress and the several states the concurrent power "to permit, restrict and prohibit abortions." Instead, the proposed amendment only gives Congress and the States the power "to restrict and prohibit abortions." Although Senator Hatch stated in his remarks when S.J. Res. 110 was introduced that it was not his intention to dictate particular legislative outcomes or policies, the language of S.J. Res. 110 appears to do precisely that.

Fundamental individual rights and liberties should not be subject to revocation by simple majority vote, and certainly not when the options for such a vote are limited from the outset to restrictive measures.

II. The Constitutional Role of the Federal Judiciary

If any of these amendments are passed, the ability of the courts to interpret the Constitution will be altered fundamentally. The competing interests at stake will have to be resolved without the guidance and leadership of one of the most important institutions of our government.

Since Marbury v. Madison, this nation has recognized that "It is the duty of the court to say what the law is. There is no dispute that the decision of the Supreme Court in Roe v. Wade is unpopular to a vocal segment of our society. Yet the Framers intended that the courts would be able to render unpopular decisions that thwart deeply held sentiment when the Constitution, as they interpret it, so requires. In the words of Alexander Hamilton, the judiciary "in a republic (is an) excellent barrier to the encroachments and oppressions of the representative body."[3/]

The ability of the federal judiciary to analyze a case on its own facts free from the political give and take of the legislature or the electorate renders that branch of government ideally suited to interpretation of the Constitution. The history of the Supreme Court has confirmed that such analysis allows for carefully considered evolution of constitutional doctrine. This process is particularly crucial in the area of individual and minority rights where those affected are often not equipped to exercise clout in the political area. The history of Brown v. Board of Education and subsequent cases interpreting Brown are recent testimony that the federal courts are equipped to remedy systemic infringement of constitutional rights where legislatures lack the ability or the will to so act. The same is true in the area of abortion rights.

Those who believe that Roe v. Wade was wrongly decided may raise arguments in support of their position before the courts. Indeed, cases subsequent to Roe, such as Harris v. McRae, 448 U.S. 297 (1980) establish that constitutional protection of a woman's right to determine whether or not to terminate a pregnancy is not a guarantee indelibly engraved but one, like other rights, which is subject to constant re-evaluation.

The proposed amendments directly frustrate any possibility of further judicial evaluation and ignore the allocation of powers so wisely accorded the judiciary, on the one hand, and the legislature on the other.

III. Federalism and States Rights

Contrary to statements by proponents of S.J. Res. 110, the proposed amendment is not a states' rights amendment. Nor is it consistent with the federalist nature of our government.

Senator Hatch has acknowledged that the proviso to his proposed amendment creates an "exception" to the Supremacy Clause. S.J. Res. 110 is directly contrary to the constitutional rule that the federal acts prevail over state laws, e.g., Testa v. Katt, 330 U.S. 386, 393 (1947). By allowing different rules in different states under certain circumstances, S.J. Res. 110 invites a situation where women travel throughout the country seeking states which permit abortion and where such traffic can vary on annual basis, depending upon the actions of state legislatures. Such a situation is precisely what the Supremacy Clause was aimed at preventing. As the Supreme Court stated in Mayo v. United States, 319 U.S. 441, 445 (1943),

> [I]t is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The Supremacy Clause of the Constitution states this essential principle."

However, it is erroneous to view S.J. Res. 110 as a states' rights amendment. According to the language of the amendment, states would not be free to determine the extent to which they could regulate abortions for Congress could override any such statute merely by passing a more restrictive measure.

In sum, S.J. Res. 110 embodies neither the uniformity shich is envisioned by the Supremacy Clause nor the ability to fashion local solutions which is championed by states rights advocates.

IV. Constitutional Amendments

The controversy at issue here is not only the decision by the Supreme Court in Roe v. Wade. At issue here is the attempt to amend the Constitution in order to obliterate a right which the Supreme Court has held to be fundamental and deserving of strict Constitutional protection. If such an amendment were passed, it would be the first time in our nation's history that the process of amending the Constitution was used in this way.

Constitutional guarantees of individual liberty, due process and equal protection should not be taken away, tampered with, or trivialized through the amending process. Nor should the amending process be invoked as a means of addressing specific, controversial and highly political concerns. The one instance is which it was so used -- Prohibition -- proved a sad and unsuccessful chapter in our history that only bred contempt for the law and institutionalized crime. The fundamental principles of our Constitution have endured precisely because the amending process has been used only to remedy basic defects in our constitutional structure. Restraint in the use of the amending process has protected, over time, the rights of both the minority and the majority. The integrity of the Constitution has been a source of our nation's greatest strength.

CONCLUSION

The federal judiciary has provided considered leadership in preserving individual and minority rights, in maintaining the constitutional balance between minority rights and majority wishes, and in addressing the great issues of our time. The proposals to amend the Constitution to abrogate a woman's right to determine whether to terminate a pregnancy undermine this crucial role of the judiciary in our constitutional system. Finally, these amendments directly encroach upon individual liberties and, by doing so, endanger the sacred traditions of our nation.

Notes

1/ The Federalist No. XLIV.

2/ West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943).

3/ The Federalist, No. LXXVIII; see also United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

Senator **Hatch**. Our next witness will be Denise Neary, vice president of the Pennsylvania Pro-Life Federation.

Denise, we are pleased to hear from you at this time.

STATEMENT OF DENISE NEARY, VICE PRESIDENT, PENNSYLVANIA PRO-LIFE FEDERATION

Ms. **Neary**. Senator Hatch, thank you for the opportunity to appear before you today.

I am Denise Neary, a registered nurse, a wife, and mother, and vice president of the Pennsylvania Pro-Life Federation, a statewide multipartisan organization with 19,000 members dedicated to the principle that all human life is sacred and should be protected by law.

The Pennsylvania Pro-Life Federation supports all legislative measures which seek to reverse or limit the far-reaching effects of the Supreme Court abortion on demand decisions of 1973.

We have consistently supported abortion funding restrictions and regulatory bills at the State and national level. A brief history of the ultimate outcomes of these types of legislation in Pennsylvania demonstrates quite clearly why we have given our unanimous endorsement to Senate Joint Resolution 110, the Hatch amendment.

OUTCOME OF PENNSYLVANIA ABORTION-CONTROL LEGISLATION

In 1978 and again in 1980, the Pennsylvania legislature voted to restrict the use of State funds for abortion and in 1974 voted to protect unborn babies past the age of viability from death through abortion. However, to this day, because of court challenges, none of these bills has the force of law, and so Pennsylvania, against the will of its citizens, continues to fund abortion on demand and affords no protection to unborn babies, even in the last 3 months of pregnancy.

Less than 2 weeks ago the Pennsylvania legislature voted to restrict abortion funding, provide women contemplating abortions with informed consent, protect babies born alive through abortions, require clinics to adhere to minimum health standards, and require parental notification prior to the performance of an abortion on a minor child.

Within hours of that bill's passage, proabortion groups, anticipating Senate concurrence, which I am pleased to say happened yesterday, vowed to enjoin it.

LIVE-BIRTH—THE DREADED ABORTION COMPLICATION

On August 2, 1981, the Philadelphia Inquirer carried this article [indicating article] on the dreaded complication of abortion—live birth. This article reveals that at present approximately one out of every four pregnancies is terminated by an abortion. American doctors, it states, "remove more fetuses than tonsils." "About once a day somewhere in the United States," the article continues "something goes wrong and an abortion results in a live baby."

A few years ago Dr. Kenneth Edelin, a Boston abortionist, was tried for manslaughter in the death of a baby born alive after a would-be abortion at 6 months. Testifying in his own defense he stated: I want to make it very clear to this court. I had no intention of delivering a live baby. The mother did not want a live baby. She wanted her baby dead.

EXPLOITATION OF WOMEN BY ABORTION PROFITEERS

In 1978 the Chicago Sun-Times conducted a 5-month undercover investigation into a number of Chicago abortion clinics. Their investigation revealed, among other things, abortions being performed on women who were not even pregnant, doctors in such a rush to perform abortions that they proceeded without proper anesthesia, the use of unqualified personnel and unsterile equipment, and the falsification of records.

The Sun-Times revealed the results of their investigation in this series of articles [indicating articles] entitled "The Abortion Profiteers," in which they found—and I quote:

> An alarming number of women who, because of unsterile conditions and haphazard clinic care, suffered debilitating cramps, massive infections, and such severe internal damage that all of their reproductive organs had to be removed.

Mr. Chairman, these abuses are just a part of the aftermath of *Roe* v. *Wade*.

PARENTAL CONSENT FOR ABORTION

Last, Mr. Chairman, I would like to address myself to an area of particular concern to me as a parent. In the United States today there is only one surgical procedure that may be performed on a minor child in a nonemergency situation without parental knowledge or consent. It is abortion. A 14-year-old girl cannot have her ears pierced without parental consent, yet she can undergo a surgical abortion, which aside from its well documented psychological effects, could render her sterile or so prone to repeated miscarriages that she may never be able to carry another child to term.

SUPPORT FOR SENATE JOINT RESOLUTION 110—THE HATCH AMENDMENT

Mr. Chairman, for the first time in 8 years we see in Senate Joint Resolution 110 a realistic chance to reverse *Roe* v. *Wade*. For the first time in 8 years we see help for the unborn and for women who have been exploited by the abortion profiteers. We commend you, Senator Hatch, for your continued efforts to defend and protect all human life and hereby commit all of the resources of the Pennsylvania Pro-Life Federation to passage and ratification of the Hatch human life amendment.

Senator HATCH. Thank you so much.

I am going to have to take a 5-minute recess at this time. We will continue in about five minutes. Thank you.

[Recess taken.]

Senator HATCH. If we could have order—our next witness will be Jane Wells Schooley of the National Organization for Women.

We are happy to have you with us.

STATEMENT OF JANE WELLS-SCHOOLEY, NATIONAL ORGANIZATION FOR WOMEN

Ms. WELLS-SCHOOLEY. Mr. Chairman, on behalf of the National Organization for Women, the largest feminist organization in this country, I am pleased to have the opportunity to appear before you today.

NOW is dedicated to achieving full equality and full reproductive rights for women and therefore is opposed to all legislation and constitutional amendments, including Senate Joint Resolution 110, which seek to deny a woman her right to make some of the most personal and profound decisions of her life—whether and when to bear a child. All the constitutional amendments pending before this subcommittee are part of an attempt by an extremely outspoken minority to impose its own personal morality on a pluralistic society which does not share its views.

This vocal opposition to women's rights has not gone unnoticed. The impact of the women's vote was felt in the November 1980 elections. According to all of the exit polls, women voted for Reagan significantly less than did men. The New York Times/CBS News poll reported that 8 percent fewer women voted for Reagan than did men. This difference calculated in actual votes amounted to a net loss of 3.3 million female votes for Reagan.

Women not only voted differently from men, but there is impressive evidence that they did so on the basis of women's issues, according to both pre-election and exit polls. As the election campaign progressed, there was evidence that the female voting pattern was based on Reagan's antiwomen's right positions.

Polls taken subsequent to the election not only confirm this disparity between the views held by women and men, but after a brief honeymoon dip in January show it growing steadily to 16 percent by mid-August. This trend persisted in spite of Reagan's appointment of Sandra O'Connor to the Supreme Court.

In addition to the difference in the way men and women perceive Reagan's performance as President, polls show that a similar gap exists in how men and women would vote in the 1982 congressional elections, and that gap is also growing. When asked in a Harris poll how they would vote in the 1982 elections, women stated that they would go Democratic by an 11-point margin, while men gave the Republicans a 4-point edge.

Therefore, over the past year it has become a political fact, documented by an increasing number of pollsters and political columnists, that many women are being disaffected by Reagan and Republican programs which are perceived to be contrary to their best interests.

Senator HATCH. If I could interrupt you there, this issue seems to cut across both parties.

Ms. WELLS-SCHOOLEY. It does as a matter of fact, of women of all political persuasions.

Senator HATCH. In other words, it is a bipartisan issue on both sides.

Ms. WELLS-SCHOOLEY. That is right. It is a bipartisan issue, but what has resulted, Senator, is that women have seen that the administration's policies in affirmative action and in treatment of women in general are against their best interests, so the gap is widening, and in the 1981 election in the Robb-Coleman race—I have those figures with me—men voted for Robb 46 percent, to females 56 percent; men voted for Coleman 49 percent to female 39 percent. It is clear that the women's vote did make a difference in that election.

Our point is that never before in history was there a difference between women's and men's vote. They voted precisely the same. This time there is a significant bloc emerging of women's votes which we feel is significant for this Congress to know about.

For example, in the hearings you held up to Monday, I believe there were 36 witnesses, 3 of whom were women.

So we are looking at it from a standpoint that this is not just an economic and a social issue; this is a political issue, and there is a voting bloc, and I think we are going to see more of that bloc as the time goes on.

The backlash to these antiwoman proposals is buttressed by general public opinion which strongly opposes congressional or State intermeddling in private lives.

In a Time magazine Yankelovich, Skelly, and White poll conducted in May of 1981, only 5 percent of those polled agreed that the Congress should decide when abortion should or should not be permitted. Only 4 percent thought that that decision should be made by State government. An overwhelming 68 percent thought that that decision should be made by the woman.

Flying in the face of tremendous public opposition and a growing women's voting bloc, the drafters of these amendments have as their ultimate goal a ban on all abortions as well as some of the most popular forms of birth control.

The amendment proposed by you, Mr. Chairman, Senate Joint Resolution 110, has been characterized as a compromise States right approach. In actuality, the proposal is neither a compromise nor an approach which assures States rights. The word compromise suggests a settlement of differences through concessions. Apparently the Hatch proposal is still plagued with opposition, not only from those interested in individual liberties but also from the antiabortion, antibirth control movement itself.

Just days after the introduction of your amendment, over 70 antiabortion groups repudiated your proposal. Charles Rice, a member of the advisory board of the National Pro-Life PAC, called the Hatch proposal "a prescription for disaster" and "fatally flawed in principle." Paul Brown, director of Life Amendment PAC, called Hatch's approach "pie in the sky dreaming."

Although the National Conference of Catholic Bishops has endorsed your proposal, the decision sparked extended debate and disagreement among some of the bishops over the wisdom of the action.

There is also opposition to the Hatch proposal among antiabortion Members in Congress. Senator Jesse Helms, in a memo to the Pro-Life Caucus, recommended that they not support this strategy.

Senator Hatch has said his amendment "makes no value judgments on abortion," yet the amendment allows Congress and the States not only to restrict and prohibit abortion, it further requires that State laws be at least as restrictive as those set by Congress.

If you really want to draft a constitutional amendment that is neutral on the issue, surely the words "prohibit" and "restrict" would not be in the proposal.

You contend that your amendment will reenfranchise the American people. In fact these decisions would actually rest with State legislatures, only 12 percent of which are female, and the Congress, only 3.7 percent of which is female, bodies which could hardly be called representative of the people it most affects.

Once the Government has been allowed to dictate the reproductive lives of women, the danger is profound and pervasive. Today the directive is to produce babies without consideration for the best interest of the pregnant woman, of those who may be dependent on her, even of the fetus itself.

Tomorrow, Government already in control of women's reproductive lives, could mandate sterilization or other limitations on the number of births allowed. Forcing a woman to continue a pregnancy or forcing her to stop a pregnancy is equally intolerable.

There are several points I would like to make, and in light of time limitations I can summarize those points.

Senator HATCH. That will be fine.

Ms. WELLS-SCHOOLEY. One is that I have heard several witnesses today and in the past say that there is no intention to affect birth control by these types of amendments. I would like to submit into the record at a later point a short summary of direct quotations from most of the leaders of the antiabortion movement, where they directly say that these amendments and their proposals will affect the pill and the IUD.

Senator HATCH. Without objection, we will put them in the record.

Ms. WELLS-SCHOOLEY. Additionally, during the Senate Judiciary Subcommittee hearings on the so-called human life bill, Stephen Galebach, the author of the HLB, stated that the passage of his bill would prohibit States from funding IUD's, morning-after pills, and would allow States to ban the manufacture or production of these drugs and devices. In my testimony I cite the reference.

Additionally, on the probable impact of a human life bill on the funding of clinics that distribute IUD's and the morning-after pills, former Solicitors General Robert Bork and Archibald Cox concurred with Galebach's opinion.

Other proponents of Federal legislation which your amendment would allow, Jack Willke for example, in his testimony on June 18, asked and answered his own question about whether an HLB would authorize a State or Federal legislative body to outlaw IUD's and morning-after pills. Willke said emphatically, "If it has only a single action, and that is abortive, it very possibly could be outlawed."

Under an HLB, there is no assurance that a State could even fund abortions in cases when the life of the pregnant woman was at stake. In my testimony I quote from Robert Nagel of Cornell's statement to Senator Baucus, where he says it is extremely unlikely that we could be certain that abortions could be funded if the life of the mother were involved.

One final thing, one of the previous witnesses from the Pennsylvania Pro-Life Federation just discussed a piece of legislation that was passed yesterday in Pennsylvania. It is model legislation. It is called the Abortion Control Act, and it gives us a very clear view of the type of State legislation that the antiabortion movement would push under your amendment, Senator Hatch.

The act, touted as model legislation, was actually drafted by an antiabortion group in Chicago and represents the most comprehensive, punitive legislation of its type. Just to give you an idea of the flavor, the Abortion Control Act as originally drafted, required paternal notice even in cases of incest. Among other provisions, allowing any adult or organization to petition to be appointed a guardian at litem for a fertilized egg or fetus on the belief or mere suspicion that the pregnant woman was about to break this law.

By the way, if in fact that woman is vindicated, she must pay those legal expenses. There is no recourse for that responsibility.

It requires labeling the IUD and some forms of the birth control all as "abortifacients."

So we see the proposals of the very proponents of this action at both the Federal and the State level already have specific legislation attacking birth control regardless of their statements to the contrary. It severely restricts in vitro fertilization, prohibits abortion coverage in State health insurance plans and in private insurance plans without additional cost. It requires parental consent of both parents or the consent of the court in the case of an unemancipated minor.

Most of the provisions of the model legislation——

Senator HATCH. Could I interrupt you?

Ms. WELLS-SCHOOLEY. Yes.

Senator HATCH. How much longer are you going to take?

Ms. WELLS-SCHOOLEY. Just about 2 minutes.

Senator HATCH. Then would you wait? I have got a Senator on the phone, and I will be right back.

Ms. WELLS-SCHOOLEY. OK.

[Brief recess taken.]

Senator HATCH. I am sorry to interrupt you. Go ahead.

Ms. WELLS SCHOOLEY. Thank you very much.

Most provisions of this model legislation are aimed at harassing or intimidating women who are trying to make responsible decisions on childbearing.

Doctors, facing stiff criminal penalties and loss of license, would hardly be in a position to exercise their best medical judgment in the treatment of their female patients. The possibility that medical judgments would be subverted by haunting legal liabilities is real. The bill purports to allow doctor discretion in cases of medical emergency.

Senator Hatch, I think it is important when we talk, as I know you are concerned about the life of the mother, that we note what this particular bill says about medical emergencies. It defines "medical emergency" as "that clinical condition so complicating pregnancy as to necessitate the immediate abortion of same to avert the death of the mother." So literally until a woman is dying there is no recourse for an abortion.

The language of the bill, such as that phrase "averting death," shows not even a rhetorical interest in saving women's lives. A doctor would be forced to wait until a female was literally dying before declaring a medical emergency to exist.

Senator HATCH. I do not know anybody in the right-to-life movement who really would advance that type of bill. I do not know anybody in Congress who would.

Ms. WELLS-SCHOOLEY. I would like to cite for the record two sources, which I would ask you to include in the record. One is a report from the National Right to Life Committee on the specific proposal which uses the words "avert the death" and specifically says that they do not want the words "save the life." Additionally, I will get to you another antiabortion paper which specifically makes this point.

After reviewing the current antiabortion, antibirth control proposals at both the Federal and State levels, there is no question as to the impact of your proposal and others. Today we have been able to highlight only some of the most profound implications of the proposed amendments before you.

Precisely at the time when ultraconservatives are advocating getting government off the backs of citizens, it is hypocritical that this type of legislation is being proposed, as it is the ultimate invasion into our private lives. Overall, the potential impact of these proposals on girls' and women's health and their very lives is devastating, as is the attack on the families which seek to responsibly guide their own destinies.

Senator Hatch, I think there has been an awful lot of testimony prepared for these hearings, and people have spent a lot of time on it. I am sure that both sides feel very strongly about the testimony that they have presented.

The National Organization for Women feels that you should give the Senators on this subcommittee adequate time to review all the testimony, which most of the Senators will not even see, before you mark up the bill. So we are requesting that you delay the markup until a later date, so that there is adequate time to review all the testimony that has been before you.

Senator HATCH. Thank you.

[The prepared statement of Jane Wells-Schooley follows:]

PREPARED STATEMENT OF JANE WELLS-SCHOOLEY

On behalf of the National Organization for Women, the largest feminist organization in this country, I am pleased to have the opportunity to appear before this subcommittee. NOW is dedicated to achieving full equality and full reproductive rights for women, and therefore, is opposed to all legislation and constitutional amendments, including S.J. Res. 110, which seek to deny a woman her right to make some of the most profoundly personal and private decisions of her life - whether and when to bear a child.

All the constitutional amendments pending before this subcommittee (S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110) are part of an attempt by an extremely outspoken minority to impose its own personal morality on a pluralistic society which does not share its views.

This vocal opposition to women's rights has not gone unnoticed. The impact of the women's vote was felt in the November 1980 elections. According to all of the exit polls, women voted for Reagan significantly less than did men. The New York Times/CBS News Poll reported that 8% fewer women (46%) voted for Reagan than did men (54%). This difference calculated in actual votes amounted to a net loss of 3.3 million female votes for Reagan.

Women not only voted differently from men, but there is impressive evidence that they did so on the basis of women's issues, according to both the pre-election and exit polls. As the election campaign progressed, there was evidence that female voting behavior was based on Reagan's anti-women's rights positions.

Polls taken subsequent to the election not only confirm this disparity between the views held by women and men, but, after a brief honeymoon dip in January, show it growing steadily to

16% by mid-August. This trend persisted in spite of Reagan's appointment of Sandra O'Connor to the Supreme Court.

In addition to the difference in the way men and women perceive Reagan's performance as President, polls show that a similar gap exists in how men and women would vote in the 1982 Congressional elections, and that gap is also growing. When asked in a Harris poll how they would vote in the 1982 Congressional elections, women stated that they would go Democratic by an 11 point margin, while men gave the Republicans a 4 point edge. Therefore, over the past year, it has become a political fact, documented by an increasing number of pollsters and political columnists, that many women are being disaffected by Reagan and Republican programs which are perceived to be contrary to their interests.

The backlash to these anti-woman proposals is buttressed by general public opinion which strongly opposes Congressional or state intermeddling in their private lives. In a Time magazine/ Yankelovich, Skelly and White poll conducted in May 1981, only 5% of those polled agreed that the Congress should decide when abortion should or should not be permitted. Only 4% thought that decision should be made by state government. An overwhelming 68% thought the decision should be made by the woman.

Flying in the face of tremendous public opposition, and a growing women's voting bloc, the drafters of these amendments have as their ultimate goal, a ban on all abortions as well as on some of the most popular forms of birth control. Three of the amendments before this subcommittee, S.J. Res. 17, 18, and 19, contain no provision for the ending of any pregnancy for any reason - not even if the pregnancy is the result of the heinous crimes of rape or incest; not even if the woman knows she is carrying a fetus with severe or fatal deformity; not even if the life or health of the pregnant woman is at stake.

The amendment proposed by Senator Hatch, S.J. Res. 110, has been characterized as a compromise "states' rights" approach. In actuality, the proposal is neither a compromise nor an approach which assures states' rights. The word compromise suggests a settlement of differences through concessions. Apparently, the Hatch proposal still is plagued with opposition not only from those interested in protecting individual liberties but also from the anti-abortion/anti-birth control movement itself. Just days after the introduction of S.J. Res. 110, over seventy anti-abortion groups repudiated the Hatch proposal. Charles Rice, member of the advisory board of National Pro-Life PAC, called the Hatch proposal "a prescription for disaster" and "fatally flawed in principle." Paul Brown, director of Life Amendment PAC, called Hatch's approach "pie-in-the-sky dreaming."

Although the National Conference of Catholic Bishops has endorsed the Hatch proposal, the decision sparked extended debate and disagreement among some bishops over the wisdom of the action. Just this week, after a previously unsuccessful attempt, a major anti-abortion group eeked out an endorsement of its Board of Directors by a narrow margin of 30-24.

There also is opposition to the Hatch proposal among anti-abortion members of Congress. Senator Jesse Helms, in a memo to the Pro-Life Caucus, recommended that they not support this strategy, saying, "It is premature to endorse any constitutional amendment at the present time, particularly the Federalism amendment...not only do we not understand the implications, we don't have the votes."

Senator Hatch has said his amendment "makes no value judgement on abortion." Yet, the amendment allows Congress and the states only to restrict and prohibit abortion. It further requires that state laws be at least as restrictive as the standard set by Congress. If Senator Hatch really wanted to draft a constitutional amendment that was neutral on the issue, surely the words "restrict" and "prohibit" would have no place in the proposal. Senator Hatch contends that his amendment will "re-enfranchise the American people." In fact, these decisions would actually rest with state legislatures (only 12% of which are female) and the Congress (only 3.7% of which are female); bodies which could hardly be called representative of the people which this amendment most affects. This amendment attempts, as do the other amendments before this subcommittee, to usurp the responsible decision making of all American women about whether and when to bear children, and to establish the government as the decision maker.

Once the government has been allowed to dictate the reproductive lives of women, the danger is profound and pervasive. Today, the directive is to produce babies without consideration for the best interest of the pregnant woman, of those who may be dependent upon her, even of the fetus itself. Tomorrow, a government already in control of women's reproductive lives could mandate sterilization or other limitations on the number of births "allowed." Forcing a woman to continue a pregnancy or forcing her to stop a pregnancy are equally intolerable.

S.J. Res. 110 would give concurrent power to the Congress and the state legislatures to restrict and prohibit abortion. The scenario which would result from a Hatch-type constitutional amendment has become increasingly clear. Recently, David O'Steen of Minnesota Citizens Concerned for Life outlined the three-step strategy of the anti-abortion/anti-birth control movement: 1) passage and ratification of a legislative authority constitutional amendment; 2) passage of an HLB by Congress and restrictive, prohibitive state legislation; and 3) passage and ratification of a second constitutional amendment establishing constitutional protection for fertilized eggs.

The initiative for a federal legislative standard is well underway and it is clearly not only anti-abortion, but also anti-birth control, despite some claims to the contrary.

Legislation now pending in Congress and bills being considered in state legislatures clearly indicate the intention of restricting some forms of birth control as well as abortion. During the May 21, 1981, Senate Judiciary Subcommittee hearings on the so-called Human Life Bill, Stephen Galebach, the author of HLB, stated that passage of his bill would prohibit states from funding IUDs and morning-after pills and would allow states to ban the manufacture or production of these drugs and devices. The following exchange clearly makes the point.

> SENATOR BAUCUS: In those cases, too, would the bill also prohibit states from funding abortion clinics that distribute IUDs and morning-after pills in your view?
>
> MR. GALEBACH: It could very well.
>
> SENATOR BAUCUS: That is, without additional legislation, this bill, if it passes, would have the effect of prohibiting the states from fudning abortion clinics engaged in the distribution of IUDs and morning-after pills?
>
> MR. GALEBACH: There might be some tough legal questions that would come up as to whether the state could fund other operations of the clinic, but the state could not fund any device that would terminate a human life after conception.
>
> SENATOR BAUCUS: Because that would be state action prohibited under the bill?
>
> MR. GALEBACH: Yes.
>
> . . .
>
> SENATOR BAUCUS: Would it permit a state to ban the use of IUDs and morning-after pills?
>
> MR. GALEBACH: It would.

On the question of the probable impact of an HLB on the funding of clinics that distribute IUDs and morning-after pills, former Solicitors General Robert Bork and Archibald Cox, during the June 1 HLB hearings, concurred with Galebach's conclusion.

Other proponents of HLB have clearly indicated their intent to ban popular forms of birth control. Jack Willke, President of the National Right to Life Committee, in his testimony of June 18, asked and answered his own question about whether an HLB would authorize a State or Federal legislative body to outlaw IUDs and morning-after pills. Willke said emphatically, "If it has only a single action and that is abortive, it very possibly could be [outlawed]."

Under an HLB, there is also no assurance that states could fund abortion even in cases when the life of the pregnant woman was at stake. It is also questionable whether states could fund abortions in cases of rape or incest even if it was their prerogative. In a July 2, 1981, letter to Senator Baucus, Professor Robert Nagel of Cornell, a supporter of S.158, responded as follows:

> "Although you state that there seems to be agreement that states would be permitted to fund abortions where the life of the mother was threatened, I must say that I believe the matter is far from certain....
>
> "In any event, it seems clear to me that even if a state does not violate due process standards when it encourages the destruction of fetuses in order to save the lives of mothers, it does not follow that a state would be permitted to perform or fund abortion in cases of rape or incest or genetic defect. In such situations, the states' aid, whatever its justification, would amount to the destruction of 'persons' (in the statutory sense) and thus violate the statute. There is not general doctrine that a state may encourage the destruction of persons for 'compelling' reasons."

The nature of the state legislation which the anti-abortion/anti-birth control movement intends to push is also quite clear. The precursor of even more restrictive legislation possible only after the passage of an abortion prohibition constitutional amendment is the Abortion Control Act. The Act, touted as model legislation, has already been amended and passed in the state of Pennsylvania and awaits the Governor's reaction. It was drafted by an anti-abortion group based in Chicago and represents the most comprehensive, punitive legislation of its type.

Some of the provisions of this model state legislation, more aptly called the Woman Control Act, include:

- paternal notice, even in cases of incest
- allowing any adult or organization to petition to be appointed "guardian ad litem" for a fertilized egg or fetus on the belief or suspicion that the pregnant woman was about to break the law
- labeling the IUD and some forms of birth control pills as "abortifacients"
- severely restricting in vitro fertilization
- prohibiting abortion coverage in state employees' health plans
- parental consent of both parents or consent of the court
- issuing death certificates for aborted fetuses

Most provisions of the model legislation are aimed at harassing or intimidating women who are trying to make responsible decisions on childbearing. By mandating burdensome delays in implementing the decision to terminate a pregnancy, sections of the bill mandate a higher risk to women's health and well-being.

The bill seeks to intrude into private health care decisions by removing medical judgement from a woman and her doctor and placing those judgements in the hands of the state legislature.

Doctors, facing stiff criminal penalties and loss of license, will hardly be in a position to exercise their best medical judgement in the treatment of their female patients. The possibility that medical judgements would be subverted by haunting legal liabilities is real. The bill purports to allow the doctor discretion in cases of medical emergency.

However, by defining medical emergency as "that clinical condition so complicating pregnancy as to necessitate the immediate abortion of same to avert the death of the mother," this discretion is obliterated. The language of the bill, such as the phrase "averting the death," shows not even a rhetorical interest in saving women's lives. A doctor would be forced to wait until a female was literally dying before declaring a medical emergency to exist. Her chances of survival under this definition are virtually nil. Under this type of legislation, women will be hard pressed to find a physician who would do abortions even at the early stages of pregnancy -- even when serious health risks may exist.

After reviewing the current anti-abortion/anti-birth control proposals at both the federal and state levels, there is no question as to the impact of Hatch's S.J. Res. 110, or S.J. Res. 17, 18, 19.

Today, we have been able to highlight only some of the most profound implications of the proposed amendments before this subcommittee. Other medical, legal, constitutional and socio-economic problems posed by these proposed constitutional amendments and their progeny which we have not discussed because of time limitations, are equally frightening.

Precisely at the time when ultra-conservatives are advocating getting government off the backs of citizens, they are hypocritically proposing legislation which is the ultimate invasion into our private lives.

Overall, the potential impact of these proposals on girls and women's health and their very lives is devastating, as is the attack on families which seek to responsibly guide their own destinies.

Senator **Hatch**. Our next witness will be Shirley Leviton of the National Council of Jewish Women.

I see that Congressman Smith is here. Shirley, could we ask you to just wait until the Congressman gives his testimony?

Ms. **Leviton**. Certainly.

Senator **Hatch**. We would appreciate that. We will call upon Congressman Chris Smith from New Jersey at this time.

Chris, we are very happy to have you here and we look forward to your testimony.

STATEMENT OF HON. CHRIS SMITH, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. **Smith**. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee who will read this testimony in the record, I am grateful for the opportunity to be here today to share some thoughts with you on Senate Joint Resolution 110, the proposed human life federalism amendment.

As a cosponsor of an identical amendment in the House, I feel compelled to urge you to favorably report Senate Joint Resolution 110 out of committee at the earliest possible moment.

Mr. Chairman, this amendment is needed to reverse several tragic, regressive, hypocritical, and discriminatory Supreme Court decisions that began with *Roe* v. *Wade* and *Doe* v. *Bolton*. Asserting that the right to privacy under the 14th amendment included the right to abortion, the Court went on to legalize surgical violence as a way to solve human problems and inconveniences.

Incredibly, the High Court's 1973 landmark decisions had at least one gaping flaw.—It refused to determine when human life began. Then the Court, absent a finding of fact on this question, proceeded as one would if it were a proven fact that unborn children were not.

As such, the unborn child's life was, in the Court's opinion, of absolutely no consequence up to at least the 6th month, and the final 3 months of a child's life in the womb was given some passing notice as potentially meaningful but still expendable and, for all intents and purposes, worthless.

The human life federalism amendment prudently reverses *Roe* v. *Wade, Doe* v. *Bolton* and subsequent case-law errors that were based on the foundation of these decisions. The amendment then empowers the State and Federal legislatures to regulate or even proscribe abortion.

Mr. Chairman, while this power is properly returned to the elected representatives of the people, nowhere in the amendment is the Congress or several States forced to act. In other words, the human life federalism amendment creates a right to act, not the duty or obligation to act. This fact, I feel, should help openminded proabortion people and prolife advocates embrace this proposal.

Another way of looking at the amendment—and I think this is one of its most appealing aspects—is in the oversight function it permits in the area of abortion policy.

I have observed in my first year here in Congress that legislation of all kinds, from clean air to foreign aid, to voting rights, to programs for handicapped children, all have one thing in common—oversight.

Whether that oversight function manifests itself in a subcommittee on oversight or in the authorization process, the result is that policy directions are often altered, revised, and reversed; programs are rewritten, expanded, or eliminated.

In my opinion, this is a responsible, reasonable, and effective way for Government to do business. More often than not, I would wager, this kind of vigorous scrutiny leads to more enlightened, responsive social policy and public policy.

I respectfully suggest, Mr. Chairman, that if this is the case with the more than 10,000 Federal programs over which we have jurisdiction or the thousands of pages of the Federal Code, why is it not in the case of a Court-imposed policy of abortion on demand?

Why is it not a proper oversight function for Congress and the several States to decide whether the Supreme Court acted correctly in legislating abortion on demand for an entire pregnancy or, more narrowly for example, when it ruled that parental consent for minors who obtain abortions was unconstitutional?

Furthermore, Mr. Chairman, I do not believe that a majority of those who support abortion really support all aspects of the Supreme Court's abortion policy, and that is to be expected. After all, the Congress rarely agrees with everything proposed by the Reagan administration. The House rarely agrees with everything the Senate does, and vice versa. I guess that is the way it should be, and that is probably why we have conference committees—to seek agreement, to seek a consensus. So why should Congress and the several States accept the High Court's abortion policy hook, line, and sinker, without any input?

Surely even the opponents of this amendment have some trouble supporting saline abortions, that horrendous and frightening procedure that literally poisons the unborn child with a caustic salt solution. The Court invalidated a ban on saline abortions in *Planned Parenthood of Missouri* v. *Danforth,* even though much of the justification for the ban involved maternal health.

Surely the opponents of this amendment have some trouble supporting hysterotomy abortions which are really C-sections—with one difference—the unborn child is discarded like junk; or the dilation and extraction method, a procedure that crushes the child; or the suction or D&C approach, which dismembers; or the introduction of prostaglandin, which merely induces labor at any point in pregnancy.

Finally, Mr. Chairman, the opponents of the amendment surely have trouble supporting late-term abortions in the fifth, sixth, seventh, and eighth months. These late-term abortions employ methods of abortion that remove the child from the uterus intact, forcing attending medical personnel to face the bodily remains of the child killed.

According to Dr. Willard Cates of the Center for Disease Control in Atlanta, about 500 late-term abortions each year result in what one newspaper called "The Dreaded Complication." As the "Philadelphia Inquirer" of August 2, 1981, wrote in a special report, "It horrifies many of the personnel who have encountered it. What happens is that about once a day, somewhere in the United States, something goes wrong and an abortion results in a live baby."

Mr. Chairman, what about these children's human rights? Five hundred babies a year, without any protection. It seems ironic that we spend so much time agonizing over capital punishment, which if reestablished would affect a handful of people, and which I might point out, I am vigorously against, yet we fail to provide basic constitutional protection to the annual 400 to 500 abortion "complications"—the children who survive abortion.

Mr. Chairman, let me conclude by saying that this amendment is a legitimate exercise of an oversight function. It is an amendment in the highest tradition of representative democracy. Those of us who feel the High Court went too far will get a chance to respond. Those of us who feel the Court itself violated fundamental human rights by denying basic protections to unborn children will get a chance to restore those rights. By the same token, those who believe the Supreme Court's abortion policy is justified will have every opportunity to sustain that perspective.

This amendment gives the people, through their representatives, the right to decide abortion policy. Surely the opponents of this amendment want their elected representatives to have the right to choose.

Thank you.

Senator HATCH. I thank you so much, Congressman.

Our next witness will be Shirley Leviton from the National Council of Jewish Women.

We are happy to have you here, and we look forward to your testimony at this time.

STATEMENT OF SHIRLEY LEVITON, NATIONAL COUNCIL OF JEWISH WOMEN

Ms. LEVITON. Thank you, Mr. Chairman.

I am the mother of three and the grandmother of eight, but today I am Shirley I. Leviton, national president of the National Council of Jewish Women, a nonprofit, volunteer organization composed of 200 sections nationwide dedicated in the tradition of Judaism to advancing human welfare and the democratic way of life. I appreciate the opportunity to appear before this subcommittee on behalf of the 100,000 members of NCJW.

Senator HATCH. Shirley, could you give me another second? I have another Senator on the phone. I apologize, but I am supposed to be on the floor.

Ms. LEVITON. I trust that red light will not go on for me too quickly; is that right?

Senator HATCH. Right.

[Brief recess taken.]

Senator HATCH. I apologize to you. Go ahead.

Ms. LEVITON. That is perfectly all right, Mr. Chairman.

I appreciate the opportunity to appear before this subcommittee on behalf of the 100,000 members of NCJW to express our strenuous opposition to the human life federalism amendment, Senate Joint Resolution 110, which is an attempt to eliminate guaranteed constitutional rights to women of every religious and moral persuasion. NCJW supports constitutional protection for all citizens.

Since its inception in 1893, NCJW has concerned itself with the strengthening of family life and the advancement of women through a coordinated program of education, service, advocacy, and social action. Our volunteers have been involved in over 1,600 direct service projects including day care, shelters for battered spouses, juvenile justice, court programs, and women's support and counseling groups.

It is with considerable alarm that we appear before you today to testify on the latest attack on the Constitution. These continued attacks have demanded a never-ending vigil for the maintenance of the rights of all citizens in this democracy.

We continue to stand firm against all moves afoot to impose a limit on, or denial of, reproductive choice. Whether these attempts are related to the appropriations process or to adoption of substantive, restrictive legislation, or, as in today's case, to propose a change in the U.S. Constitution itself, the NCJW is prepared to challenge each attack by Congress on a woman's right to choose, no matter how frequently they are introduced nor how invidious their form.

We remain persistent in our resolve to maintain our right of choice and to prevent all efforts to limit partially or totally this right to over one-half the population of this great and democratic Nation.

The current proposal to give each State in the Union the individual ultimate authority to override the U.S. Supreme Court's decision on this matter will undermine the intent of Federal law to provide the uniformity of equal rights and protection for all.

Federal law prevents us from the arbitrary decisions which can be made in each of the 50 States when dealing with such basic issues as choice. Such a proposed constitutional amendment suggests that the only way to deal with difficult issues of national scope which have, up until now, escaped a palatable solution is to spread the responsibility of decisionmaking and to abrogate the Federal Government's responsibility on this fundamental issue.

NCJW's earliest efforts were directed at assisting the scores of eastern European immigrants who were fleeing persecution, in particular religious persecution, and chose to come to America for the freedoms which were almost unimaginable in their native countries but were guaranteed here by the Constitution. Religious freedom has always been a fundamental part of our Nation's heritage, and it is of the utmost importance that it continue to remain in our country.

The present interpretation of a woman's right to choose abortion, as decided by the Supreme Court in *Roe* v. *Wade* in 1973, accepts the constitutional commitment to separation of church and state. The interpretation permits the sanctity of the family, in that it permits those values which are deemed important to a particular family to be taught and lived by that family, be it pro-choice or a no-abortion position.

All churches are able to teach according to their convictions, all families are free to practice their own beliefs, all individuals are able to live according to their conscience. We do not subscribe to changing any laws which presently give all persons freedom, freedom of religion, freedom of choice, which guarantees all individuals their most basic rights.

As a Jewish women's organization with a diverse membership, we are firmly united in our belief that the passage of this amendment would jeopardize the freedom of religion. It is sponsored by persons whose religious and moral convictions are against abortion and birth control. Certain of their beliefs lead them to deny access to information and methods of contraception to adolescents.

We do not challenge the rights of those groups to hold these convictions for themselves, for their families, and for their churches. We believe the right of these groups must be upheld—that is, that they not be forced to teach adolescents in their own family about contraceptive use and that they be permitted under constitutional law to complete each pregnancy in a live birth.

Under the Constitution we believe that other individuals be accorded the same religious freedom and that these individuals continue the right to practice birth control, to teach family planning, and to have safe, legal abortion available when necessary, so that every child born will be cherished and valued.

Religious freedom means laws protect all people; it does not deny groups from exercising their beliefs. The right not to use contraception, not to teach about contraception, and not to have an abortion is sanctioned under our current laws. The law is just and inclusive, in that it allows all people to exercise their religious beliefs. Laws are not to be made so that certain individuals who wish to exercise their religious freedom do so while denying this right to others.

NCJW, as do many in the Jewish faith, views a female as "host" for a fetus. The life of the mother is of primary consideration in a life-threatening situation, because the fetus is not considered a human until birth. This is our philosophy. We do not quarrel with other religions who believe otherwise. We do not want any law to force them to change their philosophy.

This amendment is counter to Judaic belief, in that it gives the unborn more rights than the living. It subordinates women's bodies and lives to fetal survival. We express our concern for a pregnant mother's health. It would force women with serious health problems such as cancer, severe hypertension, heart or kidney disease to carry their pregnancy to term, even though the results might have a permanently damaging effect on the mother or result in fatality.

We are also concerned with the ramifications that the amendment would have on pregnant women who may discover the fetus they are carrying has a severe genetic defect, like Tay Sachs which mostly affects Jewish children and results in death by the time the child reaches his or her fifth birthday.

Although, as a Jewish organization, we have a serious concern for Tay Sachs, we are speaking for all parents whose future children may have serious genetic defects. Today there are tests that can be conducted during the early months of pregnancy to detect genetic defects.

Many of our constituent sections have initiated Tay Sachs screening programs in their own communities. However, the legislation in debate would prevent pregnant women, knowing the child would die in the first few years of his or her life, from having a safe, legal alternative to carrying the fetus to full term.

The proposed constitutional amendments must be examined for appropriateness. Amendments receive popular support at a particular time in history, so that those who seek to change the Constitution must regard the long-term effects. Amendments conceived to meet nonuniversal needs create a poor Constitution, and we believe that every proposed amendment should be examined in this light. This error has occurred in the past at great cost to society.

In conclusion, we do not wish any law to limit the exercise of religious beliefs. We do not want any ruling, laws, or amendments which could force people of any faith to limit their rights to practice their ideology.

May I just say that I understand the markup of this amendment is planned for this afternoon. The haste with which this is being done is inappropriate, considering the importance of a proposed change in the Constitution. I hope that the schedule for markup will be reconsidered and will take place after the entire hearing record has been examined closely.

Thank you so very much.

Senator HATCH. You are welcome.

Our next witness will be Mary Bricker-Jenkins of the National Association of Social Workers.

I might mention that I am running out of time, so I am going to have to enforce the 5-minute rule. I have tried not to do that, because it is embarrassing to me personally to interrupt witnesses and ask you to shorten your statements, but if you do not mind, I am going to have to do that.

Ms. BRICKER-JENKINS. I will read fast, Senator.

Senator HATCH. That will be fine.

STATEMENT OF MARY BRICKER-JENKINS, NATIONAL ASSOCIATION OF SOCIAL WORKERS

Ms. BRICKER-JENKINS. My name is Mary Bricker-Jenkins. I am assistant professor of social work at the College of New Rochelle in New York and a member of the National Committee on Women's Issues of the National Association of Social Workers. I am currently doing doctoral work at Fordham University School of Social Science under a grant awarded by NIMH entitled "Mental Health Services for Women in Urban Settings."

I am pleased to testify today on behalf of the 90,000 members of the National Association of Social Workers, the largest professional social work organization in the world. As you may know, the aims of all social work practice include: One, enhancing people's problem solving and coping capacities; two, linking people with individuals, groups, and organizations, both public and private, which provide essential resources, services, and opportunities; and, three, contributing to the development and implementation of sound social policy.

To accomplish these purposes, which have come to be the specific responsibility of our profession in contemporary America, we work in many and varied settings, ranging from intercity tenements and hospitals to rural schools and clinics, from the Appalachian holler to the corporate headquarters of some of our major industries.

But in allocating our resources and energies, we necessarily place special emphasis on working with those who are most vulnerable and discriminated against, including poor people, women, and minority persons. And we place special emphasis on securing for all people basic human rights and on the meeting of common human needs.

My comments today especially express the concerns of many thousands of my social work colleagues who provide family planning and birth control counseling across the country.

The nationwide membership of the National Association of Social Workers has reaffirmed its belief that each and every person in this country, regardless of ethnic background, socioeconomic status, sex, and age, has the right to comprehensive reproductive health services, education, and counseling, including abortion. We believe that it is of primary importance that the needs and rights of all persons seeking family planning and reproductive health care services, education and counseling be met with sensitivity and concern for their physical and mental well-being. Finally, we believe that reproductive freedom is one of the most fundamental human and civil rights.

NASW recognizes its responsibility to uphold this right, basic to all, and must actively oppose any erosion of reproductive freedom and any restriction of access to comprehensive family planning and reproductive health care services.

Therefore, NASW, along with a sizable majority of Americans, strongly opposes the consideration and passage by the Congress of the United States of Senate Joint Resolution 110, which would effectively reverse the 1973 Supreme Court rulings by providing Congress and State legislatures authority to restrict and prohibit abortions.

We believe this proposal would, if enacted, severely restrict reproductive freedom in this country. Abortion would or could become a Federal or State crime, in contradiction to the fundamental right proclaimed by the Supreme Court in its 1973 ruling, *Roe v. Wade.*

NASW sees Senate Joint Resolution 110 as the first step toward prohibition nationwide; it thus has serious health implications for millions of American women. Passage of this amendment would allow States to prohibit emergency abortions and may force women to maintain dangerous pregnancies complicated by illness or disease. It could also lead to a tragic increase of emergency hospitalizations and deaths, as women are forced to risk unsafe, illegal abortion procedures. In addition, infant and maternal mortality may increase if Congress or State legislatures are allowed to outlaw widely used methods of birth control.

Since 1973 legal abortion has proven to be a safe procedure. In lieu of 1 million illegal abortions per year with many complications and deaths, there are now approximately 1 million legal procedures with a mortality of less than one-tenth that associated with childbirth. Illegal abortions result in emergency hospitalizations, hemorrhaging, infections, hysterectomy, and other serious complications.

Prior to the legalization of abortion in 1973, an estimated 1 million illegal abortions were performed annually in the United States and more than 1,000 women died every year as a result. In addition, public health reports show that legal abortion has been associated with fewer premature births and decreasing maternal and infant death rates nationally.

Each year an estimated 25,000 women will have an ecotopic pregnancy. Abortion is the only treatment to protect the life of the mother in this case. Also, many chronic and acute diseases are complicated or aggravated by pregnancy. These include kidney disease, diabetes, and hypertension. Women with these diseases need the option to choose whether to remain pregnant.

The National Association of Social Workers believes that making abortion a crime would impose the heaviest burdens on young, poor, and minority women. Members of these groups would be least able to afford the services of qualified illegal practitioners and therefore would be forced to rely on less expensive and dangerous services to attempt self-abortion or to bear unwanted children.

According to the most recent statistics, 31 percent of all women obtaining legal abortions in the United States are teenagers, 22 percent are medicaid eligible—in those few States which continue to provide abortion services—and 31 percent are black women or members of other minority groups. While there is considerable overlap among these three categories, it would appear that about 60 percent of all women obtaining legal abortions in 1979, or about 900,000 women, fell into at least one of these three groups.

Members of these groups are also facing the hardest struggles in their efforts to participate fully in our society, to realize the values and aspirations we share as Americans, and to make their contributions to the well-being of the Nation. Laws and practices which result in their bearing unwanted children will force many of them, as well as other women, onto the welfare rolls and will otherwise block their efforts to escape the dependency and poverty so inimical to our traditions.

I want to make the point strongly, that welfare allowances have never provided in any State an income sufficient to secure the health and safety of women and children, and they certainly will not do so under Reaganomics. It seems particularly brutal, therefore, to take any action which would force more women and children onto this dismal existence of welfare.

In conclusion, I wish to stress that the testimony I have presented today is based on the NASW policy statement on abortion, which at our recent delegate assembly in November was overwhelmingly reaffirmed. We as social workers know from our own experience that women who choose abortion are making a moral choice, based on a system of morality which values responsibility and caring for one another.

I would also like to note that empirical evidence supporting this view has recently been presented in the work of university psychologist Carol Gilligan in her book "In a Different Voice," just published.

We know also that whatever our personal and private choice may be, we must preserve the legally codified right of all women to make the choices which they find necessary to preserve their health and to promote their own wellbeing as well as that of their families and communities.

We, therefore, will continue to oppose vigorously any attempt to restrict this right. We, therefore, support freedom of choice with no governmental interference, State or Federal, and we urge this committee and the U.S. Congress to reject Senate Joint Resolution 110 and any other similar bills and constitutional amendments which would negate a woman's freedom of choice.

I would also like to say in closing that I am struck by the sight of so many empty chairs at the committee table. We urge you, along with 44 other national organizations, to postpone marking up Senate Joint Resolution 110 until after the holidays.

Thank you very much.

Senator HATCH. Thank you.

Our next witness will be Nellie Gray, president of the March for Life.

[No response.]

Senator HATCH. Then we will move on to Dr. Elizabeth Verdesi of the United Presbyterian Church Council on Women in the Church.

Dr. Verdesi, we are happy to have you here.

STATEMENT OF ELIZABETH VERDESI, UNITED PRESBYTERIAN CHURCH COUNCIL ON WOMEN IN THE CHURCH

Ms. VERDESI. Thank you. I am happy to be here.

My name is Elizabeth Verdesi. For the past 4 years I have served as staff to the Council on Women in the Church of the United Presbyterian Church in the U.S.A. In the years following my graduation from college and the seminary, I have been a minister's wife, mother of two children, director of Christian education in a local congregation, organizer of a counseling service, and a youth worker.

The Council on Women in the Church, for which I am the staff, is accountable to our United Presbyterian General Assembly, the highest governing body of our denomination. Our General Assembly is composed of approximately 650 commissioners, half clergy and half laypersons, elected annually by 152 presbyteries in all 50 States, within whose bounds are 2,435,000 members. Within that total membership of the church, there are individuals, of course, who hold differing and sometimes even conflicting views on every subject of significance, including that of abortion rights.

In the early 1970's, however, the Council on Women in the Church conducted a special study on problem pregnancy. As a result of that, the United Presbyterian General Assembly in 1976 recommended that all 9,000 congregations in all 50 States study that report, which stated in part:

> Women should have full freedom of personal choice concerning the completion or termination of their pregnancy, and that should not be restricted by law, except that it be performed under the direction and control of a properly licensed physician.

This prochoice position of the United Presbyterian Church was reaffirmed in our general assembly meetings in 1978, 1979, and 1980.

Today, I have come to testify in opposition to the enactment of any law or constitutional amendment which would restrict the option of safe, legal abortions. United Presbyterians believe that motherhood should be chosen and not coerced and that women have a right to bear children when they are prepared in their own view to undertake this kind of responsibility. Any society that insists that women must bear children as a duty to the State is more tyrannical than democratic.

The availability of safe abortion is a contemporary phenomenon. In the 19th and 20th centuries a number of medical discoveries were made which, in combination with each other, have resulted in procedures which make abortion safe and reliable. With the more recent advent of amniocentesis which detects genetic defects in the early months of pregnancy, and now with genetic engineering already breaking on the horizon, one cannot but wonder why it is precisely at this moment in history that the abortion controversy has become so prominent.

With the coming of elective abortion, women, for the first time in the history of humankind, are now in a new ethical situation. That is, pregnant women are now in a position to act as free moral agent under God in relation to their pregnancy. Throughout the history of the Christian era women have ordinarily been kept or have chosen to remain submissive to the authority of institutions dominated by men—doctors, lawyers, priests, pastors—or they have deferred to the judgment of their fathers, husbands, brothers, and sons.

Now, just at the time when the right of a woman to make responsible decisions according to her own conscience has been realized, just at that same time, the right of the fetus, which is still only potential human life, is raised up as worthy of higher consideration.

Is this really because of concern for the fetus, which cannot act for itself, or is it part of our sexist culture that refuses to allow women to act as moral agents? Or is it partially an unconscious wish to punish women for their sexual activity, leaving the father of the fetus unfettered and unknown?

The Supreme Court decision of January 22, 1973, in *Roe* v. *Wade* recognizes that individuals' right to privacy is guaranteed by the Constitution. In the case of an unwanted pregnancy, a woman is permitted to decide on the basis of her own personal religious or moral belief whether to carry that pregnancy to term or not. The possibility of her acting responsibly as her own moral agent is granted and acknowledged.

To alter this possibility in any way, whether by law, by constitutional amendment, by statutory definition of when life begins, or by State legislation, so that women will be compelled to bear children against their conscience, will make a mockery of the first amendment. It will have the effect of forcing a particular moral and religious standard on everyone.

In summary, I wish to stress that the United Presbyterian Church in the U.S.A. has a strong commitment to our understanding that all people are made in the image of God, both women and men. We believe, therefore, that both women and men must be permitted to act responsibly and to participate in all of the decisions that life's dilemmas create as equal partners under God's guidance. Any law or statute or amendment which restricts that freedom would be an infringement of the freedom for which this country was first established and which has become an integral part of the fabric of this great Nation.

In conclusion, I would like to add my request that you consider very seriously the possibility of delaying the markup until after the holiday, when the hearing record can be completed and the rest of the Senators on the subcommittee can have a chance to study the testimony.

Senator HATCH. I might note that a number of you are concerned about the hearing markup. We have had extensive hearings. This is our 9th full day of hearings. We are going to proceed at 2 o'clock today, and let the chips fall where they may on the issue.

We will still have plenty of time between the markup today, assuming that an amendment comes out of the subcommittee, and the markup in the full Judiciary Committee, for all to consider it, and I am sure everybody will. I thought I would clarify that.

Ms. VERDESI. Yes; but is there any rush to do it today?

Senator HATCH. Some believe so.

Ms. VERDESI. I mean, it could be delayed, could it not?

Senator HATCH. Not really. Not really at this point. We are just going to go ahead, because we want to get the subcommittee work done and completed before the end of the year. Then, of course; it has to go to the full committee. There will be full debate in the full committee.

There is no great desire on anybody's part to rush through any aspect of this, but merely to complete the subcommittee's work.

Both sides have been fully heard. I have yet to hear a complaint by any Senator that we have not been faithful in listening to both sides in this matter, because we have. I have sat through hours and hours of hearings on abortion. We do recognize your sincerity and others' in requesting the delay, but we do have to move ahead.

Ms. VERDESI. Thank you.

Senator HATCH. Thank you.

Our next witness will be Jan Wilkins, president of Americans Concerned for Life.

We are happy to have you here with us, Jan.

STATEMENT OF JAN WILKINS, PRESIDENT, AMERICANS CONCERNED FOR LIFE

Ms. WILKINS. Mr. Chairman, I am very grateful to be here and have an opportunity to speak to you in support of Senate Joint Resolution 110. My name is Jan Wilkins, and I am representing American Citizens Concerned for Life, a national prolife organization.

ACCL last appeared before this subcommittee in 1974 during the Senate's first hearings on proposed constitutional amendments to reverse *Roe* v. *Wade*. The fact that the committee is still addressing this subject 7 years later is graphic testimony to the difficult issues involved.

Before commenting specifically on Senate Joint Resolution 110, there are several general observations I would like to make about the abortion issue and the ongoing efforts to reverse *Roe* v. *Wade*.

ACCL has supported all of the efforts by the Congress during the past 8 years to restore legal protection for unborn children. We were early proponents of the Hyde amendment, and we have advocated a wide variety of alternatives to abortion legislation, so that women will have adequate services and assistance during their pregnancies and thus will not be pressured into abortions for lack of other options.

In this regard, we are especially grateful, Senator Hatch, for your cosponsorship this year of Senator Denton's Adolescent Family Life Act. This bill has now become law and will make it possible for thousands of teenagers to choose life for their babies and enable thousands of others to defer childbearing to a more appropriate time in their lives.

ACCL has endorsed the numerous statutory restrictions on abortion and abortion funding that have been proposed by the Congress and the State legislatures in recent years. Of course, under *Roe* and its progeny, the States and the Federal Government are severely limited by the courts in their ability to enact life-protective legislation, even though substantial majorities of the public favor it. We have supported every prolife constitutional amendment introduced in the Senate and House since 1973. We have yet to see a constitutional amendment that we could not support. This includes Senator Burdick's life support amendment, a so-called States rights proposal, which failed to be reported from subcommittee in 1975 on a 4-4 tie vote.

Some of these amendments provide for Federal as well as State jurisdiction; some do not. Some would grant personhood to the unborn; some would not. Some prohibit private action killing, and others prohibit only State action. But none of them deserves to be condemned as an inadequate or unprincipled response to *Roe* v. *Wade*. A fundamental principle which we must keep in mind when evaluating abortion legislation is that any prolife law or amendment which is passed, whatever its content, is infinitely better than one which is not passed.

Consequently, I urge you and your colleagues to approve whatever amendments or protective statutes can attract the required vote and which you believe will withstand subsequent challenge in court. In doing so, we respect and commend your efforts to achieve the necessary congressional consensus.

A second principle which ought to be kept in mind is that any constitutional amendment restricting abortion will be only as strong as its implementing legislation. Because the Constitution cannot compel legislatures to enact laws, the practical effect of all the proposed constitutional amendments restricting abortion is essentially the same. Effective laws protecting life will be enacted not by constitutional edict but as a result of widespread assent to the principle that defenseless life ought to be protected. All that any amendment can do is to restore this legislative authority to lawmakers and negate the alleged constitutional "right to an abortion."

Because Senate Joint Resolution 110 has aroused so much interest recently, a brief comment is appropriate. At the time of Senator Burdick's amendment in 1975, the late professor of law David Louisell published a lengthy commentary on it in "The Human Life Review." Because we believe his analysis applies equally to Senate Joint Resolution 110 today, I would like to quote his concluding paragraph in full:

> Whatever his conscience may dictate as his personal norm, what defender of life can be so sure of the wisdom of his individual appraisal of prudential judgment in the public domain, as to justify withholding his support of a workable amendment (which I judge the Burdick proposal to be) under today's conditions? The clock strikes high noon. The morning hours are spent—I do not say wasted—for the education in the cause of life achieved by those who shouldered the burden the Court sadly laid down in January, 1973, is monumental and a lasting tribute to their conviction and courage. But the hour for a common pro-life cause is here, lest the shadows of a long night engulf us.

Senator Hatch, you know what an extraordinary undertaking it is to attempt to amend the Constitution on any subject, let alone on such a controversial issue as abortion. It will take an enormous organizational effort and educational campaign to accomplish this task, but we are going to amend the Constitution, Senator Hatch, because we are willing to make the effort involved.

We urge you and the other members of this subcommittee to report out a suitable constitutional amendment to protect the life of the unborn child, and we pledge to work with you for its passage by two-thirds of the Senate. In the process of bringing about this constitutional reform, we accept responsibility for helping to change the conditions of life for women who are pregnant under unfortunate circumstances, so that they need not resort to the choice of abortion. We pledge to you our support for legislation which will ameliorate the conditions of disadvantaged and vulnerable pregnant women, children who need special care and protection, and families who face exceptional problems in attempting to care for and raise their children.

ACCL will be the partner and supporter of all elected officials working for the protection and enhancement of human lives, and we will continue to champion whatever legislation will bring about these goals.

Thank you very much.

Senator Hatch. Thank you so much. We appreciate having your testimony.

I notice that former Congresswoman Bella Abzug is here, so we will call upon her at this time. Congresswoman Abzug represents Women U.S.A.

We are happy to welcome you to the subcommittee.

STATEMENT OF BELLA ABZUG, WOMEN U.S.A.

Ms. Abzug. Thank you, Mr. Chairman.

I want to apologize for not being here when I indicated I would, but as usual the air controls our lives.

Senator Hatch. I am afraid that is right. I understand.

Ms. Abzug. I appreciate this opportunity to appear before you in behalf of Women U.S.A., which is an action and information network serving women from all walks of life and from every part of our Nation.

In the interests of time, I ask unanimous consent for my complete testimony to be incorporated in the record, and I shall try to summarize that.

Senator HATCH. It certainly will be. All statements are going to be included in the record.

Ms. ABZUG. Seven years ago as a Member of Congress, I had a similar opportunity to testify at hearings conducted by this subcommittee on the wisdom of seeking to negate the U.S. Supreme Court's historic *Roe* v. *Wade* decision by imposing restrictions on the right to choose abortion. I have recently reread that testimony. I think it might be helpful, and so I would like to ask your permission to incorporate it as well with my testimony in the record.

Senator HATCH. Without objection, we will incorporate it.

Ms. ABZUG. I opposed then, as I do now, any action to interpose the Government between a woman and her fundamental right to privacy in making a purely personal decision. Government, whether at the local, State, or Federal level, has neither the right nor the necessity to tell a woman whether she shall or shall not bear a child.

In the case of Senate Joint Resolution 110, women would be harassed by Government intervention at all levels. The Congress, the President, the State legislatures, the Governors, all would be authorized to dictate to a woman the circumstances under which she could decide not to have a child, including no circumstances, no exemptions, even if her life is at stake.

In the 7 years since this subcommittee's hearings on the impact of *Roe* v. *Wade*, when the subcommittee wisely decided not to support a constitutional inhibition of the right to abortion, we have witnessed this phenomenon: Public support for a woman's freedom of choice in reproductive matters—which was then considered to be about three-quarters or 75 percent of this country's opinion—has steadily increased, while Congress and some States and localities have steadily sought to limit that freedom by restricting Medicaid funding, denying access to Federal employees to abortion facilities, and seeking enactment of the various amendments and laws.

When you proposed Senate Joint Resolution 110, I believe you asserted that no consensus exists in this country on the issue of abortion. I must respectfully disagree. There is consensus. In fact, if you analyze the constituencies of the people who have appeared before this committee itself, they represent millions and millions of people from a broad range of organizations. Those who favor the amendment represent a very narrow segment of the population and a very small number of people in this country.

I am not going to recite all the polls—you have had them before you—nor the testimony. In my own testimony I refer to an interesting poll, in Life magazine in November 1981, which shows the enormous support for the right of legal abortion.

The desire to impose a constitutional ban or restrictions on the right to abortion remains, I think, largely a political scare tactic and a distinctly minority view among Americans, a view that, in my opinion, would undermine the peaceful coexistence of differing and at times contradictory moral, ethical, religious, legal, and philosophical beliefs that are the hallmark of American democracy and the animating spirit of the continuing vitality of this country.

I think you should reject Senate Joint Resolution 110 for these reasons: One, it would deny to millions of American women a basic freedom, a basic liberty. It would tie up the Congress and the various State legislatures in years of bitter, angry, and emotional contention from within and without, first in the initial stages of the ratification process and then, if the amendment should pass, in the implementation stage.

Rather than settling the question of abortion or changing anyone's mind, Senate Joint Resolution 110 inherently guarantees that this controversy will be with us for years to come. If ratified, Senate Joint Resolution 110 would lead to legislative battles, demonstrations, and increased divisiveness in all 50 States as well as here in this Nation's Capital. There will be struggles over the passage of individual State laws banning or restricting abortions, and if laws are enacted there will be continuing struggles to get them repealed.

There is no way that American women will possibly accept the intervention of the Congress or a State legislature in a decision of such great personal importance to each woman who must make it. I can assure you that for most women this is an extremely difficult and painful decision.

Senate Joint Resolution 110 will not, as some may believe and hope, remove Congress from this controversy by passing it to the States or passing on to the States the right to enact prohibitory or restrictive legislation. A vote by any Member of Congress in favor of this proposed amendment can only be interpreted as a vote to deprive women of their freedom of choice.

Furthermore, if States enact legislation that falls short of the total ban on abortion favored by many antiabortion groups, you can be certain that these groups will be back here in force demanding that Congress enact a prohibition on abortion without any exemptions.

If Senate Joint Resolution 110 is ratified and implementing legislation is passed, it is unlikely that antiabortion laws could be enforced in any consistent or massive way. Women would be harassed, degraded, physically endangered, threatened with imprisonment, and in fact actually jailed. But based on the experience of women throughout history, they would continue to seek abortions.

How could antiabortion laws be policed? Clearly, anyone who performed an abortion on someone else would be subject to prosecution, but would a woman who had an abortion or induced an abortion on herself be charged with murder? Even if she were charged with a lesser crime, our police and courts are already so overburdened that it is unlikely they would be able to handle a large volume of such cases. This could lead to show trials and selective police actions, indictments, trials, and as occurs in many police and court jurisdictions, women who are least able to defend themselves—the poor, the minorities, and the very young—would be the chief victims.

Would the use of IUD's and other contraceptive methods be outlawed as well? How would the spontaneous abortions that occur in roughly 10 percent of all pregnancies be distinguished unerringly from the illegal kind? Would not some woman who suffered miscarriages be afraid to seek prompt medical help for fear of being accused of embryocide?

I believe that abortion is the least desirable method of birth control. Few women prefer it to other methods. It is generally regarded as a method of last resort. But safe and legal abortion free from stigmas and penalties must be available to any woman who finds herself pregnant against her will and for any one of a multitude of reasons decides that she should not have a child.

Freedom of choice must be available to the poor and to the young who traditionally have been the main victims of antiabortion laws.

Women USA is opposed to compulsory pregnancy just as it is opposed to compulsory abortion or compulsory sterilization. We oppose the adoption and ratification of Senate Joint Resolution 110 and any other legislative attempts to intrude the power of the State or a particular set of beliefs into the private lives of women.

We are all concerned with the right to life. We must also be concerned with preserving the essence of our democratic society in which all viewpoints must flower and compete for support.

Thank you, Mr. Chairman. I hope that you have a happy holiday, Christmas and Hanukah, and that maybe if you do spend a lot of time marking up you will be interfering with your long vacation. So that is another thought to take into consideration. [Laughter.]

Senator HATCH. As always, we are glad to have your very enlightened viewpoint.

Ms. ABZUG. Well, I wish I had a little more time to discuss some of the legal implications, which I know have been very well covered by witnesses before me, but I think there are some very serious questions involving the question of the supremacy clause; I think it is in conflict with the wording of this amendment. I also believe that it interferes with the concept of federalism in that there is a superseding, in some instances, possibly of congressional power, and many other things like that, but I guess my time is up.

Senator HATCH. We will be happy to have you submit any additional information you care to.

Ms. ABZUG. Thank you. I will submit a brief memo on that.

Senator HATCH. Let me say this to you: Merry Christmas and happy Hanukah to you also.

Ms. ABZUG. Thank you.

Senator HATCH. Our next witness will be Alfred Moran of Planned Parenthood of New York City.

Mr. Moran, we are pleased to have you with us today and thank you for the effort you have put forth.

STATEMENT OF ALFRED MORAN, PLANNED PARENTHOOD, NEW YORK CITY

Mr. MORAN. Thank you, Mr. Chairman.

I appreciate this opportunity to talk about the constitutional amendment proposals that are before you and which are designed to either prohibit abortion or return it to regulation by the various States, with preeminent power retained by the Congress.

The proposals to extend protection to the fetus as a person from the moment of fertilization are profoundly different from State laws overturned in 1973 by the Supreme Court. The Court in 1973 was following the lead of New York and 17 other States, which had all repealed or reformed their abortion laws. The statutes the Court overturned were enacted in the 19th century to protect women from the hazards of primitive abortion methods. The States had acted to force women to carry pregnancies to term, because at that time childbirth was safer than abortion.

None of those laws sought to sanctify the fetus or to give it rights that transcended the pregnant woman's. The sanctity of the fetus was an article of faith to some religious groups, but it was not the law of the land.

I was raised a Roman Catholic, and I am intimately familiar with the religious doctrine that preaches protection for the fetus regardless of consequences for woman or child. I have seen its impact on families and on women. I have been employed in the social and health field in New York City since 1947, and I know the length that women go to, to avoid bearing a child they cannot care for. That experience compels me to oppose the Hatch amendment along with the others, because it will remove constitutional protection women need.

Mr. Senator, I remind you that it was the Supreme Court in 1965 that overturned contraceptive restrictive statutes in the various States that made contraception illegal. It was States rights in those days that had to be superseded in order to make contraception available to women in order to be able to prevent pregnancy. You are now proposing to return to the States the power to compel women to carry pregnancies to term.

I would like to ask, with your permission, to enter into the record one of the most definitive records of safe legal abortion in the United States, "Ten Years in the State of New York, With Medicaid Funding." I have given copies of it to the staff. With your permission, we would like to have that entered into the record.

Senator HATCH. Without objection, we will put it in the record.

Mr. MORAN. I would like to commend particularly to you the summary that is at the end of that book, which was written by Bishop Paul Moore of the Episcopal Diocese of New York, and his comments on abortion in a religious context. I think it is important to read that, particularly in light of some of the other testimony we have heard about the religious issue this morning.

Planned Parenthood of New York City's experience with abortion is also pertinent. Of our 40,000 patients, about 10,000 use our abortion services, and our staff will tell you that none of them had made the decision about abortion easily or casually.

The underlying message that comes from Planned Parenthood patients and from the 1.5 million women reported on "Safe and Legal" is a message of determination, the determination that they will bear only those children that they can care for, love, support, and nurture.

People prefer to prevent pregnancy. Ninety percent of American women at risk of unwanted pregnancy are taking serious steps to avoid it, but our most effective method, the oral contraceptive, is distrusted by many women. Only one-third of Planned Parenthood's clients in New York now choose the pill, as compared to 75 percent 6 years ago.

For young women under 25 who intend to have children later in life, many physicians will not prescribe the intrauterine device, because of serious concern about infection and consequent sterility. Seventeen out of every hundred diaphragm users get pregnant in the first year using that method.

There are 58 million women between the ages of 15 and 50 in this country. Most of them are at risk of pregnancy for some time every year. The youngest among them face 25 to 35 years of avoiding pregnancy—300 to 400 monthly challenges—so that they can become pregnant the one, two, or three times during their lives when they want to bear a child. Based on statistics and present contraceptive methods, one can predict that virtually every American woman turning 15 this year will have at least one unwanted pregnancy before menopause. Many will have more than one.

I urge this committee to respond to the demonstrated determination of American men and women to avoid unwanted, unintended childbearing, by enabling them to prevent pregnancy more successfully, rather than by trying to outlaw abortion.

The proposals before you today will not stop abortion. They will simply drive it underground. American women who are pregnant and troubled about continuing a pregnancy will listen to their own conscience. They will turn to their own religious leaders, their own families, and they will assess their own life situations.

If they decide as a matter of religious principle or of personal necessity that they cannot manage to bear a child, they will seek abortion, legal and safe, or underground and illegal, even if it places them at extraordinary personal risk. I urge you to respect the consensus that exists among the majority of Americans, a consensus demonstrated by every poll, by the use of contraception, and by the utilization of abortion itself.

American men and women are determined, as I have said before, to bear only those children they can care for, love, support, and nurture. I urge the committee to understand and respect this commitment. I urge you to help all Americans prevent unwanted pregnancy successfully and consistently. It is the only way you can radically reduce the number of abortions in this country.

Thank you.

Senator HATCH. Thank you so much, Mr. Moran.

[The prepared statement of Alfred Moran follows:]

PREPARED STATEMENT OF ALFRED F. MORAN

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

I APPRECIATE THIS OPPORTUNITY TO TALK ABOUT THE CONSTITUTIONAL AMENDMENT PROPOSALS BEFORE YOU, WHICH ARE DESIGNED TO EITHER PROHIBIT ABORTION OR RETURN IT TO REGULATION BY THE VARIOUS STATES WITH PREEMINENT POWER RETAINED BY THE CONGRESS.

THE PROPOSALS TO EXTEND PROTECTION TO THE FETUS AS A PERSON FROM THE MOMENT OF FERTILIZATION ARE PROFOUNDLY DIFFERENT FROM STATE LAWS OVERTURNED IN 1973 BY THE SUPREME COURT. THE COURT — FOLLOWING THE LEAD OF NEW YORK AND 17 OTHER STATES AND THE DISTRICT OF COLUMBIA, WHICH HAD ALL REPEALED OR REFORMED THEIR ABORTION LAWS -- OVERTURNED STATUTES THAT WERE ENACTED IN THE 19TH CENTURY TO PROTECT WOMEN FROM THE HAZARDS OF PRIMITIVE ABORTION METHODS. THE STATES HAD ACTED TO FORCE WOMEN TO CARRY PREGNANCIES TO TERM BECAUSE AT THAT TIME CHILDBIRTH WAS SAFER THAN ABORTION. NONE OF THOSE LAWS SOUGHT TO SANCTIFY THE FETUS OR TO GIVE IT RIGHTS THAT TRANSCENDED THE PREGNANT WOMAN'S. THE SANCTITY OF THE FETUS WAS AN ARTICLE OF FAITH FOR SOME RELIGIOUS GROUPS, BUT IT WAS NOT THE LAW OF THE LAND.

I WAS RAISED A ROMAN CATHOLIC, AND I AM INTIMATELY FAMILIAR WITH THE RELIGIOUS DOCTRINE THAT PREACHES PROTECTION FOR THE FETUS REGARDLESS OF CONSEQUENCES FOR WOMAN OR CHILD. I HAVE SEEN ITS IMPACT ON FAMILIES AND WOMEN. I HAVE BEEN EMPLOYED IN THE SOCIAL AND HEALTH FIELD IN NEW YORK CITY SINCE 1947 AND KNOW THE LENGTHS THAT WOMEN WILL GO TO, TO AVOID BEARING A CHILD THEY CANNOT CARE FOR. I KNOW THE CONSEQUENCES OF ILLEGAL, CLANDESTINE ABORTION AND OF COMPULSORY CHILD-BEARING.

THAT EXPERIENCE COMPELS ME TO OPPOSE SENATOR HATCH'S "HUMAN LIFE FEDERALISM AMENDMENT" ALONG WITH THE OTHERS, BECAUSE IT WILL REMOVE CONSTITUTIONAL PROTECTION OF WOMEN AND MAKE ABORTION SUBJECT TO THE VAGARIES OF STATE LEGISLATURES AND THE CONGRESS.

PRIOR TO 1970, 6,500 WOMEN EACH YEAR WERE ADMITTED TO PUBLIC HOSPITALS IN NEW YORK CITY FOR INCOMPLETE OR BOTCHED ABORTIONS. ABOUT 25 WOMEN A YEAR DIED. THOUSANDS OF CHILDREN WERE BORN TO PARENTS UNABLE AND OFTEN UNWILLING TO CARE FOR THEM. MANY WHITE YOUNGSTERS FOUND ADOPTIVE HOMES, BUT BLACK BABIES AND INFANTS WITH MEDICAL PROBLEMS WERE FORCED INTO INSTITUTIONS. CHILDBEARING AMONG TEENS WAS AT A RECORD LEVEL, AND HUNDREDS OF CHILDREN OF TEEN PARENTS DIED IN INFANCY.

But in 1970 in New York, and around the same time in a large number of other states, those realities changed. Abortion was made legal and safe. The New York Legislature decided it was wrong and dangerous to force women to bear children against their will. The law it passed was almost identical to the decision ultimately reached by the United States Supreme Court.

I would like to ask that you enter into the record Safe and Legal: Ten Years of Legal [and Medicaid-funded] Abortion in New York State.

Safe and Legal is based entirely on public records from official agencies. It shows conclusively that legal abortion virtually eliminates death and complications from abortion; the babies who are born are healthier; fewer teens become parents. It demonstrates that there has been a dramatic decline in infant and maternal mortality. In addition, vast sums have been saved in public expenditure for welfare and related services, making more money available to care for children who are born.

One of the most striking corollaries of legal abortion documented here has been the increased use of contraception throughout the state. And I particularly commend to you the summary written by Bishop Paul Moore of the Episcopal Diocese of New York, for its comments on abortion in a religious context.

PPNYC's direct experience with abortion is also pertinent. Of the 40,000 patients we serve annually, about 10,000 use our abortion services. They are a microcosm of the state and the nation. Some are very young women -- a few as young as 12, pregnant because of ignorance. Others are women in their late 30's and 40's -- too old, in their judgment, to safely and capably bear children. Most of our abortion patients have assiduously practiced family planning and failed. Or they have abandoned their method -- the pill or the IUD -- out of fear of complications. Many are married; the majority are single. They are black and white; Medicaid clients and the well-to-do; Catholics, Protestants, and Jews.

Our staff would tell you that none of them have made the decision about abortion easily or casually.

But the underlying message that comes from Planned Parenthood patients and from the 1.5 million women reported on in Safe and Legal is a message of determination --the determination that they will bear only those children that they can care for, love, support, and nurture.

A new value on childbearing is starting to emerge, in New York and in this country. For the first time in history, for rich and poor alike, it's possible for the birth of children to be a considered and deliberate action, with the value

PLACED ON EACH CHILD AS AN INDIVIDUAL. INCREASINGLY, CHILDREN ARE NOT THOUGHT OF AS PROPERTY OR MORE WORKING HANDS FOR THE FAMILY. THEY ARE NOT JUST SEEN AS PARENTS' "SOCIAL SECURITY," NOT AS PUNISHMENT FOR SEX OR THE PENALTY FOR BEING A WOMAN, AND NOT JUST AS A RANDOM ACCIDENT. MORE AND MORE, EACH CHILD IS NOW SEEN AS A NEW, UNIQUE MEMBER OF THE HUMAN FAMILY WHOSE FULLEST GROWTH AND DEVELOPMENT SHOULD BE THE GOALS OF BOTH ITS PARENTS AND OUR SOCIETY.

OVERWHELMINGLY, PEOPLE PREFER TO PREVENT PREGNANCY. NINETY PERCENT OF AMERICAN WOMEN AT RISK OF UNWANTED PREGNANCY ARE TAKING SERIOUS STEPS TO AVOID IT. BUT OUR MOST EFFECTIVE METHOD, THE ORAL CONTRACEPTIVE, IS DISTRUSTED BY MANY WOMEN. ONLY ONE-THIRD OF PPNYC'S CLIENTS NOW CHOOSE THE PILL, COMPARED TO 75% A HALF-DOZEN YEARS AGO. FOR YOUNG WOMEN UNDER 25 WHO INTEND TO HAVE CHILDREN LATER IN LIFE, MANY PHYSICIANS WILL NOT PRESCRIBE THE INTRAUTERINE DEVICE, BECAUSE OF SERIOUS CONCERN ABOUT INFECTION AND CONSEQUENT STERILITY. SEVENTEEN OUT OF EVERY HUNDRED DIAPHRAGM USERS GET PREGNANT IN THE FIRST YEAR USING THAT METHOD. AND IN PPNYC'S OWN PATIENT POPULATION, MORE THAN 10% OF DIAPHRAGM USERS FAIL TO PREVENT PREGNANCY. CONDOM USERS ALSO EXPERIENCE FAILURE RATES UP TO 10% AND 15% TO 25% OF THE USERS OF "NATURAL FAMILY PLANNING" METHODS REPORT FAILURES.

THERE ARE 58.5 MILLION WOMEN BETWEEN THE AGES OF 15 AND 50 IN THIS COUNTRY. MOST OF THEM ARE AT RISK OF PREGNANCY FOR SOME TIME EVERY YEAR. THE YOUNGEST AMONG THEM FACE 25 TO 35 YEARS OF AVOIDING PREGNANCY — 300 TO 400 MONTHLY CHALLENGES — SO THAT THEY CAN BECOME PREGNANT THE ONE, TWO OR THREE TIMES DURING THEIR LIVES WHEN THEY WANT TO BEAR A CHILD. BASED ON STATISTICS, ONE CAN PREDICT THAT VIRTUALLY EVERY AMERICAN WOMAN TURNING 15 THIS YEAR WILL HAVE AT LEAST ONE UNWANTED PREGNANCY BEFORE MENOPAUSE. MANY WILL HAVE MORE THAN ONE.

I WOULD URGE THE UNITED STATES SENATE AND THIS COMMITTEE TO RESPOND TO THE DEMONSTRATED DESIRE OF AMERICAN MEN AND WOMEN TO AVOID UNWANTED, UNINTENDED CHILDBEARING BY ENABLING THEM TO PREVENT PREGNANCY MORE SUCCESSFULLY, RATHER THAN BY TRYING TO OUTLAW ABORTION.

BECAUSE THE PROPOSALS BEFORE YOU TODAY WILL NOT STOP ABORTION. THEY WILL SIMPLY DRIVE ABORTION UNDERGROUND.

AMERICAN WOMEN WHO ARE PREGNANT AND TROUBLED ABOUT CONTINUING THE PREGNANCY WILL LISTEN TO THEIR OWN CONSCIENCE. THEY WILL TURN TO THEIR OWN RELIGIOUS LEADERS, THEIR OWN FAMILIES, AND WILL ASSESS THEIR OWN LIFE SITUATIONS. AND IF THEY DECIDE, AS A MATTER OF RELIGIOUS PRINCIPLE OR OF PERSONAL NECESSITY, THAT THEY CANNOT MANAGE TO BEAR A CHILD, THEY WILL SEEK ABORTION - LEGAL AND SAFE, OR UNDERGROUND AND ILLEGAL, EVEN IF ILLEGALITY PLACES THEM AT EXTRAORDINARY PERSONAL RISK.

I URGE YOU TO RESPECT THE CONSENSUS THAT EXISTS AMONG THE MAJORITY OF AMERICANS — A CONSENSUS DEMONSTRATED BY EVERY POLL, AND BY THE UTILIZATION OF ABORTION ITSELF. AMERICAN MEN AND WOMEN ARE DETERMINED, AS I SAID BEFORE, TO BEAR ONLY THOSE CHILDREN THEY CAN CARE FOR, LOVE, SUPPORT, AND NURTURE.

I URGE THE COMMITTEE TO UNDERSTAND AND RESPECT THIS COMMITMENT. I URGE YOU TO MOVE THE SENATE TO TAKE THE ACTION NECESSARY TO HELP ALL AMERICANS PREVENT UNWANTED PREGNANCY SUCCESSFULLY AND CONSISTENTLY — WHICH IS THE ONLY WAY YOU CAN REDUCE RADICALLY THE NUMBER OF ABORTIONS IN THIS COUNTRY.

WHAT'S NEEDED IS A NATIONAL PROGRAM TO:

- DISCOVER, TEST AND MARKET WITHIN TEN YEARS A NEW RANGE OF CHEAPER, SAFER, MORE EFFECTIVE CONTRACEPTIVE METHODS. CONGRESS HAS TO PROVIDE THE LEADERSHIP - NOT ONLY BY FEDERAL FUNDING BUT BY PROVIDING SIGNIFICANT INCENTIVES FOR PRIVATE INDUSTRY TO JOIN THE EFFORT.
- COMMIT ADEQUATE FEDERAL MONEY TO INSURING THAT ALL AMERICANS -- REGARDLESS OF AGE OR ECONOMIC STATUS -- HAVE EQUAL ACCESS TO PREGNANCY PREVENTION SERVICES.
- ENCOURAGE SEX EDUCATION THAT EMPHASIZES PREGNANCY PREVENTION AND MAKE IT POSSIBLE FOR OUR CHILDREN TO LEARN ABOUT SEX FROM THEIR PARENTS, THEIR MINISTERS AND THEIR TEACHERS, AND NOT FROM DESIGNER JEANS COMMERCIALS AND TELEVISION SITCOMS.

INSTEAD OF TRYING TO STRIP AWAY CONSTITUTIONAL RIGHTS, LET'S ADDRESS THE PROBLEM AT ITS SOURCE. TOGETHER WE CAN GIVE PEOPLE BETTER TOOLS TO CONTROL THEIR OWN LIVES. THIS IS THE ISSUE AND THIS IS THE SOLUTION.

THANK YOU.

Senator HATCH. Our next witness will be Paulette Joyer, Feminists for Life of America.

Ms. Joyer, we are very happy to have you with us.

STATEMENT OF PAULETTE JOYER, FEMINISTS FOR LIFE OF AMERICA

Ms. JOYER. Thank you, Senator Hatch.

I am Paulette Joyer, and I am happy today to be representing Feminists for Life of America. Feminists for Life of America is a nationwide organization of women and men dedicated to promoting justice for women and the protection of all human life.

We support the equal rights amendment and the Hatch human life amendment. We see these two amendments as complementary in their concern for human life. We are also very strongly committed to authentic reproductive self-determination.

The movement for genuine reproductive freedom is the ideology which recognizes that women and men should have access to safe, effective, nonsexist techniques and information which enable them to control their fertility. This definition does not include abortion. It makes no more sense to include feticide in a definition of reproductive freedom than infanticide.

ABORTION IS SEXIST

In the prolife feminist analysis, abortion on demand is an indication of sexism in our culture, just as prostitution is. The proabortion movement is the most insidious manifestation of sexism in our society, because while it is contributing to our dehumanization we are seduced into believing that in denying the humanity of our unborn children and subscribing to the absurd blob theories we will achieve equality.

Abortion on demand has done nothing and will do nothing to change the inferior status of women. In reality, it is a reactionary solution to a problem pregnancy, for it reinforces the status quo, encouraging society not to change the conditions which force women into abortion. It is in despair and frustration that a woman chooses abortion. However, responsible reproductive freedom does not include the destruction of human life.

HATCH HLA TO PROTECT UNBORN AND WOMEN

Our society has failed millions of women in the last 8 years and destroyed millions of our children. The Hatch human life amendment holds the promise of enabling Congress and the States to restore protection for the lives of unborn children and end the mutilation of women through legalized abortions.

Since 1973 we have witnessed diminishing support and concern for women with unplanned pregnancies. Sexism as manifested in the proabortion mentality, causes society to view our fertility as disease. An unplanned pregnancy is considered a symptom of the disease and therefore must be cured through abortion.

FERTILITY CONTROL A JOINT RESPONSIBILITY

Prolife feminists reject such attitudes. Abortion is a deadly invasion into a healthy woman's body to destroy new life. It is our greatest hope that passage of the Hatch human life amendment will force all of us to work together to create a society which recognizes that fertility control is the joint responsibility of women and men and affirms that authentic reproductive freedom will only be possible in a world where women and men accept equally the responsibility for child nurturing and rearing and where there is respect for all human life.

Feminists for Life of America thanks you, Senator Hatch, for this amendment and urges all members of the U.S. Senate to support Senate Joint Resolution 110. We look forward to working in our States for its ratification.

Senator HATCH. Thank you so much, Ms. Joyer. We appreciate your efforts.

Our next witness will be Sherry Matulis of Protect Abortion Rights, Inc.

Ms. Matulis, we are happy to have you here, and we will look forward to taking your testimony.

STATEMENT OF SHERRY MATULIS, PROTECT ABORTION RIGHTS, INC.

Ms. MATULIS. I would like to thank you, Senator Hatch, for giving me this opportunity to testify on behalf of Protect Abortion Rights, which is a national organization dedicated to freedom of choice.

I would like to begin by saying that I have been married for 35 years, I am the mother of 5 children, the grandmother of 3, and the victim of a rapist and an illegal abortionist.

In the mid-1950's I was raped, very brutally raped, and this act resulted in a pregnancy. When I first suspected this to be the case, I went immediately to the doctor who had delivered the two children we had at the time, and I told him what had happened, and I pleaded with him to help me. But, of course, he could not. Although he was sympathetic and he wanted to help, to have performed an abortion would have meant chancing up to 20 years in prison, both for him and for me.

After visiting this doctor, I went to another, a bit less reputable. This second physician's sense of ethics left a great deal to be desired, but even for him performing an abortion, for whatever reason, was just too risky a thing to undertake.

Knowing nowhere else to turn, and horribly terrified by all I had heard about the local abortionist, I went home, and I tried all the various home remedy things that I had heard of—things like falling down the stairs, scalding the lower half of my anatomy in hot tubs, and even drinking a full pint of castor oil, which I assure you is no enviable feat.

But none of these things were at all effective, and so as a final, desperate measure, I took the only option left. I went to see the local back-alley abortionist.

I think the thing I will always remember most vividly, Senator Hatch, was walking up those three flights of darkened stairs and down that darkened corridor, and knocking on that door at the end of it, not knowing what was behind it or whether I would ever walk back down those stairs again.

That, I think, stands out in my mind more than anything else; more than the incredible filth and my fear on seeing it that I would surely be infected; more than the fact that the man was an alcoholic, that he was drinking throughout the whole procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the pain, which was indescribable, other than to say that it was the most intense pain I have ever been subject to in my life; more than the humiliation, the degradation of being asked to perform a deviate sex act after he had aborted me; more than the hemorrhaging and the peritonitis, and the hospitalization that followed; more even than the fear of being found out and locked away for perhaps 20 years; more than all of these things, those pitchy stairs, and that darkened hallway and the door at the end of it stay with me, and frighten me still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might be taking the last walk of my life, that I might never again see my two children, or my husband, or anything.

And yet regarding this as a clear possibility, and recognizing it as one, still I had no choice at the time. I had to do what I did, because not to have done it would have meant giving birth to the offspring of a literal fiend, and the terror of that was even worse.

The man who raped me left me for dead. And I very nearly was. The man who aborted me could not have cared less if I had died. And again, I very nearly was. In fact, I consider that I am alive today more or less by accident, and that accident is the accident of being born stubborn.

I am a stubborn person, and I admit it. I have had to be to survive. But I am not a mean, or uncaring, or immoral person. I have never wilfully done anything in my life to hurt another person, and when someone did hurt me, when that cruel and twisted person raped me, and brutalized me, and impregnated me, and sliced open my abdomen, and left me for dead, it should not have been the prerogative of society to compound that crime, to say to me in effect, "All right, you have survived this. Now you can go see an alcoholic quack and let him take a whack at you, because we somehow feel that a potential life should be given much more consideration than an existent one."

Twenty-seven years later, Senator Hatch, I still have nightmares about those dark stairs, and that dark hall, and what was on the other side of that door. And I resent them. I resent very much what I had to go through to terminate an unbearable pregnancy. But I resent even more the idea that any woman should, for any reason, ever again be forced to endure the same. If abortion is made illegal, this is what she will be forced to endure.

To speak of a "right to life" and deny simultaneously the right to live that life, fully and in accord with one's own rational dictates is the most odious of paradoxes. It ranks right up there with establishing a "right to sexual freedom" for all eunuchs.

I think that what this issue comes down to is a question of whether the State should own and control a woman's internal organs or whether she should. As a representative of Protect Abortion Rights and a libertarian who feels very strongly about individual freedom, naturally I think the individual has a right to control their own internal organs.

I would like to offer additional material in evidence. That is all I have to say for now, and I thank you.

Senator HATCH. Without objection, it will be added. Thank you so much for your testimony.

[Material supplied follows:]

NEVER AGAIN

By
Sherry Matulis

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INTRODUCTION

In the yesterdays of our country, stories like the one reprinted in this pamphlet went untold. Rape was a shameful secret and abortion unspeakable — not only a crime, but a fear-filled, shocking word that was never used.

Now in the early 1980's, when abortion has been lawful and available for more than a decade in a few of our states (legal in all since 1973), it is difficult to remember those "good old days." It has been easy to forget the time when pregnant women were condemned to childbearing no matter how tragic their stories might be, when "choice" was represented by the backstreet pervert who cost "an arm and a leg" if not your life.

Here, in some vivid prose and poetry, is an abortion story, written by a Midwestern woman, Sherry Matulis — wife, mother, businessperson, writer, poet and *victim.*

You will never forget her story.

When you read it, please reflect on the horror and degredation that the Flat-Earthers of our society would return us to, as they undo, as Ms. Matulis so correctly says, "the only good thing to have happened in the 70's."

This is the way it was and the way *it must not be again.*

Anne Gaylor, President
PROTECT ABORTION RIGHTS, INC.
Madison, Wisconsin
June, 1981

I get it all the time. From nearly everyone I know—well-intentioned friends as well as all the nerds. "Why do you do it, Sherry?" they ask. "Why make things, uh, difficult for yourself? I mean, my lord, at *your* age, *you* certainly don't have anything to be concerned about!"

I don't, huh?

The "it" that I do, the thing I'm getting all this good unsolicited advice about, consists of campaigning for freedom of choice. In all aspects of life. But presently, especially as regards abortion. And they're right of course, these friends and other types; I do deliberately put myself between the rock and the hard place—as often and as vociferously as possible. I "do it" via public speaking, feature articles, private counseling, even that old tried and true forum, the letter to the editor.

And they're also right about not having anything to be concerned about—so far as the possibility of my ever becoming pregnant again. Having been hanging around the lot for a half century or so, and being the nearly two decades' veteran of a total hysterectomy (which was preceded by a vasectomy on my husband's part), were I to become pregnant again the concern would not be with being able to obtain a safe, sanitary and relatively inexpensive abortion but, rather, with upstaging the Second Coming. Upstaging, hell. It'd put it right off the stage.

But there was a time....

I was 23, very pleasantly married, the mother of two planned-for and especially loved children (the number later grew to five), and working my butt off nights in a cocktail joint, which at the time was one of the very few employment options available to any woman who needed to make more than $27.50 a week.

And I did, I decidedly did. My husband was a construction worker; there was a depressive paucity of new building starts; and like most young couples with rent to pay and a couple of kids to feed and clothe, we weren't making the Mellons and the Morgans turn green with envy. As a matter of fact, we were about two rungs on the ladder below extreme poverty. And happy. That we were. Dumbly, poorly but oh, lord, so truly happy!

Until I was raped. My god, how simple that sounds now. I—was—raped. Three little words. How could three little words wreak such havoc with one's entire life? How could something that sounds so simple nearly bring that life to an end?

Here's how.

I got off the 1:20 a.m. bus and started my nightly trudge home, cutting the three blocks to two and a half by what we called the schoolyard shortcut. The route was the same one I'd taken nearly every night for a year. (I wouldn't walk alone late at night now, I probably wouldn't even walk in a crowd late at night now, but this was a time before rapes and muggings and getting bopped for pocketbook change was commonplace.)

I remember the moon was full; I remember thinking, Full moon brings out all the flakes and fruitcakes—there had been plenty of them that night, grabbing and groping. (I had "accidentally" dumped a tray of drinks on one of the more obnoxious ones.) I remember thinking how not too many moons distant I would be in a home of my own, a place with decent plumbing and a yard for the kids. My very first very own home. And then no more aching arches, no more fighting off the Cocktail Casanovas with one hand and balancing a tray with the other. When I got my home, the one I'd been working for, between babies, for years, I was going to stay in it. Just me and my footbath, forever. I remember whistling—not out of fear but happiness.

And for a long time thereafter, that was all I remembered. It was all I could bear to.

He must have been waiting close to the building, in the shadows. I didn't see him until he was on top of me—no pun intended. And I still remember very little about the act itself; not because I'm any longer trying not to but because when he threw me down against the blacktopped court, my skill cracked and I blacked out.

One merciful concussion and a couple of hours later, I was again staring at the moons. Yeh, both of 'em. Both full. And all I could think was, Well, no wonder! what else, with *two* full moons?!

The back of my head was warm and sticky-wet. Blood. Lots of it. Most of my clothing had been torn off and scattered. And as I tried to get up to retrieve it, I felt a terrible searing pain in my midsection. Like a knife, I thought. Looking down, I saw this odd, ugly mass of something perched atop my abdomen. It took at least a minute to realize that it was part of my intestine. The knife was no longer there—I suppose he has it somewhere, with a few notches in the handle—but it had been; and my guts were oozing out of a neatly carved X.

Holding both hands against something I hope never to feel again in my life, somehow I managed to get up; and somehow I managed to get home; and somehow, with a lot of suturing and a couple weeks' intensive care and an infinite amount of love from a husband who rushed home from three states away and never left again, I managed to survive. Only to find myself wishing, about a month later, that I hadn't.

I was pregnant. And I was *not* pregnant by my husband. Something of which both of us hadn't the slightest doubt.

I was pregnant. . . by that *bastard*, that *fiend*, that sub-human excuse for a life form, that *thing* who was not content with the mere foul violence of rape but who found it necessary/pleasurable to also gut his victims and leave them to expire. (We later learned the knife act was a religious rite, an act of "purification"; the X through which my innards became outards was supposed to have represented the cross.)

I was pregnant. And I could not stay that way, I could not. But then what *could* I do?

I could finish the job he'd started—I could whack myself up in nice neat little pieces hoping no one would notice. And leave two wanted and loved children to fend for themselves? Great idea. Think of something else. Well, I could go see my doctor, plead with him, beg him for an abortion, tell him straight out the circumstances, surely he would understand, surely he would help.

Oh, yeh?

Oh, he was sympathetic, make no mistake about it; he patted me on the shoulder (my head still hadn't healed completely) all the while he told me how he'd really like to help, but he just couldn't, because it could jeopardize his whole career, and heavens! he could maybe even end up in the slam for twenty years. By the time I left his office, I was almost feeling sorry for *him*! (In all fairness, what he said was correct; he could have gone to prison for aborting me. And I didn't want that; but then neither did I want to be raped and pregnant.)

He did offer a few suggestions — all zilch. I could, for example, he suggested, go ahead and have the baby, then place it for adoption. He didn't suggest, however, how I might explain such action to a frowning society—much less to a frowning mother-in-law: "Yeh, well, gee, mom, it's like this, see, I just decided I didn't want the third kid, so I gave it away. That's okay with you, right?" (Had I been the doctor's wife and had the doctor's wife's money, I could of course have just taken an extended vacation. But then had I been the doctor's wife, it wouldn't have been necessary — doctor's wives had really no problem obtaining abortions; nice safe clean abortions.)

The rest of his ideas weren't quite so innovative, the main thrust being that I should have the child and accept my fate like a good girl and stop bothering people who didn't want to jeopardize their careers and spend twenty years in striped coveralls. He assured me, however, that no matter what I did or didn't do, everything would be fine, just fine. I was supposed to give my problem to the Lord (I would've loved to! especially since that was its original source) and then, "You'll find some way together to work it all out, I'm sure."

And I was real glad he was. Sure, that is. Because what I was was confused. And hurt. And frightened. And desperate. And getting damned mad. And willing to try anything, everything, one of each. Which is precisely what I did. I feigned migraine to get a prescription for ergotrate—which, I think, gave me a migraine. I went on a two-day castor oil diet and lost five pounds and a quart of hemorrhoidal blood—and nothing else. I damn near scalded the lower two-thirds of my anatomy squatting in hot tubs. I detested the taste of alcohol, but I held my nose and downed two pints of Everclear. And when I woke up, everything was intact but the additional throbbing head. That was when I got out the meat mallet and began pounding my almost-healed abdomen.

My husband was ready to stick me in a straight-jacket—just to preserve my original color. And like the doctor, but for an entirely different motive (his concern was for me, not the fetus), he wanted me to go through with the pregnancy. Actually, what he wanted was for me not to kill myself, nor to hire it done by the only sort of abortionist that was available at that time. His thought was that once the baby was born, we could both accept it as our own. And good person that he is, he probably would have tried. *Maybe* he could even have done it. But I could not, not ever. And I knew it. I knew that had I given birth to a child conceived under those circumstances, I would not be able to look at it without remembering. And remembering would mean hating all over again. And I wasn't willing to put either myself *or* a child through that. I would far rather take my chances, slim as they might be, at the Main Street Butcher Shoppe.

When I was finally able to make him understand this, my husband reluctantly agreed to take me to the local back-alley abortionist—an alcoholic quack who quite literally buried more than one of his mistakes. This was in 1954, when a dollar was worth perhaps three times what it is today. In the manner of first things first, I had to hand this drunken butcher one thousand of them before I ever got through the door. Which bought me the most painful, fear-filled and degrading experience of my life.

After I had swallowed my two aspirin "anesthetic," I was told to climb up on what resembled a dirty kitchen table and hoist my skirt. There followed a few obscene comments about my underpants and how I could take 'em off now, but I should have—ha! ha!—left 'em on before. Then pain. Eyeball-popping pain. Lots and lots of it. Far more, I'm sure, than was necessary. And just to be certain I'd remember the momentous occasion: after the scraping-it-into-an-already-near-full-bucket procedure was over, El Quako-Quacko offered me 20 of my 1000 bucks back for a quick blow job.

Had I felt a little stronger at the time, had my life's blood not been pouring out between my legs like Niagara Falls, I would quite likely have used his own damn dirty knife to do the world a favor. As it was, I simply stuffed a towel between my legs, pulled up my pants—which were still around my ankles, hied myself out of there and went home to hemorrhage.

Another trip to the hospital, another ten days' stay, a little bout with peritonitis, a half-dozen transfusions (all of which we could ill afford and which put me back to square one re owning my own home)and what the hell! the old girl was as good as new. Almost. But not quite. Not quite ever that "good" again. Not in the sense that "good" is docile or tractable or pliant or amenable or submissive or for one second willing to sit silently by while a bunch of Pollyanna Prufaces do their obscene vocal best to bring back the back-alley quack. The one *they'll* never have to patronize—not because they don't have abortions but because they do have pull.

Twenty-seven years ago I was physically and financially brutalized, not only by two cretin-thugs—the first who raped, the second who robbed—but by a myopic, bluenosed and totally hypocritical society; a society that revered ignorance and made it the criterion for most of its laws; a society that looked upon rape in much the same light as it looked upon stealing a package of Spearmint gum—and acted on it to an even lesser degree; a society that made it a felony for any woman to own and control her own internal organs. A society which really hasn't changed very much for the better; and which is now on the verge of reversing the only good thing to have happened in the 70's.

This is the society that allowed someone else to spill my guts but that gets terribly indignant when I spill them. Well, scaaarooo you, society! I survived in spite of you. (Countless others, sad to say, weren't so fortunate.) I don't know that I could again. I do know that no woman should have to. And if I have anything to say about it, no woman ever will.

Yeh, I get it all the time—"Why do you do it, Sherry?" And really, at *my* age, what *do* I have to be concerned about? Where half the nation's populace is concerned, try: everything.

Sherry Matulis

Failure Of Completion

by Sherry Matulis

"Murderer!" Oh, yes, they called me that.
I hear it yet. Sometimes. Not often anymore.
But still sometimes . . . At night. In screams.
"Murderer!"

They said I'd killed—no, "slaughtered" was the word
they used. Yes, slaughtered, all of them concurred:
a crime had taken place.
Why, sure!
None, least of all I, doubted that.
But what? By whom?
I guess that's where we differed . . .

You see, they said *I* had destroyed a human life.
And I, well, I rather thought they'd done their best
(or worst, depending on the point of view)
to pull off same. And failed. And having made
a bloody mess of things, were Heaven-bent
on resurrecting each contentious bone
of pre-Copernicusian decay
that might, however weakly, lend support
to Absolution's slack-kneed argument.

A bloody mess? Oh, lord, but it was that!
So bloody. And so full of pain and fear.
And pitchy, tear-stained endless flights of stairs
that led to one dank cobwebbed cubicle
two tiny aspirins
and a dirty knife.

And life? Perhaps. At least a chance to have
a chance to live—outside the womb. A reason to.
a chance to hang around and try to figure
why? they condemn what Is
and laud what Might Be
and mourn what Never Was.

I: Was. I: Am
a life. Existent. Not Potential. Not Might Be.
No Might Be ever laid it on the line—
clung to a filthy, blood-soaked cot and shed
her dignity
and bank account
to rid
the scarlet shame of some dear mother's son;
boy tired of picture books and masturbation,
boy wanted Action, boy went out Looking.
And, rather like the mountain, Iwasthere.
(The mountain having one distinct advantage:
assaults leave it unscarred, unchanged. And envied.)

O irony, thy name is Good Clean Fun!
A blacktopped court, intended to inhibit
(thorough sundry *other* athletic endeavors)
the adolescent's pulsing prime ambition,
was proving ground for all Repression's failure:
he bopped me *and* his ma in one fell swoop.

A thousand icy showers gone for naught!
Two hundred million microscopic players
burst on that court to dribble their contempt
for moral platitudes but half their size.

TWO HUNDRED MILLION!
Yet *I* am the one?
I am Destroyer Of Potential Life?

Each time one-good-god-fearing-son-of-eve
puts hand/psyche to task, he has undone
"potential life" enough to quite replace
the nation's populace. And *I'm* the one!
"Murderer?"

Oh, sure, I did dispose
(sans any self-accomplished ecstacy)
of one of those few eggs that yet remained
within the basket after Nature'd done
one cracking crack-up thing with all the rest:
390,000 with one swat!
(She hadn't heard, I guess, about the law.)
But . . . Murderer?

Oh, my! how men must hate
the act, how they must sob
each time they purge whole vast "potential worlds."
What throbbing guilt must grip each black-frocked soul
who damns the shucking of one wombmote, yet
dispenses . . . handily . . . a forest's beams!
Murderer?

Oh, yes, they called me that. I hear it yet . . .
The Sewing Circle meets somewhere today
to stitch up their vaginas and to knit
a few more yarns about the "Baby Killer."
(They sell so well at the Bizzares, you know.)
And I don't mind too much. Not anymore.
Right now, the single thing that troubles me
is contemplating how my younger sisters
may once more have to climb back-alley stairs
and bare themselves to alcoholics' hands
that proffer the profane, the *only* choice.
(The one which, first, "ya' pays yer money" for—
enough of it to buy the whole damn store.)

And all because some glassy-eyed flat earthers,
who call themselves "pro-lifers" with straight face,
consider other people's wombs most fitting
repositories: for their too big noses.

Abortion's but *one* failure of completion;
these others write their congressmen each day.
Yeh, misery loves company, and they
would joyously become *your*
"Murderers!"

(From Progressive Magazine--August 1981)

THE LAST WORD *Sherry Matulis*

ABORTION, 1954

I get it all the time, from nearly everyone I know. "Why do you do it, Sherry?" they ask. "Why make things, uh, difficult for yourself? I mean, my lord, at *your* age, you certainly don't have anything to be concerned about!"

The "it" that I do, the thing I'm getting all this good unsolicited advice about, consists of campaigning for freedom of choice. In all aspects of life. But now, especially regarding abortion. And they're right, of course; I do deliberately put myself between the rock and hard place—as often and as vociferously as possible. And they're also right about not having anything to be concerned about—so far as the possibility of my ever becoming pregnant again.

But there was a time. . . .

I was twenty-three, pleasantly married, the mother of two planned-for and well-loved children (the number later grew to five) and working nights in a cocktail joint. One night, I got off the 1:20 A.M. bus and started my usual trudge home, cutting the three blocks to two and one-half by what we called the schoolyard shortcut.

I remember the moon was full; I remember thinking, Full moon brings out all the flakes and fruitcakes—and there had been plenty of them that night, grabbing and groping in the bar. I remember thinking how not too many moons distant I would be in a home of my own, a place with decent plumbing and a yard for the kids, the place I'd been working for, between babies, for years. I remember whistling—not out of fear but out of happiness.

And for a long time thereafter, that was all I remembered. It was all I could bear to.

He must have been waiting close to the building, in the shadows. I didn't see him until he was on top of me, and I still remember very little about the act itself—not because I'm trying not to any longer but because when he threw me down on the blacktop, my skull cracked and I blacked out.

One merciful concussion and a couple of hours later, I was again staring at the moons. Yeah, both of 'em. Both full. And all I could think was, Well, no wonder! What else, with *two* full moons?

The back of my head was sticky-wet. Blood. Lots of it. Most of my clothing had been torn off and scattered. And as I tried to get up to retrieve it, I felt a terrible, searing pain in my midsection. Like a knife, I thought. Looking down, I saw this odd, ugly mass of something perched atop my abdomen. It took at least a minute to realize that it was part of my intestine. The knife was no longer there, but it had been, and my guts were oozing out of a neat X.

FRANCES JETTER

Holding both hands against something I hope never to feel again in my life, somehow I managed to get up; somehow I managed to get home; and somehow, with a lot of suturing and a couple of weeks' intensive care and an infinite amount of love from a husband who rushed home from three states away and never left again, I managed to survive. Only to find myself wishing, almost a month later, that I hadn't.

I was pregnant. And I was *not* pregnant by my husband. I was pregnant by that *fiend*. And I could not stay that way.

My doctor would not help me, so I feigned migraine to get a prescription for ergotrate--which, I think, gave me a migraine. I went on a two-day castor oil diet and lost five pounds and a quart of hemorrhoidal blood—and nothing else. I scalded the lower two-thirds of my anatomy squatting in hot tubs. I detested the taste of alcohol, but I held my nose and downed two pints of Everclear. And when I woke up, everything intact, I got out the meat mallet and began pounding my almost-healed abdomen.

My husband was ready to stick me in a straitjacket. He wanted me to go through with the pregnancy—or rather, he wanted me not to kill myself, or to be killed by the only sort of abortionist that was available at that time. He thought that once the baby was born, we could both accept it as our own. And good person that he is, he probably would have tried.

But I could not, not ever. I knew that had I given birth to a child conceived under those circumstances, I would not be able to look at it without remembering. And remembering would mean hating all over again. And I wasn't willing to put either myself *or* a child through that.

When I was finally able to make him understand this, my husband reluctantly agreed to take me to the local back-alley abortionist—an alcoholic quack who buried more than one of his mistakes. This was in 1954, when a dollar was worth perhaps three times what it is today. I had to hand this drunken butcher one thousand of them before I even got through the door.

After I had swallowed my two-aspirin "anesthetic," I was told to climb up on what resembled a dirty kitchen table and hoist my skirt. There followed a few obscene comments about my underpants and how I could take 'em off now, but I should have—ha! ha!—left 'em on before. Then pain. Eyeball-popping pain. Lots and lots of it. Far more, I'm sure, than was necessary. After the scraping-it-into-an-already-nearly-full-bucket procedure was over, he offered me twenty of my one thousand bucks back for a quick blow job.

Another trip to the hospital, another ten-day stay, a little bout with peritonitis, a half-dozen transfusions (all of which we could ill afford and which put me back to square one when it came to owning my own home) and the old girl was good as new. Almost—but not quite. Not in the sense that "good" is docile or tractable or pliant or amenable or submissive or for one second willing to sit silently by while anyone tries to bring back the back-alley quack, the one *they'll* never have to patronize—not because they don't have abortions but because they do have pull.

Twenty-seven years ago, I was physically and financially brutalized, not only by two cretin-thugs—the first who raped, the second who robbed—but by a myopic, bluenosed, and totally hypocritical society: a society that revered ignorance and made it the criterion for most of its laws; a society that made it a felony for any woman to own and control her own internal organs; a society which really hasn't changed very much for the better, and which is now on the verge of reversing the only good thing to have happened in the 1970s.

That's why, even at *my* age, I do what I do. ■

Sherry Matulis is a poet and science fiction writer in Peoria, Illinois. This article was adapted from her longer piece, "Never Again," published by Protect Abortion Rights in Madison, Wisconsin.

Senator HATCH. Our next witness will be Nellie Gray, president of March for Life.

Nellie, we are happy to welcome you to the subcommittee today.

STATEMENT OF NELLIE GRAY, PRESIDENT, MARCH FOR LIFE

Ms. GRAY. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to testify today in behalf of prolife legislation.

Senator HATCH. Nellie, let me mention before you begin, that we have a 5-minute rule in effect. When the yellow light comes on, you have 1 minute left.

Ms. GRAY. Thank you.

If I may have the prepared statement enclosed in the record——

Senator HATCH. Without objection, that will be done.

Ms. GRAY. Thank you.

I am representing today the March for Life, which is a nonprofit, nonpartisan, nonsectarian corporation. We are registered lobbyists, and we are working to support all prolife legislation which meets the life principles.

Basically, those life principles, which are included as part of the testimony, recognize that each individual human life begins at the moment that human sperm and ovum unite, that there is a value and dignity of each human being, and that the highest law of our land must protect that value and dignity and that right to life, without any exceptions, from the moment of fertilization, without regard to age, health, or condition of dependency.

It is this type of legislation that we will support in any measure, whether it is a constitutional amendment or a statute, or however it happens to be formulated. Our only criterion is that it must meet these life principles—namely, it cannot denigrate the right to life. It cannot assume that life does not begin at fertilization. Therefore, the kind of legislation that we want to see is that which recognizes the full legal personhood of all human beings.

I have put in my testimony a rather lengthy discussion of the slavery experience in America and the lessons that we should have learned. I went into not only the things that we ask the abortionists to learn, but I particularly went into the kinds of experiences that we as prolifers should learn—that the slave was put into the Constitution as only three-fifths man and two-fifths property. That was done according to the "Federalist Paper 54" as a matter of constitutional expediency, in order to get the Constitution before the people.

It was put in as a moderate position, because there was grave disagreement between the slave owners and the abolitionists. These particular aspects of our legislative history of the Constitution shows, by history, that those compromises and that so-called moderate position did not hurt, but rather it created turmoil in the country forever until the slaves were actually both de jure freed after a civil war and de facto freed after a century of segregation. The reason is that people of goodwill cannot sit by while fellow men are treated less than human beings.

After that slavery experience, then comes the abortion issue, and we are exactly right back to the same issues that faced the drafters of the Constitution. We are also following another experience of our own, which is the Holocaust.

With the abortion issue now, we have a group of people who want to denigrate the human life of innocent preborn children, and from that flows a denigration of the personhood of all other human beings. We have an act by the Supreme Court, much like the *Dred Scott* decision, which we are trying to overturn.

I think the lesson to be learned is that if we do not respect the value and dignity of each and every human being in the legislation, we are going to have the same turmoil, until we finally free the preborn children and emancipate them, just as the slaves were freed.

There is before us right now the whole notion that there is something subhuman, something unusual, about the children, as there was the slaves. That whole notion of trying to not use the word "kill" has again reared its ugly heads as euphemisms that we cannot tolerate.

But the issue is joined. It is, shall we have abortion, or shall we not? As the slavery issue, this has no middle ground whatsoever, no moderate position. Either the babies are killed, or they are not. Therefore, when we see history repeating itself, we come to the issue of what to do. The "what to do" is that we indeed assure that the Constitution reaffirms the right to life of every human being, and it mandates such a right, and mandates protection for that right.

Therefore, the whole prolife movement, for a decade now, has been firmly for a mandatory human life amendment, not a permissive one, not a States rights, not one that gives discretion to either a Federal legislature or a State legislature over the issue of who lives or dies. It must be mandated as a Federal issue, right at the Federal level, right here in the Congress where the issue is joined. Therefore, the only legislation that we can support is a statute or a constitutional amendment which does indeed mandate protection for the human being.

The question is, so what are we going to do about the abortionists who do not want to let go of their bloody business? The answer is that they shall learn that abortion is not any more respectable than racism is now. We must treat this in a very forthright, decisive manner.

I know that some people like to say that that position is hardcore or some other words of derogation, but actually it is the norm, because the norm has always been that the innocent children shall be protected. That is in the Hypocratic oath. Therefore it is the norm to protect. It is not the norm to have a little bit of abortion.

The right to life movement has been wrestling with this question for some time, and they are united on a mandatory unity amendment. They are not united on Senate Joint Resolution 110, and I come today to ask you not to report that bill out. It has divided the movement.

I have a minority report, which was filed by 18 directors last Saturday. This particular minority report I would also like to include in the record. We show that we will not support something that does not have a mandate to protect the personhood of the children.

The reason we cannot support Senate Joint Resolution 110 is that it contradicts the very principles for which we stand. We cannot leave the right to life up to the decision of any legislator who lives and who dies. Thank you.

Senator HATCH. Thank you, Nellie. We appreciate your testimony.

[The prepared statement of Nellie Gray follows:]

PREPARED STATEMENT OF MISS NELLIE J. GRAY

Mr. Chairman, and Members of the Subcommittee,

I am Nellie J. Gray, President, *MARCH FOR LIFE*, which is a non-profit, non-partisan, and non-sectarian corporation, governed by the *Life Principles*, which are a part of our charter. A more detailed explanation of the principles is attached to this testimony, and basically they include the following provisions:

-- a recognition that the life of each human being begins when the human sperm and ovum unite
-- that the value and dignity of each human being is the same throughout the natural continuum of life
-- that the value and dignity of each human being is the same as that of every other human being
-- that the highest law of our land *shall* protect the right to life of each human being from fertilization, without regard to age, health or condition of dependency.

With these *Life Principles* as basic guidelines for our actions, we can test each piece of legislation to determine whether or not we shall support or reject it -- strictly on the basis of principles. We are convinced that what is right in principle will also be politically expedient, because we can marshall the prolife forces only for those pieces of legislation which pass the test of being right in principle. Bad legislation frustrates and divides the prolife movement.

SUPPORT FOR PROLIFE LEGISLATION

Therefore, the legislation which *MARCH FOR LIFE* will support enthusiastically assures protection of innocent preborn and born human beings as persons with an inalienable and paramount right to life. The Federal, State and local governmental entities and branches, thereof, must be mandated to provide protection for the right to life of each human being.

We will support protection provided by an amendment to the Constitution or by a statute implementing the Constitution, so long as the legislation meets the *Life Principles*. That is, *MARCH FOR LIFE* will reject any legislation -- amendment or statute -- which denies, implicitly or explicitly, the personhood of any human being, born or preborn from fertilization. We cannot permit legislation which will do harm.

PERSONHOOD

A natural person is a human being with rights; a thing is the object of the rights. In various eras of history, societies have denied human beings their natural and inalienable rights, and during each such era, conflict reigned until the human beings' rights were restored. The common examples of such tragedies include slavery and the WWII Holocaust, both of which America experienced. If we do not learn from these experiences, we are sure to relive, as a Nation, the effects of innocent human beings victimized by the megalomania of other human beings, and the result of conflict as human beings of good will struggle to save the innocent victims.

THE SLAVERY EXPERIENCE

In debate between abortionists and prolifers, the latter usually use the slavery experience to reiterate to abortionists that they may not use the body of an innocent preborn child as property any more than slave owners could use the body of a black man as property. That is certainly a lesson abortionists should have learned by now, and, by now, begun to heed and stop the killing of innocent preborn children.

There is also a lesson from the slavery experience for us as prolifers -- namely, it is not only fruitless but also destructive to compromise the life of an innocent human being for a mistaken notion of political expediency.

One of the great compromises agreed upon by the drafters of the Constitution was to provide in Article I, Section 2, Clause 3, that slaves would be counted for purposes of apportionment as three fifths of a person. In arguing for this provision as necessary, right and proper, Publius writes in The Federalist No. 54 about the master-slave relationship, about a slave being vendible, and subject at all times to be restrained in liberty and chastised in body by the capricious will of another. He goes on to write that the slave "is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property." He continues:

> *. . . The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied, that these are the proper criterion; because it is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is disputed them in the computation of numbers; and it is admitted, that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants. . . .*

Publius then gives the pros and cons on how to count the slave in the population census. Slave states wanted to count the negroes as whole persons for purposes of representation in Congress, even though the negroes were omitted from any count in the State. A case could be made that for the federal Constitution, a federal rule on counting population should apply to all States. There was a case to be argued for pro-choice and states' rights. And, Publius wrote:

> *. . . A rigorous adherence, however, to this principle, is waived by those who would be gainers by it. All that they ask is that equal moderation be shown on the other side. Let the case of the slaves be considered, as it is in truth, a peculiar one. Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants; which regards the slave as divested of two fifths of the man. . . .*

History records that Publius won his argument, but the slaves and our country lost on principle, and paid the price for this great compromise.

Look at the concepts in this Federalist Paper: black human being but not a "person," pro-choice for slave owner and State to decide the fate of the slave, states' rights to declare personhood without a federal rule to apply to all human beings equally, debased human being, divested of personhood, and similar concepts now being used by abortionists with regard to the innocent preborn child.

Look, too, at the actual words in the text of this Federalist Paper: mixed character of persons and property, moderation, and compromising expedient of the Constitution.

Look further -- the slavery issue was argued between slave-owner and abolitionist over the fate of the victimized slave, who had no part of the argument over his own well-being. Abolitionists were hard-liners, who wanted no slavery at all. Slave-owners wanted to control their slaves as property as they saw fit. In between were the "moderates," who would not own a slave themselves, but would not impose their morality on the slave-owner, and found the abolitionists a troublesome lot. In reading the Lincoln-Douglas debates, one finds the "hard questions" raised: Were the blacks of inferior intelligence? If freed, would the blacks want to vote? Would they be able to manage property and care for themselves? Would they intermarry with whites? What dire situations would the black freedman bring to the social, economic, financial, political, cultural, legal, educational, defense, religious, and civic structure of the country? These diversionary questions were argued at length, and obscured the basic principle that the slave was a human being of innate worth, with value and dignity equal to the white man -- the slave was equal in value and dignity to the slave owner. Only the law kept them apart. That wrong law would have to yield to the full freedom of the slave. Nothing "moderate" or "in between" reinforcing the mixed character of person and property of the slave would suffice. The experiment of "one state slave and one state free" did not work. The issue was joined: the solution was clear: all citizens must be treated equally, without regard to race, color, or previous condition of servitude.

Look carefully, and realize that when the black human being was freed from servitude, nothing was added to make the freeman more human than that same human being had been as a slave. Our country did not collapse when the former slave ceased to be two-fifths property and became a full person. Rather, our country began to heal the wounds of divisiveness as the former slave began to participate in his *de jure* rights. And, our country began to feel proud again, as black men, women, and children began, after a century of unwarranted segregation, to participate in their rights, *de facto*.

THE SLAVERY LESSON

It is clear that some issues -- those of life or death and value and dignity of each human being, for example -- are issues involving what is right or wrong, with no middle ground. It was not possible to have, in America, "a little bit of slavery," or one state free and one state slave. The "great compromise" put into the Constitution did not quiet the debate, but only fueled it to a raging war. Emancipation of the slaves made them *de jure* freedmen in the mid-1800's, but unrest smoldered through segregation until the blacks became *de jure* and *de facto* freedmen in the mid-1900's.

The lesson to be learned is that the slavery issue with its ugly divisiveness would not go away until slavery, lingering in America through segregation, was openly, forcefully and irreversibly repudiated by the whole citizenry, and upheld by the Supreme Court and civil rights legislation.

A person is subject to scorn if attempting to cling to vestiges of segregation. Candidates for public elected or appointive offices are disqualified for vestiges of racism, because they cannot serve all of the people equally.

The lesson learned is that once the evil of slavery was put into the Constitution by a compromise for political expediency -- hearlded as a "moderate" position -- it could not be removed from the Constitution short of force. The slave owners who profited off the bodies of the slaves would not relinquish their "property" until division wracked havoc in the country.

Our country's proper answer to the evil of slavery finally came. That answer is: there shall be *no* slavery; there shall be not even a little bit of slavery; there shall be no lingering slavery through segregation; there shall be no respectability for even the advocacy of slavery or segregation. Because the slavery issue has brought such turmoil to our country, it shall be resolved at the Federal level by writing the policy of " no slavery " into the Constitution, and there shall be no exceptions. All Federal, State and local branches of government and agencies thereof are mandated to follow the law of the land and are not permitted to exercise local discretion to determine whether or not slavery shall continue within their respective jurisdictions.

AND THEN COMES THE ABORTION ISSUE

No sooner had American begun to rid itself of the evil of slavery and begun to heal centuries-old wounds, than it plunged into another controversy created by repeating the errors of slavery and again attempting to define a whole class of innocent human beings as less than full persons.

By the late 1960's, some States decided to deny legal protection to innocent preborn children in the wake of the megalomania that a human embryo and fetus was a thing and not a "person." This tiny human being was not even given the benefit of being three-fifths man, as was the slave. Once again the Supreme Court put its weight in support of the error that a preborn human being was not a "person." Just as the Supreme Court's *Dred Scott* decision did not settle the issue or bring peace, so the Supreme Court's *Roe v. Wade* decision of January 22, 1973 did not settle the abortion issue or bring peace between abortionists and prolifers.

TO KILL OR NOT TO KILL!

Abortion kills an innocent preborn human being. Abortionists like to argue that a human embryo or fetus is not "human" in the full sense, and, therefore, an abortion simply removes a "blob" of tissue from the mother. Abortionists argue further that there is no killing. This illogic began in the abortionists' early push to decriminalize abortion, and was highlighted in an editorial entitled: "A New Ethic for Medicine and Society," in the journal California Medicine, September 1970, pages 67-68, which provided in part:

> . . . *In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.*

The testimony given before this subcommittee and Senator East's Senate Judiciary Subcommittee on Separation of Powers amply supports what everyone knows: that an individual human being's life begins at union of the human sperm and ovum. Thus, the preborn child is a human being, with value and dignity equal to any born human being, and as such, in a civilized society, has a right to life equal to each and every other human being. It follows clearly that the right to life issue -- the abortion issue -- like the slavery issue, involves what is right or wrong, with no middle ground. Abortion has been wrong since at least the time of the Hippocratic oath, and continues to be wrong, even though decriminalized by the Supreme Court.

THE ISSUE IS JOINED: Not Even A Little Bit of Abortion

Abortionists are the slave-owners of today, wanting to profit off the bodies of innocent preborn children and their mothers and fathers. Abortionists, as did their slave-owner predecessors, want no restraints on their activities. Abortionists use the same untenable arguments of the slave-owners to continue their killing business: pro-choice, states' rights, personal rights, property rights, rights of privacy, and even providing a "good" for those involved in the killing of preborn children. None of the abortionists arguments are valid, because it is not good, necessary or right or proper to kill innocent preborn children for any reason, including reasons associated with medicine, law, economics, social acceptance, morality, personal rights, or any other reason.

Thus, the issue is joined: yes or no to the abortion issue. Shall innocent preborn children be protected by the law of our land, or shall they be killed with justifiable homicide turned over to any born person who decides to kill a preborn child?

HISTORY BEGINS TO REPEAT ITSELF: Slavery followed by Abortion

If America does not learn from its slavery experience, it is doomed to relive the horror of that experience through the slaughter of millions of innocent preborn children. Since the late 1960's when States began to overturn their anti-abortion laws, there has been a prolife movement in the United States. This movement grew in numbers and activity since the Supreme Court's infamous abortion decisions of January 22, 1973. The constant debate and controversy between abortionists and prolifers has highlighted the prolife issue to such an extent that it is clear that some legislative action must be taken. Politicians have felt the heat of the controversy and want to put it to rest.

Prolifers insist that the issue be settled now as the slavery issue was finally settled: clear-cut laws in favor of protecting the right to life of all innocent human beings from fertilization, without regard to age, health or condition of dependency. Yet, words such as "moderation," "compromise," and "middle-ground" keep popping up in the political discussions. "Political expediency" abounds.

Prolifers have argued since the late 1960's that abortion must be put down, forthwith. There must be no toleration of abortion in any form or any reason.

Experience during the past decade indicates that abortionists cannot be appealed to for justice for the life of preborn human beings, any more than slave-owners could be trusted for humane care of the slaves and for protection of basic human rights of the slaves. The evil of abortion produces a ripple effect to plague the mother, father and family of the victimized preborn child as slavery adversely affected the family of each slave. As the evil of slavery permeated the laws and social structure of early America, so the evil of abortion permeates the laws and social structure of today. What is to be done?

WHAT IS TO BE DONE?

The grass roots prolife Americans have set the stage, the path, and the goal. The prolife movement is guided by the *Life Principles*, mentioned on page 1 of this testimony. These *Life Principles* must also be used as guidelines for the work of elected and appointed officials in restoring prolife tradition to America. This would lead the legislators to support legislation which would recognize and protect the full personhood of all born and preborn human beings from fertilization.

A MANDATORY HUMAN LIFE AMENMDMENT

Since January 22, 1973, the prolife movement has supported a Mandatory HUMAN LIFE AMENDMENT as the most effective way to undo the damage of the Supreme Court's infamous abortion decisions, *Roe v. Wade* and *Doe v. Bolton*. Even though we well recognize that the Supreme Court may reverse itself, as it has done many times before in its history, we want to reaffirm in the Constitution that there is protection for each and every human being embodied in the highest law of our land. We want to assure that other generations do not have to live through the agony of the slavery issue or the abortion atrocities visited upon any other group of human beings, whether it be the aged, handicapped, or anyone.

Therefore, *MARCH FOR LIFE* strongly endorses, and urges that this Subcommittee report out, unanimously, the Helms/Dornan "Paramount" HUMAN LIFE AMENDMENT now before this Congress. The few, simple words of this important formulation of a constitutional amendment are:

> *The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency.*

By guaranteeing legal protection for the right to life of each and every human being, this provision of the Constitution would assure that each human being would enjoy the status of a "person." A more detailed statement of the provisions of this amendment is attached.

The essential element of a "mandatory" human life amendment is that all Federal, State and local governmental entities and private persons are bound by its provisions and are not free to use individual discretion to decide on which persons live and which die.

THE "UNITY" AMENDMENT

There has been unanimous support by the board members of several major prolife organizations, including *MARCH FOR LIFE*, for a new text of a mandatory human life amendment, which incorporates the major provisions of the "Paramount" HUMAN LIFE AMENDMENT, and also spells out the principle of "equal care" for both the mother and her preborn child in case of any distress during pregnancy.

The text of this unity amendment is important, because, for many years, it was the wording of a mandatory human life amendment which had kept the grassroots divided even though the goals set by each group tended to be, in large part, supportive of the *Life Principles*.

The unity amendment has already had the salutary effect of bringing the prolife resources together, where the pooled efforts of prolifers throughout the United States can be directed toward early enactment of the mandatory human life amendment -- the unity amendment.

A HUMAN LIFE STATUTE

Legislation, other than a constitutional amendment, which also meets the *Life Principles*, has been and will continue to be supported by the *MARCH FOR LIFE*. For instance, we have testified time and again requesting Congress to stop all of the public funding of abortions, so that no tax dollars are used to kill innocent preborn human beings and tramautize their mothers and fathers.

In addition, we support and recommend for this Subcommittees favorable consideration a statute which defines the word "person" in the Constitution to include each human being from fertilization, and, thus, would require Federal, State and local governmental entities and individuals to be bound by the clear meaning of the Constitution.

We are aware of the concerns of some members of the Judiciary Committee that such a statute might not be constitutional. However, there is only one source of a binding determination on the issue of constitutionality, and we strongly recommend that the statute include a provision to place any challenge of the statute in the federal court system and to require expeditious consideration of the issue through the lower and appellate courts, including the Supreme Court.

THE "STATES' RIGHTS" AMENDMENT -- S.J.Res. 110

From the very early days of the prolife movement, there was unanimous agreement, stated in the policy of major organizations, that any legislation which provided that protection of a human beings' right to life was a matter of discretion at any level of government was so inconsistent with prolife principles that it merited disapproval. Thus, the states' rights approach was rejected because that would simply turn the abortion controversy back to the states, with each state deciding on which preborn human beings live and which die. Putting the discretion of legislating which innocent preborn children live or die in the hands of the Congress does not overcome the objection prolifers have always had to the states' rights -- or permissive -- legislative approach. Arguing that the discretion is taken from the Supreme Court and placed in the Congress also does not overcome the objection to permissive legislation. Permissive rather than mandatory protection denies the personhood of innocent preborn human beings. S.J.Res 110 would provide in the Constitution that killing innocent preborn children is perfectly alright, unless and until a Federal or state legislative body decided that some of the children could live. This turns over the closely held power of justifiable homicide to individuals to exercise at will. It is this lack of mandatory protection for the right to life of innocent human beings which has caused *MARCH FOR LIFE* , other major prolife organizations, and many state and local prolife organizations to withhold support of S.J.Res. 110.

Allied to this objection is the fact that S.J.Res. 110 is one big exception to the *Life Principles*. While prolifers have deplored the "exceptions clauses," this measure gives us the exceptions clauses in reverse; that is, kill preborn children through abortion except those who are permitted to live. We reject this concept.

Political expediency is given by those who support S.J.Res. 110, suggesting that by putting a little bit, or even a whole lot, of abortion into the Constitution, it will receive favorable consideration by Members of Congress. We suggest that was what the framers of the Constitution did with the slavery issue, and that did not work, as mentioned in this testimony, above. Enacting an amendment to the Constitution merely as a matter of expediency can do much harm, as with the slave.

POLITICAL EXPEDIENCY -- UNITY

MARCH FOR LIFE strongly recommends to this Subcommittee, that, as a matter of political expediency for the babies and our country, that the prolife unity which was achieved in early October be used as the cornerstone for right and proper legislation to be reported out to the full Judiciary Committee and sent to the Senate floor for action. The unity which is achievable is the coming together of all prolife grassroots workers, all prolife clergy, and prolife members of elected and appointed governmental positions. In 1980, grassroots prolifers were asked to (1) work for more prolife Members of Congress, and (2) achieve unity on recommended legislation. We have meet the requests on both counts, and it is now time to take action with these results.

Unity on the life principles will give us the necessary building steps to the right and proper end of full protection for all human beings. Diversion from the unified position creates division among grass roots prolifers, and a waste of valuable time and energy.

THE RIGHT AND PROPER COURSE

Mr. Chairman, the reason that I went into great detail about the lessons to be learned from the slavery issue is that we must follow those lessons in order to work properly to emancipate the preborn children today.

This abortion issue must be resolved at the Federal level in clear and unmistakable terms to the abortionists that their activities are not respectable, never have been and never will be, and their activities shall be curtailed once and for all in a forthright mandate to stop killing the innocent preborn children. Abortionists cannot be appeased or reasoned with, just as Chamberlain could not appease Hitler and slaveowners would not free the slaves until forced to do so. There can be no two-step approach to stopping abortion -- there must be one forceful step right now. We have the unity of forces, and that force cannot be dissipated on unacceptable legislation or amendments to the Constitution.

SUMMARY AND CONCLUSION

I have written much today to say over and over again that there is only one way to handle the evil of megalomania which permits some human beings to prey on others. The slave owners, the Nazis, the abortionists, and any such who come after them, must be told forcefully by people of good will that they may not prey on any other human being at all.

This abortion issue must be put down now, and abortionists relegated to the disrespectful role of the racists and any others in our society who will not respect the value and dignity of each human being.

Let me make it unmistakably clear that *MARCH FOR LIFE* will not support legislation which admits to the liceity of abortion, as S.J.Resolution 110 does because it would place into the Constitution the provision that abortion continues as a matter of right until a legislature says that it must be stopped. We cannot have the lives of any human being, including the tiny innocent preborn children, dependent on the whim of political fortunes and campaigns.

MARCH FOR LIFE, from working throughout the country, strongly believes that America is prolife; not proabortion and not pro-choice to kill a son or a daughter at the direction of any legislative body.

The position I am taking today, and have taken for a decade, is not controversial or "hard-line," or any other word suggesting deviation from the norm. Rather, the position I take is the norm, and has been the law of the land and of societies for centuries. There is value and dignity for each human being.

I simply examined the facts of biology and make my decision as a lawyer to try to protect the life of each and every human being in our society. That is what this country is all about.

I have learned anew from the prolife grassroots Americans the beauties of the virtues to Love God, Man and Country.

I am pleased to testify today and recommend strongly to this Subcommittee that it report out a Mandatory HUMAN LIFE AMENDMENT, which the prolife workers will support throughout the country.

Respectfully submitted,

Nellie Gray

Miss Nellie J. Gray
President

Attachments:

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The Life Principles & The Human Life Amendment

It is timely to discuss again the "Life Principles" because of repeated experience with the Hyde Amendment and the fact that many versions of a Human Life Amendment have been introduced from year-to-year in the Congress. The language and intent of each prolife bill bears scrutiny, because the prolife movement has spent much time discussing the "wording" of an amendment. It seems this discussion occurred because the subject has been approached in a cart-before-the-horse fashion. That is, the "words" of an amendment became the subject of discussion before the "principles" of an amendment were formulated.

Thus, the MARCH FOR LIFE, without concern for amendment language, developed the "Life Principles" * shown on the back cover, with more detail on the inside back cover. The "Life Principles" address the issues facing the prolife movement and make a judgmental statement about these issues.

There seems to be widespread agreement in the pro-life movement that an amendment must regulate action by a State and individuals against taking the life of an innocent human being, and must reaffirm protection for born persons as well as provide protection for preborn persons. The issues which are still the subject of much discussion include the value of human life at its beginning, the "exception clause" for the life of the mother, the right of privacy, a "no compromise" stance, and a mandatory-versus-permissive type of amendment.

Some discussion of these issues include the following:

Value of Human Life, From Fertilization

What a subject to have to discuss in this day and age! However, it must be discussed, because in a materialistic fashion, the life of a person today may be assigned such a low value that it may be debased or disposed of arbitrarily by individuals in the society or by the State.

This follows from the Supreme Court's decision to declare that the preborn human being is not a "person" under the protection of the Constitution. There have been disgusting extentions to the born person of this disregard for human life.

The "Life Principles" address the issues and positively state that the life of each human being, born and preborn, from fertilization, shall be preserved and protected by all available ordinary means and reasonable efforts.

The "beginning" of a human life still seems to be a favorite issue of controversy for the abortionists, who want to declare the preborn child as a "non-person." However, the simple information that the father's sperm fertilizes the mother's ovum and a unique human being comes into existence is really so basic that abortionists who argue the matter cannot be taken seriously in any discussion.

It is so important that a HUMAN LIFE AMENDMENT provide legal protection from fertilization that the language cannot be omitted or even vague. Unless clearly stated, the Supreme Court could interpret the protection as beginning at implantation, viability, birth, or any point in between. With in vitro fertilization already a reality, protection from fertilization becomes an even more compelling requirement of the Human Life Amendment. Prolifers are deeply disturbed by the wreckless disregard for the lives of tiny human beings who come into existence in a little glass dish and may be discarded if found to be "imperfect."

The "Life Principles" go on to provide in summary, that under the law, and without regard to state of health or conditions of dependency:

- the value of each person's life is the same at each stage of that person's life continuum, and
- the value of one person's life shall be the same as that of another person's life.

The Supreme Court abortion decisions leave to the prolifers the enormous job of restoring the right to life of the preborn and reaffirming the right to life of born persons. With all of the work necessary to pass a Constitutional amendment, it is imperative that the language clearly provide protection for each human being from fertilization and at all stages of a person's life, without exception.

"Exception Clause"

What is so wrong with an "exception clause" that it generates so much discussion?

The most frequently and persistently mentioned exception is: "No abortions, except to save the life of the mother." To try to soften the impact of this exception clause, and make a distinction without making a substantive difference, the import of this exceptions clause has also been phrased as: "except to prevent the death of the mother." By either phrasing, the "exception clause" is the "exception clause." It means: Do not kill innocent preborn human beings, except that you may kill innocent preborns under certain circumstances. Thereby, it actually authorizes abortion.

Yet, the "life of the mother" exception clause has begun to roll off the tongue of some persons operating in the name of right-to-life, as if it had substantive, beneficial and limited meaning. It has unfortunately found its way firmly entrenched in the past few years in the federal legislation trying to cut off tax dollars for abortions in the appropriations bills. Thereby, these advocates of the excep-

* copy of Life Principles, attached[44]

Excerpt from:
MARCH FOR LIFE Program Journal
January 22, 1981

tion clause have given certain credibility to the fallacy of the clause, which the abortionists are quick to use. For instance, abortionists can ask: If you really believe that life begins at fertilization, and that all human life is valuable, how can you then say that killing an innocent preborn child is okay, and should be written into law, in order to save the life of the mother?"

Abortionists also ask why should abortion not be written into the law to be performed when "medically necessary," or to treat victims of rape and incest by killing the innocent preborn child. Thus, when people operating in the name of right-to-life advocate one exception, the abortionists push for more and more exceptions.

Some right-to-lifers want to merely restore the protection for preborn children to its state in the 19th Century, when many State laws had an exception for the life of the mother. However, that was not good law for the 19th Century, and, since January 22, 1973, the old laws which served the former age have been wiped away, and we must start anew to write the law for this age. The old law will serve no longer, because the medical information and tone of the time have changed too drastically.

So, what is wrong with the exceptions clause. Well, to begin with, it is contrary to the basic premise that the preborn child is a human being with his own rights and with a value and dignity equal to any other human being. Thus, each human being — born and preborn — has an equal right to live, which shall be protected by the law of our land.

Once recognizing that the value of each human being's life is the same, there is no logical way to try to carve out exceptions to the family of human beings; it is impossible to define some human beings as less human than others. Who would do the carving? Who would set the criteria? Who would do the selecting? Would the State legislate who is human and who is not? Would the State give license to those who would set the criteria? Would the State give license to those who could eliminate those defined as "less than human?" Would the State pay for the destruction of those defined as "less than human?"

History records shocking periods of man's inhumanity to man, in which the State has, indeed, made an exception to the family of man. The State actually, by law, defined some human beings as less than human, and subjected them to degradation and death. In our own country, the great controversy over slavery raged between slave-owners and abolitionists. The first round of this controversy produced the "great compromise", which was deemed necessary by the drafters to get the Constitution ratified, and which was supposed to satisfy everyone and solve the slavery issue for all times. The drafters wrote slavery into the Constitution when they provided in Article I, Section 2, Clause 3, dealing with apportionment of the House of Representatives, that slaves would be counted as three-fifths person. Federalist Paper No. 54 was used to sell this compromise position that slaves had the mixed character of persons and property. Such inhumanity brought unrest and a crisis situation, because people of good will began to defend the defenseless innocent human beings marked as victims of the megalomania.

The apportionment provision dealing with slavery was changed by Clause 2 of the Fourteenth Amendment, which became a part of the Constitution on July 20, 1868, and Negroes were *de jure* "whole persons." But Jim Crow flourished and the "separate but equal" doctrine was approved by the Supreme Court in 1896 (*Plessy v. Ferguson, 163 U.S. 537*). It was not until the mid-1950's that the "separate but equal" doctrine was striken by the Supreme Court and the blacks became not only *de jure* but also *de facto* whole persons.

America has relived, through TV shows of "Roots" and "Holocaust," the horrifying incidents of slavery and the Nazi "Final Solution." America is now living through the horrifying incidents of abortion—physician and mother killing a preborn child. If America cannot learn from history that acts and eras of inhumanity bring pain and destruction to our country, we are doomed to relive such history. So, let's take a look at some of the lessons to be learned from history.

Remember: Slavery and the "Final Solution" were heralded by their perpetrators as "good" for the country. For instance, slaves were said to be needed for the economy and were coveted "property," used for personal convenience. Remember, also, slavery was legal, and, thus, thought to be moral.

Notice that in abolitioning slavery, "no exceptions" were permitted in the law. That is, slavery was not permitted where "economically indicated" to get the cotton crop in, or for the "mental wellbeing" of the Mistress who needed her personal servants, or where "physically necessary" to wet nuse the Master's children. Similarly, it was not deemed necessary to continue slavery for those persons who "preferred" the status of slave rather than freedman, or for those persons deemed to be "unfit" for a "meaningful life" in the society, or for those persons "unwanted" by blacks or whites because of mixed blood. This analogy between status of slave and preborn child could go on and on.

Suffice it to say, that none of these circumstances or conditions could justify the continuation of the institution of slavery or the continuation of specific instances of slavery. There was "no exception" to the full and total abolition of slavery in the law of the land. True, the "slavery mentality" did linger and may continue to linger, and there may continue to be incidents of slavery. However, the law is clear in abolishing *all* slavery, and being able to deal effectively with violators of the law which prohibits slavery.

It is equally true, that as a matter of law, there can be "no exceptions" to the full and total abolition of abortion. The so-called "hard cases" demand solutions which do not include killing a preborn child. Similarly, there is no instance where the medical treatment for a born person includes a prescription for killing a preborn child.

The question has been asked: *Do you support any exceptions at all for abortions? What about cases of women who are crippled, who have multiple schlerosis, diabetes, cancer, heart disease, mental illness, or other of many medical conditions where a doctor and the woman would find the*

Excerpt from: MARCH FOR LIFE Program Journal, January 22, 1981 *pregnancy to be inadvisable—medically?*

In this regard, William J. Hogan, M.D., in private practice as Obstetrician/Gynecologist in Bethesda, Maryland, provides the following statement:

> We do not support any exceptions at all for induced abortion, which is the direct killing of an unborn child. We believe, with Hippocrates, that a physician, operating in the best interest of both his patients—mother and child—can never directly intend to kill either of them.
>
> As early as 1951, at the Congress of the American College of Surgeons, Dr. R. J. Heffernan of Tufts University, stated: "Anyone who performs a therapeutic abortion for physical disease is either ignorant of modern methods of treating the complications of pregnancy or is unwilling to take the time to use them."[1] How dramatic has been the further advance of modern medicine since 1951 hardly needs comment. Open heart surgery and kidney transplant are just two striking examples of this dramatic progress in medicine. Numerous successful pregnancies have been reported following open heart surgery and kidney transplant, to name just two medical problems.
>
> All the medical conditions you have mentioned in your question can be cared for skillfully in modern medicine, so that the life of the mother and the child are both sustained. The killing of the child within the womb of a woman with a serious medical condition, in itself, poses a risk to the life of the woman.
>
> Before abortion became legalized in America, doctors did indeed apply their medical skills in preserving the life of both mother and child. Dr. Frederick L. Good, former Surgeon-in-Chief of Boston City Hospital, Obstetrical and Gynecological Service, reported in 1951, that no therapeutic abortions were performed in that hospital in a 30-year period, and that during that time, the mortality rate due to conditions supposedly benefitted by therapeutic abortions had been zero.[2] There have been many major university hospitals that have gone a decade or more without performing a single therapeutic abortion. For example, prior to 1968, the University Hospital of the College of Medicine, University of Cincinnati, did not perform a single therapeutic abortion in 15 years.

Despite the foregoing, the discussion continues because there is genuine concern that there may be true medical complications for the lives of a mother and her preborn child. How shall this concern be dealt with? The "Life Principles" provide:

> *When two or more human beings are in a situation in which their lives are mutually endangered, all available ordinary means and reasonable efforts shall be used to preserve and protect the life of each and every human being* so endangered.

An explanation of this "Life Principle" goes on to recognize that, even with these efforts and means, one human being's life may be lost, or all may be lost. However, the decisions concerning whose life can be saved and whose life cannot be saved must be made on a case-by-case basis, taking into consideration the total circumstances, and trying to save as many persons as possible. The exception clause to save the life of the mother would do great damage to efforts to save both mother and child, because there may be circumstances when only the life of the preborn child will be able to be saved. In that case, a law which gives preference to the life of the mother may well doom both mother and child, by preventing the medical procedures to try to save both, and at least save one human being.

It has been stated that few and narrow "exceptions" could be clearly stated in the HUMAN LIFE AMENDMENT, and protection would be provided except in those well-drawn specific cases. The fallacy with this approach is (1) it admits that the value of the preborn child is, somehow, lesser than born human beings, (2) it attempts to pick and choose those conditions under which the preborn child is of lesser value and may be killed by unilateral decision, (3) it erroneously assumes that the law will accomodate only those exceptions proposed by and approved of by the prolifer setting forth the exceptions, and (4) it assumes that the Supreme Court will change immediately its interpretation of the "exception clause."

With regard to this latter point, it was the Supreme Court's interpretation of the "exception clause" in the anti-abortion law of the District of Columbia which opened the doors of abortion clinics in 1971. The Supreme Court also ruled on the "exception clause" in *Roe v. Wade*, stating in footnote 54 *(410 U.S. 113, 157)*:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

America and the prolife movement has plenty of experience with the "exception clause" to know that it has not worked in our past history, and it is not appropriate for trying to get legal protection for the innocent preborn child. With this history, it seems well to omit an "exception clause" altogether from any formulation of the HUMAN LIFE AMENDMENT. Rather, the legislation must provide in a positive way that the mother and her preborn child shall have an equal value before the law. The proposed "Paramount" HUMAN LIFE AMENDMENT, discussed in this *Journal*, will meet this important principle.

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1. Article in *American Journal of OB Gyn*, Vol. 66, No. 2, Aug. 1953, pp. 335-345.
2. Good, *Marriage, Morals & Medical Ethics*, New York, 1951, p. 148-9.

Excerpt from: MARCH FOR LIFE Program Journal, January 22, 1981

The Right of Privacy

Abortion is an homicide—born human beings killing a preborn human being. Abortion is an homicide for which a State may no longer impose a criminal penalty, because the Supreme Court has newly found somewhere in the Constitution the right of privacy which includes a woman's right to kill her preborn child—a right which has tagged on it the right of a physician to cooperate with the woman and be paid for committing the homicide.

There is no doubt that a person has a right of privacy protected by the Constitution—that's basic law of a society governed by people. But, at no time has this right of privacy included the right to commit homicide, whether among members of a family or behind closed doors of a private home.

The Supreme Court's decision of the "right of privacy" to include abortion was particularly disturbing because the Court was unable to state specifically where this right was to be found in the Constitution.

The Court stated that whether it be found in the 14th Amendment, where the Court believed that it was, or in the 9th Amendment, as determined by the lower court, certainly this right of privacy encompassed abortion.

But, then, if a HUMAN LIFE AMENDMENT is proposed which deals only with rights in the 5th and 14th Amendments, would the Court later find that the right of privacy which encompasses abortion, really rests in another amendment, such as the 9th, 10th, etc.? If such be the case, it would do no good to pass an amendment to the Constitution which would deny abortion under one provision of this basic law of our land only to have abortion found to be permitted under another provision.

Further, we cannot permit the right to life of preborn human beings to be balanced against the "right of privacy" and declared to be a lesser right, as was done by the Court in the 1973 *Roe v. Wade* case. The right to life must be paramount rather than inferior to any other right protected by the Constitution.

Thus, an important criterion for any HUMAN LIFE AMENDMENT is that it close all loopholes in this whole area of "right of privacy and abortion." It is a travesty that the Court should have included killing a preborn child as within the scope of the right of privacy when no other homicide has ever been so included, and this is an important area which must be properly treated in prolife legislation.

No Compromise With Human Life!

This phrase became a chant and a shout at the MARCH FOR LIFE January 22, 1976, on the steps of the U.S. Capitol. It has spread across the country. What does it mean? It means that a prolifer does not have the right to compromise with the life of another human being, including the preborn child whom the prolifer has volunteered to defend. The prolifer realizes that the preborn child is a person with the same right to life as any other person. A volunteer defender of that preborn child's life cannot pick and choose from among the conditions under which the child's rights shall be preserved. There can be no bargaining with the enemies of the child to set conditions for killing the child with impunity.

Some of the great compromises of history further enslaved the victims of the bargains. In order to propose the Constitution to the States, one of the Great Compromises by the Founding Fathers was to declare the slave to be two-fifths property and three-fifths man and enshrine this provision in the apportionment provisions of the Constitution. Thus, the slaveholders and the abolitionists were supposed to be happy. The Constitution was adopted, but this great compromise did not stop the controversy, even though the victims of the controversy had nothing to say about the outcome of the controversy.

Chamberlain went to Munich to negotiate away the rights and property of the Czechoslovakian people. Hitler was not appeased, but took the country and the people and the property, and enlarged the destructive war.

Much can be said about the art of compromise to bring about desired results. But the life of another human being, including the tiniest preborn, cannot be the subject of compromise on the fundamental right to life.

Prolifers cannot compromise the rights of the preborn child because (1) the rights do not belong to the prolifer to give away and (2) even if it were possible to compromise, history tells us that the compromise will not produce good or lasting protection for the child.

When pieces of "compromise" legislation have passed the Congress in the past few years permitting the innocent preborn to be killed under certain circumstances, prolifers are asked, "Can you live with that?" The reply, of course, is that most *born* human beings will be able to continue to remain alive and not be killed—but certainly the *preborn cannot live* with this legislation.

Thus, it is offensive for a legislator or abortionist to question a prolifer, "What is the minimum legislation you will take?" The answer, without hesitation or doubt, is that any prolife legislation must protect all born and preborn human beings from the moment of fertilization, without exception. We cannot permit "even 'a little bit of abortion' " to be written into any law. Our society cannot authorize or even tolerate legislation which permits some human beings to be treated before the law with lesser value and dignity than other human beings. These basic and indispensable principles must be the touchstone of all prolife legislation: No haggling, No bargaining, NO COMPROMISE!

Mandatory or Permissive?

The HUMAN LIFE AMENDMENT which prolifers can support is one which *mandates* rather than merely *permits* protection for each human being's right to life. This means that our society, through our laws, will not tolerate one person killing another innocent person, including the preborn child. Prolifers understand the personhood of the preborn and born human beings and, therefore, must demand that protection is mandated for the life of each person.

An amendment which would *permit* States to proscribe or approve of abortion as the State legislature sees fit is a Constitutional amendment which approves of abortion. That is the inherent evil in the states rights approach, and why it shall continue to be rejected by the prolife movement.

There has been far too much dabbling with wording for a states rights approach to a Constitutional amendment that must cease. It is now time for all of these efforts to focus on the "Paramount" HUMAN LIFE AMENDMENT which the profile workers can support and advocate.

Excerpt from: MARCH FOR LIFE Program Journal, January 22, 1981

March for Life BOX 2950, WASHINGTON, D.C. 20013
TELEPHONE 202-LIFE 377
202-547-6721

Life Principles

These Life Principles express the ideals motivating pro-life Americans and indicate the purpose of the

March for Life

We hold these truths to be self-evident: That all human beings are created equal and are endowed by their Creator with certain inalienable rights, among which is the right to life, and

The right to life of each human being shall be preserved and protected by every human being in the society and by the society as a whole, and

The life of each human being shall be preserved and protected from that human being's biological beginning when the Father's sperm fertilizes the Mother's ovum, and

The life of each human being shall be preserved and protected from the biological beginning throughout the natural continuum of that human being's life by all available ordinary means and reasonable efforts, and

The life of each human being shall be preserved and protected at each stage of the life continuum to the same extent as at each and every other stage regardless of state of health or condition of dependency, and

The life of each human being shall be preserved and protected to the same extent as the life of each and every other human being regardless of state of health or condition of dependency, and

When there is any doubt that there exists a human being's life to preserve and protect, such doubt shall be resolved in favor of the existence of a human being, and

When two or more human beings are in a situation in which their lives are mutually endangered, all available ordinary means and reasonable efforts shall be used to preserve and protect the life of each and every human being so endangered,

WHEREFORE, PURSUANT TO THESE PRINCIPLES, we recommend and urge the adoption of a Mandatory HUMAN LIFE AMENDMENT to the Constitution of the United States of America.

ATTACHMENT: (for page 44, above)

The "Paramount" Human Life Amendment

introduced by

Senator Jesse Helms (R.-N.C.)   Representative Robert K. Dornan (R.-Calif.)

The paramount[1] right to life[2] is vested[3] in each human being[4] from the moment of fertilization[5] without regard to age, health or condition of dependency.[6][7]

1. "Paramount" is used to show that the right to life is the highest right protected by the Constitution, and cannot be balanced off against other rights, such as privacy.

2. The inalienable right to life endowed by our Creator is so inherent that it is enumerated in the Declaration of Independence, and protected by the Fifth and Fourteenth Amendments by due process of law. This Amendment would assure that the right to life is now enumerated in the Constitution as the paramount right to be protected by the dignity of the basic law of our land.

3. "Vested" is used to show that the right to life is inherent, unconditionally, when a human being comes into existence, and is not "granted" by society or a government. This right can be divested only by the acts of the human being who has the right, and operation of the criminal laws. The Fifth and Fourteenth Amendment due process protection remains in effect as usual. The word "vested" is a good legal term, and is used in the Constitution (Art. I, Sec. 1,) which vested all legislative power in the Congress.

4. "Each human being" is used to avoid any confusion about whether there is a distinction between "person" and "human." In order to have the right to life vested, it is necessary only to be a human being. Once this right vests, there can be no quibbling over whether or not "personhood" attaches, because only human persons have the right to life. That is, artificial persons (corporations) do not have a right to life under the Fourteenth Amendment.

5. "From the moment of fertilization" is used to assure that each human being has legal protection when the unique homan comes into existence. There has been some discussion about the "process" of conception or fertilization, and this provision means that legal protection attaches at the very beginning of the union of the sperm and the ovum, whether fertilization occurs naturally or in a glass dish.

6. "Without regard to age, health or condition of dependency" is used to assure that legal protection will not depend on the Court's or anyone's definition of who is or is not a "human being" or a "person" or who has an "acceptable" quality of life. This assures legal protection for preborn, elderly, handicapped and everyone, which includes "in vitro" fertilizations, so that none can have reckless disregard for any human being's life. This Amendment becomes more necessary with scientific experimentation and the Supreme Court's ruling on January 9, 1979, *Colautti v. Franklin*, concerning "viability."

7. Note that there is no provision in this Amendment for "an exception to kill a preborn child to 'save the life of the mother.'" The "exception clause" is unnecessary to save the life of the mother, and, in fact, is detrimental, as a medical, legal and moral matter, as well as a political matter. It is politically expedient to do what is right; killing is wrong!

This Amendment would protect every born and preborn human being's paramount right to life to the same extent, and, thus, reasonable efforts and ordinary means would be used to save both the mother and her preborn child as well as all other human beings. In the years since the Court's January 22, 1973 infamous abortion decisions, prolifers, have seen their worst fears come true as the "exception clause" became a loophole to negate legislative efforts and to kill preborn children. An "exception clause" authorizes "a little bit of abortion" by specifically saying that some abortions are okay. If used in a Human Life Amendment, it would, for the first time, give Constitutional authority to kill preborn children.

Remember, as of now, abortion is *NOT* in our Constitution. It is no longer punished as a crime only because the Supreme Court erroneously interpreted the "liberty" provision of the Fourteenth Amendment as the "freedom" to kill an innocent preborn human being. But, the Court could reverse itself and stop abortions, if "a little bit of abortion" is not engraved into the Constitution. Human lives cannot swing in the balance at the pleasure of the Court. The "Paramount" HUMAN LIFE AMENDMENT must be enacted for the good of people and our Country.

Excerpt from: *MARCH FOR LIFE Program Journal, January 22, 1981*

Senator HATCH. Our next witness will be Emily Moore of the National Women's Health Network.

Ms. Moore, we are happy to have you with us.

STATEMENT OF EMILY MOORE, NATIONAL WOMEN'S HEALTH NETWORK

Dr. MOORE. Good afternoon. We would like to thank you for this opportunity to present the testimony of the National Women's Health Network, the only national membership organization devoted exclusively to women and health.

I am Dr. Emily Moore, a medical sociologist, and have spent many years analyzing data from a wide variety of countries where abortion is both legal and illegal. The results are largely contained in this volume to which I will occasionally refer, and a copy of which I will leave you [indicating book]. It is not the Montgomery County phone book; it is a book I wrote.

The National Women's Health Network is concerned about the health consequences to women and their families of the possibility of restricted access to legal abortion in our country.

We can approach the question of consequences in two ways—by examining the health benefits that have resulted from liberalized laws, thus predicting a reversal of those benefits in the event of deliberalization; or by examining the actual consequences of a deliberalized law.

We are all familiar with the data which illustrate declines in maternal mortality and morbidity following liberalization of abortion laws in our own and many other countries. Attached are numerous tables containing data from many countries, indicating post-liberalization improvements and relevant health status.

In addition to significant documented maternal health benefits, there is also evidence that the substantial recent declines in perinatal mortality in America are due in large part to the prevention of high risk births through changes in availability of legal abortion and subsidized family planning services.

The scholarly article attached to our testimony, in which an analysis was performed to determine the relative effects of four major public policies, concludes that:

> The most striking finding is that the increase in the legal abortion rate is the single most important factor in reductions in both white and nonwhite neonatal mortality rates, of greater impact than Medicaid, than maternal and infant care, and other public policies.

Let us turn to the second approach—anticipating consequences of a reduction in access to legal abortion. There are very few examples of actual case histories. Highly restrictive abortion laws were passed in the context of militaristic pronatalism in Fascist Spain in 1944, in Nazi Germany in 1935, and, at the other end of the political spectrum, in the prewar Stalinist Soviet Union in 1936, where the abortion law of 1920, which was quite liberal, was abruptly reversed.

Then in the 1960's and 1970's, several eastern European nations, concerned with birth rates their governments considered too low, undertook a range of pronatalist policies, including incentives to family building and modification of access to abortion. However, none introduced as drastic a change as did Romania in 1966.

In combination with policies rendering divorce exceptionally difficult, permission for legal abortion was greatly curtailed. There were 1.1 million legal abortions in Romania in 1965, dropping to 206,000 2 years later—about one-fifth of the prerestriction level. The adverse health consequences to women and infants were enormous. Maternal mortality more than quadrupled.

I am afraid the Xeroxing of our table and attachment does not pick up the most significant line, which is the death rate in Romania. I have penciled it in on a single copy here. If you would like the original, I will be glad to submit that in evidence.

Maternal mortality rose from 1.45 to 6.90 deaths per 100,000 women of childbearing age in a few years.

Maternal morbidity is evidenced by increased admissions to hospitals, and so-called spontaneous abortions also increased dramatically. Reversing the decline in infant mortality, which is almost unprecedented in the history of the world, Romania experienced a sharp rise in infant deaths, from 47 to 60 infant deaths per 1,000 live births.

You may think, "Ah, but Romania is not America, and conditions there are not quite the same as those here." I attach hereto another table indicating a wide diversity in pregnancy outcomes among women denied legal abortion. The percentage carrying to term varies from 8 to 87 percent.

There are many cultural conditions affecting how women will decide to do when access to legal abortion is blocked. It is difficult to predict how many will choose foreign abortions, illegal domestic abortions, self-induced abortions, or full-term delivery. But not even wealthy Americans can be assured of access to foreign facilities when they need abortions, and, of course, middle-class and poor women have little choice to go abroad.

Let us assume for the moment that most American women would not choose unsafe, illegal abortions. The remaining alternatives then are an increase in unwanted births, with all the social, economic, psychological, as well as medical adverse effects for women, their families, and in many cases the taxpayer, and the greater reliance on methods of contraception which may lower the likelihood of accidental pregnancy but cause women to run a higher risk of medical complications or health problems.

I refer you to a chart which compares mortality risks associated with various approaches to fertility regulation. If a woman selects a method of contraception such as the diaphragm, which is completely safe but may not be entirely effective, and relies on abortion in the event of contraceptive failure, she in fact has made the most rational personal choice in terms of the lowest risk to her own health.

In short, removal of legal abortion would eliminate from our options the very one which offers the most rational choice with the lowest medical risk.

I would also like to draw your attention to a health model, which describes decisions to engage in health-promoting acts. Those that are most easily made are those which are done requiring only a single rather than repetitive action and when they are undertaken in response to perceived conditions or symptoms, like setting a broken arm.

Health actions are most difficult when done in the absence of pain or symptoms and done repeatedly, like fastening your safety belt, eating a good diet, exercising regularly, and so on. Abortion falls in the first of these categories, contraception in the latter.

In short, it is not a question of either abortion or contraception. We must consider both abortion and contraception to be critical components of a complete system of fertility regulation.

Finally, I would like to end on a personal note. Exactly 21 years ago today I was in a hospital, where I stayed throughout the Christmas holidays, receiving penicillin daily because I had a perforated uterus and peritonitis.

I cannot tell you the emotions that were stirred in me by the previous testimony, describing conditions and feelings so very similar to my own. I am glad I could be here to tell you about it today. A common myth is that middle-class women can always obtain a safe abortion procedure somewhere. This was certainly not true in my case, however middle class I might have been. The younger women of today have no concept of what it was like back then. I pray to God they may never have to find out.

Thank you for the opportunity to present this testimony on behalf of the National Women's Health Network.

We would also like to request that you postpone the markup of the resolution until after the holiday recess, to allow time for study of testimony presented today and in previous hearings.

Senator HATCH. Thank you, Dr. Moore.

[The prepared statement and additional material submitted by Dr. Moore follows:]

PREPARED STATEMENT OF EMILY C. MOORE, PH. D.

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. WE WOULD LIKE TO THANK YOU FOR THIS OPPORTUNITY TO PRESENT THE TESTIMONY OF THE NATIONAL WOMEN'S HEALTH NETWORK. WE ARE THE ONLY NATIONAL MEMBERSHIP ORGANIZATION DEVOTED EXCLUSIVELY TO WOMEN AND HEALTH.

I AM A MEDICAL SOCIOLOGIST AND HAVE SPENT MANY YEARS COLLECTING AND ANALYZING DATA FROM A WIDE VARIETY OF COUNTRIES WHERE ABORTION IS BOTH LEGAL AND ILLEGAL: THE RESULTS ARE LARGELY CONTAINED IN THIS VOLUME TO WHICH I WILL OCCASIONALLY REFER.

THE NATIONAL WOMEN'S HEALTH NETWORK IS CONCERNED ABOUT THE HEALTH CONSEQUENCES TO WOMEN AND THEIR FAMILIES OF THE POSSIBILITY OF RESTRICTED ACCESS TO LEGAL ABORTION IN OUR COUNTRY. WE CAN APPROACH THE QUESTION OF CONSEQUENCES IN 2 WAYS: BY EXAMINING THE HEALTH BENEFITS THAT HAVE RESULTED FROM LIBERALIZED LAWS & INCREASED ACCESS AND THUS PREDICTING A REVERSAL OF THOSE BENEFITS IN THE EVENT OF DE-LIBERALIZATION. OR BY EXAMINING THE ACTUAL CONSEQUENCES OF A DE-LIBERALIZED LAW.

WE ARE ALL FAMILIAR WITH THE DATA WHICH ILLUSTRATE DECLINES IN MATERNAL MORTALITY AND MORBIDITY FOLLOWING LIBERALIZATION OF ABORTION LAWS IN OUR OWN AND MANY OTHER COUNTRIES. /While trends such as improved medical care for women hospitalized for complications from illegal abortions may be a partial explanation for declines in mortality and morbidity, significant declines often result from the change in the status of abortion -- from illegal to legal./ ATTACHED ARE TABLES CONTAINING DATA FROM MANY COUNTRIES INDICATING POST-LIBERALIZATION IMPROVEMENTS IN RELEVANT HEALTH STATUS (Attachment A, pp. 594-610 and p. 642, Moore-Cavar, 1974 and Tietze, p.102).

IN ADDITION TO SIGNIFICANT DOCUMENTED MATERNAL HEALTH BENEFITS, THERE IS ALSO EVIDENCE THAT THE SUBSTANTIAL RECENT DECLINES IN PERINATAL MORTALITY IN AMERICA ARE DUE IN LARGE PART TO THE PREVENTION OF HIGH-RISK BIRTHS THROUGH CHANGES IN AVAILABILITY OF LEGAL

ABORTION AND SUBSIDIZED FAMILY PLANNING SERVICES. THE SCHOLARLY ARTICLE ATTACHED TO OUR TESTIMONY IN WHICH A "LEAST SQUARES" ANALYSIS WAS PERFORMED TO DETERMINE THE RELATIVE EFFECTS OF 4 MAJOR PUBLIC POLICIES, INCLUDING MEDICAID, MATERNAL AND INFANT CARE PROJECTS, SUBSIDIZED FAMILY PLANNING SERVICES FOR LOW-INCOME WOMEN, AND THE LEGALIZATION OF ABORTION, CONCLUDES THAT "THE MOST STRIKING FINDING IS THAT THE INCREASE IN THE LEGAL ABORTION RATE IS THE SINGLE MOST IMPORTANT FACTOR IN REDUCTIONS IN BOTH WHITE AND NON-WHITE NEONATAL MORTALITY RATES. /Not only does the increase in abortion dominate the other public policies, but it also dominates schooling and poverty." Abstract, p. 695 of Grossman, Michael and Steven Jacobowitz. Variations in Infant Mortality Rates among Counties of the United States: the Roles of Public Policies and Programs. Demography 18:4, November 1981, 695-713, Attachment B./

LET US TURN TO THE SECOND APPROACH -- ANTICIPATING CONSEQUENCES OF A REDUCTION IN ACCESS TO LEGAL ABORTION. THERE ARE VERY FEW EXAMPLES OF ACTUAL CASE HISTORIES. HIGHLY RESTRICTIVE ABORTION LAWS WERE PASSED IN THE CONTEXT OF MILITARISTIC PRONATALISM IN FASCIST SPAIN IN 1944, IN NAZI GERMANY IN 1935, AND AT THE OTHER END OF THE POLITICAL SPECTRUM, IN PRE-WAR STALINIST SOVIET UNION IN 1936, WHERE THE LIBERAL ABORTION LAW OF 1920 WAS ABRUPTLY REVERSED.

THEN,IN THE 1960's and '70's, SEVERAL EASTERN EUROPEAN NATIONS -- CONCERNED WITH BIRTH RATES THEIR GOVERNMENTS CONSIDERED "TOO LOW", UNDERTOOK A RANGE OF PRONATALIST POLICIES, INCLUDING GENEROUS FAMILY ALLOWANCES, INCENTIVES FOR FAMILY BUILDING, AND MODIFICATION OF ACCESS TO ABORTION. HOWEVER, NONE INTRODUCED AS DRASTIC A CHANGE AS DID ROMANIA IN 1966. IN COMBINATION WITH POLICIES RENDERING DIVORCE EXCEPTIONALLY DIFFICULT, PERMISSION FOR LEGAL ABORTION WAS GREATLY CURTAILED. /After de-liberalization, the Romania law was somewhat broader than U.S. laws and Western European laws then in effect -- about as liberal as the American Law Institute's Model Code and the Colorado-like "reform" laws passed in several states in our country, 1967-1970./ THERE WERE 1,115,000 LEGAL ABORTIONS IN ROMANIA IN 1965, DROPPING TO 205,800 IN 1967 -- ABOUT 1/5th

THE PRE-RESTRICTION LEVEL. THE ADVERSE HEALTH CONSEQUENCES TO WOMEN AND INFANTS WERE ENORMOUS: MATERNAL MORTALITY MORE THAN QUADRUPLED, /from 1.45 to 6.90 deaths per 100,000 women ages 15-44, from 1965 to 1970. See attachment C, Christopher Tietze, Induced Abortion: A World Review, 1981. New York. A Population Council Factbook, 1981, 4th Edition, p. 104./

MATERNAL MORBIDITY, AS EVIDENCED BY INCREASED ADMISSIONS TO HOSPITALS FOR SO-CALLED "SPONTANEOUS" ABORTIONS, ALSO INCREASED DRAMATICALLY, AND, REVERSING A DECLINE IN INFANT MORTALITY, ROMANIA EXPERIENCED A SHARP RISE IN INFANT DEATHS /81.5 in 1956/ FROM 46.6 IN 1966 TO 59.9 INFANT DEATHS PER 1000 LIVE BIRTHS IN 1968. /David, Henry and Robert McIntyre, Reproductive Behavior Central and Eastern European Experience. New York: Springer, 1981, p. 188./ YOU MAY THINK "AH, BUT ROMANIA IS NOT AMERICA AND CONDITIONS THERE ARE NOT QUITE THE SAME AS THOSE HERE." I ATTACH HERETO ANOTHER TABLE /Attachment D, Moore-Cavar, pp. 587-590/ INDICATING A WIDE DIVERSITY IN PREGNANCY OUTCOMES AMONG WOMEN DENIED LEGAL ABORTION /the percent who carry to term varies from 8% to 87%./ THERE ARE MANY CULTURAL CONDITIONS AFFECTING HOW WOMEN WILL DECIDE WHAT TO DO WHEN ACCESS TO LEGAL ABORTION IS BLOCKED, AND IT IS DIFFICULT TO PREDICT HOW MANY WILL CHOOSE FOREIGN ABORTIONS, ILLEGAL DOMESTIC ABORTIONS, SELF-INDUCED ABORTIONS, OR FULL-TERM DELIVERIES. NOT EVEN WEALTHY AMERICAN FAMILIES CAN BE ASSURED OF ACCESS TO FOREIGN FACILITIES WHEN THEY NEED ABORTIONS, AND OF COURSE, MIDDLE CLASS AND POOR WOMEN HAVE LITTLE CHOICE TO GO ABROAD. LET US ASSUME FOR THE MOMENT THAT MOST AMERICAN WOMEN WOULD NOT CHOOSE UNSAFE, ILLEGAL ABORTIONS. THE REMAINING ALTERNATIVES, THEN, ARE AN INCREASE IN UNWANTED BIRTHS (WITH ALL THE SOCIAL, ECONOMIC, PSYCHOLOGICAL, AS WELL AS MEDICAL, ADVERSE EFFECTS FOR WOMEN AND THEIR FAMILIES, AND IN MANY CASES THE TAXPAYER), AND A GREATER RELIANCE ON METHODS OF CONTRACEPTION WHICH MAY LOWER THE LIKELIHOOD OF ACCIDENTAL PREGNANCY, BUT CAUSE WOMEN TO RUN A HIGHER RISK OF MEDICAL COMPLICATIONS OR HEALTH PROBLEMS. I REFER YOU TO A CHART /Attachment E, Tietze, op.cit., p. 100/ WHICH COMPARES MORTALITY RISKS ASSOCIATED WITH VARIOUS APPROACHES TO FERTILITY REGULATION. IF A WOMAN SELECTS A METHOD OF CONTRACEPTION -- SUCH AS THE DIAPHRAGM --

WHICH IS COMPLETELY SAFE BUT MAY NOT BE ENTIRELY EFFECTIVE, AND RELIES ON ABORTION IN THE EVENT OF CONTRACEPTIVE FAILURE -- SHE IN FACT HAS MADE THE MOST RATIONAL PERSONAL CHOICE IN TERMS OF THE LOWEST RISK TO HER OWN HEALTH. IN SHORT, REMOVAL OF LEGAL ABORTION WOULD ELIMINATE FROM OUR OPTIONS THE VERY ONE WHICH OFFERS THE MOST RATIONAL CHOICE WITH THE LOWEST MEDICAL RISK.

/I would also like to pass along to you a health model which may be useful to the discussion of abortion AND contraception vs. abortion OR contraception. Decisions to engage in particular health-promoting acts are most easily made when the behavior requires only a single, rather than repetitive action, and when it is undertaken in response to a perceived condition or symptom -- Box A -- setting a broken arm, for example; it is most difficult when the action is done in the absence of any pain or symptom, and when it must be done repeatedly -- Box D, fastening safety belts, eating a good diet and exercising regularly, for example. Abortion falls in Box A, while contraception falls in Box D. Therefore, we must consider both abortion and contraception to be critical components of a complete system of fertility regulation./

	One-time action	Repetitive actions
Curative	A. Set a broken arm Take out a splinter Abort unplanned pregnancy	B. Have rabies shots Have chemo-therapy
Preventive	C. Smallpox vaccination Immunizations	D. Fasten safety belts Drink your orange juice Exercise regularly Always use contraception

I WOULD LIKE TO END ON A PERSONAL NOTE. EXACTLY 21 YEARS AGO TODAY, I WAS IN A HOSPITAL WHERE I STAYED THROUGHOUT THE CHRISTMAS HOLIDAYS, RECEIVING PENICILLIN DAILY BECAUSE I HAD A PERFORATED UTERUS AND PERITONITIS (A SERIOUS INFECTION). I'M GLAD I CAN BE HERE TODAY TO TELL YOU ABOUT IT. A COMMON MYTH IS THAT MIDDLE-CLASS WOMEN CAN ALWAYS OBTAIN A SAFE ABORTION PROCEDURE. THIS WAS CERTAINLY NOT TRUE IN MY CASE. THE YOUNGER WOMEN OF TODAY HAVE NO CONCEPT OF WHAT IT WAS LIKE BACK THEN. I PRAY TO GOD THEY MAY NEVER HAVE TO FIND OUT.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY ON BEHALF OF THE NATIONAL WOMEN'S HEALTH NETWORK.

WE WOULD LIKE TO REQUEST AT THIS TIME THAT YOU POSTPONE THE MARK-UP OF S.J. RES 110 UNTIL AFTER THE HOLIDAY RECESS, TO ALLOW THE SUBCOMMITTEE THE TIME TO STUDY THE TESTIMONY PRESENTED HERE TODAY AND OVER THE PAST 3 MONTHS BY DOZENS OF WITNESSES.

APPENDIX A

International Inventory of Information on

INDUCED ABORTION

EMILY CAMPBELL MOORE-ČAVAR

DIVISION OF SOCIAL AND ADMINISTRATIVE SCIENCES
INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION
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Table 10.2a Declines in the Number of Abortion Deaths

Note: These are deaths from illegal, spontaneous, and in post-liberalization years legal abortions.

Country and Sub-national area	Period covered	Number of abortion deaths	Year of liberalization
Bulgaria 1/	1956	47	1956
	1959	16	
	1961	8	
Czechoslovakia 1/	1956	53	1957 a/
	1959	14	
	1961	6	
England and Wales 2/	1960	62	1967 b/
	1961	54	
	1962	57	
	1963	49	
	1964	50	
	1965	52	
	1966	53	
	1967	34 c/	
	1968	50 c/	
	1969	35	
	1970	32	
	1971	26	
Greece 3/	1933-38	65 (annually)	none
	1956-65	3 (annually)	
Hungary 1/	1956	83	1956
	1959	35	
	1961	32	
Hungary 4/	1950	100	1956
	1962	37	
	1964	24	
Hungary 5/	1930's	250-300 annually	1956
	1964-1968	10 d/ annually	
Netherlands 6/	1950	31	none
	1964	4	
Poland 1/	1956	76	1956
	1959	26	
	1961	26	
U.S.A. 7/	1955	266	none (yet)
	1960	289	
	1965	235	
	1966	189	
U.S.A.: California 8/	1966-1967	35 d/	1967
	1968-1969	22 d/	

Table 10.2b Declines in Abortion Mortality Rates per 100,000 Women 15-44

Country and Sub-national area	Period covered	Abortion mortality rate per 100,000 women 15-44	Year of liberalization
Hungary 9/	1955	3.17	1956
	1956	3.85	
	1957	2.40	
	1958	2.88	
	1959	2.13	
	1960	1.55	
	1961	1.40	
	1965	1.11	
	1966	1.02	
	1967	0.84	
	1968	0.79	
	1969	0.88	
	1970	0.70	
	1971	0.39	
Czechoslovakia 9/	1955	2.26	1957 a/
	1956	1.90	
	1957	1.58	
	1958	1.08	
	1959	0.52	
	1960	0.59	
	1961	0.40	
England and Wales 9/	1955	0.72	1967 b/
	1956	0.79	
	1957	0.67	
	1958	0.70	
	1959	0.52	
	1960	0.69	
	1961	0.59	
	1965	0.55	
	1966	0.56	
	1967	0.36	
	1968	0.53	
	1969	0.37	
	1970	0.34	
	1971	0.23	

Country and Sub-national area	Period covered	Abortion mortality rate per 100,000 women 15-44	Year of liberalization
U.S.A.: New York City 9/	1965	2.49	
	1966	1.87	
	1967	1.20	
	1968	1.25	
	1969	1.42	
	1970	1.29 e/	
	1971	0.69 f/	

a. passed in 1957, but implemented 1958

b. passed in 1967, but implemented 1968

c. In 1967, abortion deaths were unusually low. G. E. Godber (1972), letter to the editor of British Medical Journal, 4, November, 295, notes that:

> "The Abortion Act came into effect on 28 April 1968 and before the action by the Coroners Society /when their help was invoked to ensure that cases known to coroners were so recorded as to be classified as abortion/. Registrations of deaths investigated by a Coroner are often delayed until after April of the year following death. If this happens the delayed deaths are counted with those of the following year. For an unknown reason this happened with an unusually large number of deaths due to abortion (six) in 1967. These deaths have been counted with those of 1968."

d. induced abortions only

e. 0.94 if deaths from legal abortion are excluded

f. 0.34 if deaths from legal abortion are excluded

Sources for the Above Table Are:

1. Mehlan, K. H. (1964). The Effects of Legalization of Abortion on the Health of Mothers in Eastern Europe. In: G. W. Cadbury et al. (eds.). Proceedings of the 7th Conference of the IPPF, Singapore, February 1963. Amsterdam: Excerpta Medica, International Congress Series No. 72, 214-222.

2. Huntingford, P. J. (1972). The Abortion Act (1967) in England and Wales. In: I. Nazer (ed.). Induced Abortion: A Hazard to Public Health. Beirut: IPPF, 313-328.

   also: Potts, M. (1973). Abortion in Western Europe and Africa. Paper presented at North Carolina Population Center Workshop.

   and: Weatherall, J. (1972). Abortion Deaths. Letter to the Editor. British Medical Journal, 4, October, 176-177.

3. Valaoras, V. et al. (1969). Greece: Postwar Abortion Experience. Population Council: Studies in Family Planning, 1:46, 10-16.

4. Potts, M. (1967). Legal Abortion in Eastern Europe. Eugenics Review, 59:4, December, 232-250.

5. Klinger, A. (1970). Demographic Consequences of the Legalization of Induced Abortion in Eastern Europe. Paper presented at the meeting of American College of Obstetricians and Gynecologists, New York, April.

6. Treffers, P. (1967). Abortion in Amsterdam. Population Studies, 20:3, 295-309.

7. Tietze, C. (1969). Demographic Aspects of Abortion in the United States. Paper presented at IUSSP meeting, London.

8. Jackson, E. W. et al. (1971). Therapeutic Abortions in California. California Medicine, 115.

9. Tietze, C. and D. Dawson (1973). Induced Abortion: A Factbook. Population Council, Reports No. 14.

Table 10.3a **Number of Maternal and Abortion Deaths Before and After Abortion Law Liberalization**

Country	Year	Number of Deaths from: Pregnancy, childbirth, confinement	Abortion: legal	Abortion: illegal and spontaneous
Hungary 1/	1946	277	--	160
	1950	198	--	100
	1955	128	--	69
	1960	73	6	33
	1965	64	2	25
	1970	51	1	16
England and Wales 2/	1950	517	103	
	1955	382	66	
	1960	248	62	
	1965	169	52	
	1970	114	32	

Table 10.3b Ratio of Maternal and Abortion Deaths Before and After Abortion Law Liberalization: Hungary 1/

Year	Deaths due to gestation, childbirth and confinement, per 100,000 births	Deaths per 100,000 abortions: "other" abortions	Deaths per 100,000 abortions: legal induced abortions
1946	161	804	--
1950	98	292	--
1955	60	148	--
1960	50	80	4
1965	48	68	1
1970	34	50	1

Table 10.3c Rate of Maternal and Abortion Deaths After Abortion Law Liberalization: Yugoslavia, Croatia[3]

Year	Abortion Mortality Rate per 100,000 women 15-49	Non-Abortion Maternal Mortality Rate per 100,000 live births
1960	3.0	59.1
1965	1.2	49.2
1970	0.6	22.9

Sources for the above tables are:

1. Goodhart, C. B. (1972). Abortion Deaths. Letter to the Editor. British Medical Journal, 4, November, 295.
2. Mikolás, M. (1973). The Effect of the Legalization of Abortion on Public Health and Some of Its Social Concomitants in Hungary. Demográfia, 16:1, 7-113.
3. Stampar, D. (1973). Croatia: Outcome of Pregnancy in Women Whose Request for Legal Abortion Have Been Denied. Population Council: Studies in Family Planning, 4:10, October, 267-269.

If abortion mortality declines after liberalization, some type of comparison is necessary before conclusions can be drawn; for example

- -- deaths over the 5-year period before liberalization can be compared with abortion deaths over the 5-year period after liberalization
- -- deaths from abortion since liberalization can be compared with trends in non-abortion maternal mortality, or
- -- deaths from abortion in a country with a liberalized abortion law can be compared with trends in abortion deaths where the law remains restrictive, or
- -- deaths from abortion where the law has been liberalized can be compared with the trend in a country where a liberal law has been restricted.

The system for recording deaths should be noted -- whether deaths are those attributed or associated. It can be assumed that prior to liberalization, some deaths from illegal abortion will be concealed (it will be disputed to what extent this has in fact happened), and that after liberalization abortion deaths are likely to be more carefully scrutinized.

(1) If a noticeable decline in abortion mortality is observed, before attributing the decline to the liberalization of the abortion law, one should note whether maternal mortality of all kinds was also declining, and whether the abortion mortality decline was greater after than before liberalization.

For example, Miklós (1973) points out that in Hungary, the number of deaths due to abortion decreased as rapidly prior to liberalization as they did after:

Year	Number of Abortion Deaths	
1946	160	
1954	53	(8 years later)
1954	53	
1970	16	(16 years later)

The abortion law was liberalized in Hungary in 1956.

If the starting point is very high, however, it can be expected that it will decline rapidly. It is more difficult to reduce by a comparable percent an already-low rate. Post-war (1946) deaths in Hungary were no doubt unusually high, and improved medical care in the succeeding years would bring the rate down substantially. The post-liberalization decline, on the other hand, would have to be attributed to other causes one of which might be said to be the availability of legal abortion.

Maternal mortality in Hungary also declined markedly, but the percent change in abortion mortality was greater:

Period	Non-abortion Maternal deaths	Percent decline	Abortion deaths	Percent decline
1946-1970	277 51	82	160 16	90
1956-1970	125 51	59	83 16	81

(2) If a noticeable decline in abortion mortality is not observed, there are several things to consider:

If the deaths from abortion were already low, the effects of liberalization may be hard to detect, from mortality data alone, particularly if illegal abortions are competently done and rarely result in mortality. (Viel, 1970) noted that the greatest difference in abortion mortality is observed between developed and less-developed countries, rather than between those with liberal or restrictive laws.

If the decline in abortion mortality does not seem to be much better than the decline in maternal mortality, it may be that abortion law liberalization has actually contributed to both, by removing some high-risk women from the maternal death category (now they can have an abortion instead of carrying a dangerous pregnancy to term), and by enlarging the proportion of women who seek pre-natal care because they are less likely to be reluctant mothers.

> Today, it may be assumed that a woman who carries a baby to term really wants the child and is willing to take care of herself during pregnancy....Only a few years ago,...25% of the pregnant women appeared at the hospital only once during pregnancy -- when they were in labor. Now, less than 15% show up only for the delivery. (Medical World News, 1974)

2. Abortion Mortality: Increases after Restriction

If it is difficult to make inferences concerning the effect on illegal abortion of a liberalized abortion law by examining changes in abortion and mortality deaths, a clearer suggestion of the effects of a policy change can be seen from the rise in abortion deaths following on the restriction of a formerly liberal abortion law, such as in Romania. While it can be argued that abortion mortality declines for reasons other than a decrease in illegal abortion incidence, it is hard to find an explanation for a marked increase in abortion mortality when legal abortion becomes drastically curtailed other than the increase in illegal activity.

Country	Year	Abortion Mortality Rate per 100,000 women 15-44
Romania	1965	1.45
	1966	1.87
	1967	3.80
	1968	4.91
	1969	5.78
	1970	6.90

Source: Tietze, C. and D. Dawson (1973). Induced Abortion: A Factbook. Population Council: Reports, No. 14.

3. Abortion Morbidity: Declines after Liberalization

> We believe the argument will now shift from deaths to ill-health, because deaths from legal abortion are so few that this no longer constitutes an issue. In this connection, we note with interest the statement by the British Medical Association's Special Panel on Abortion: "In the past emphasis has been on mortality; the emphasis now should be on morbidity." (ALRA, 1972)

Table 10.4 includes data on hospital admissions for complications of abortions (some of which can be presumed to be due to illegal abortions) before and after liberalization of abortion laws.

(1) If there appears to be a noticeable decline, some of the same considerations as are pertinent to declining mortality are also relevant to declining morbidity: for example, illegal abortionists may be increasing in care and skill.

(2) If there does not appear to be a decline in hospital admissions after liberalization, several explanations are possible:

- -- a decreasing number of complicated illegal abortions may be disguised by a simultaneous increase in greater willingness to be admitted to hospitals for treatment (as in Eastern Europe in the decade after liberalization).

- -- the ratio of admissions for abortion to live births may not reflect the declining numbers of illegal abortions if the number of live births has also been decreasing (as in Croatia, Yugoslavia, in the years shown in Table 10.4; the ratio between 1965 and 1970 rose, while the rate per 1000 population remained virtually unchanged).

-- if the percent of hospital admissions for abortion that are due to illegal abortion is small (relative to the proportion due to spontaneous abortion), then a small change in admissions does not adequately reveal what may be a substantial decline in morbidity from illegal abortions. To illustrate the point:

Hypothetical Situation A

Total Hospital Admissions	Spontaneous	Criminal Induced
Pre-liberalization		
100,000	80,000	20,000
Post-liberalization		
90,000	80,000	10,000

Overall reduction	Reduction in Illegal Admissions
10%	50%

Hypothetical Situation B

Total Hospital Admissions	Spontaneous	Criminal Induced
Pre-liberalization		
100,000	60,000	40,000
Post-liberalization		
90,000	60,000	30,000

Overall reduction	Reduction in Illegal Admissions
10%	25%

That is, in situation A where illegal abortions are only 20% of hospital admissions, an overall decline of 10% masks a 50% reduction in illegal admissions; in situation B, where illegal abortions constitute a larger proportion of all admissions, a similarly recorded overall decline of 10% represents only a 25% reduction in criminal abortion admissions.

Table 10.4 Non-Legal Abortion Morbidity: Hospital Admissions Before and After Liberalization of Abortion Laws

Country and Sub-national area	Year of Liberal-ization	Year of admissions	Number of admissions	Ratio per 1000 live births	Rate per 1000 population
Czechoslovakia[1/]	1957	1953	29,100	u	2.3
		1958	27,700	u	2.1
Hungary[1/]	1956	1953	39,900	u	4.2
		1958	37,400	u	3.8
		1963	34,100	u	3.4
		1967	34,900	u	3.4
England: London[2/]	1967[a/]	1966[b/]	1,363[c/]	u	u
		1969[b/]	870[c/]	u	u
U.S.A.: California, Los Angeles, Univ. of So. California Medical Ctr.[3/]	1967	before 1967	800 annually	u	u
		after 1967	100 annually	u	u
U.S.A.: California, San Francisco General Hosp.[4/]	1967	1967	u	68[d/]	u
		1968	u	36[d/]	u
		1969	u	22[d/]	u
		1967	u	125[e/]	u
		1969	u	49[e/]	u
U.S.A.: New York City, 10 municipal (free) hospitals[5/]	1970	1970/71	415 monthly	u	u
		1971/72	220 monthly	u	u
		1972/73	199 monthly	u	u
Yugoslavia: Croatia[6/]	1960	1960	3,745	49.2	0.90
		1965	1,468	20.6	0.34
		1970	1,554	25.4	0.35

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a. passed in 1967; implemented 1968

b. first 3 months

c. admissions to London Emergency Bed Service (a 37% reduction)
also: 1967 10% of these emergency admissions were for abortion
1-6/1970 6% were for abortion

d. septic abortions per 1000 live births

e. "spontaneous" abortions per 1000 live births

Sources for the Above Table Are:

1. Tietze, C. (1970). Abortion Laws and Abortion Practices in Europe. Advances in Planned Parenthood. Proceedings of the 7th Annual Meeting of the AAPPP, April 1969.

2. Kemp, W. M. (1971). Utilization of Hospital Beds. New England Journal of Medicine, 285, 1381.

   Huntingford, P. (1971). Mortality and Morbidity of Abortion. Lancet, 1:7707, 1012-1013.

3. Medical Tribune (1971). 12:3.

4. Goldstein, P. and G. Stewart (1972). Trends in Therapeutic Abortion in San Francisco. American Journal of Public Health, 62:5, May, 695-699.

5. Frug, G. (1973). Three Year Abortion Report, December. New York City: Health Services Administration.

6. Štampar, D. (1973). CROATIA: Outcome of Pregnancy in Women Whose Requests for Legal Abortion Have Been Denied. Population Council: Studies in Family Planning, 4:10, 267-269.

4. Abortion Morbidity: Increases after Restriction

As is the case with abortion mortality -- it is more difficult to "explain away" changes upward in morbidity following restriction of an abortion law than changes downward after liberalization. Table 10.5 presents data from two countries in which abortion laws have been restricted (Romania) or more strictly interpreted (Czechoslovakia), and in both instances a rise in hospital admissions for abortions was observed, indicating an increase in illegal abortion incidence. In addition, when the liberal abortion policy of 1920 in the Soviet Union was reversed in 1936, there was a rapid increase in registration of incomplete abortions: "Within four years, by 1940 [in 30 geographic regions of the Russian Federated Socialist Republic], more than 90 percent of all registered abortions in major cities were incomplete abortions initiated outside the hospital" (David, 1971, citing Sadvokasova, 1969). Data from Hungary following the late-1973 restriction will be awaited with interest.

C. A Checklist of Cautions for Examining Data on Legal and Illegal Abortion

1. When the outcome of pregnancies in women refused legal abortion is reported, is there a substantial proportion of women who could not be traced? What assumptions are made concerning the probable outcome of their pregnancies?

2. Are the women who carried their pregnancies to term followed long enough to determine whether or not they kept the baby or continued to reject the pregnancy by giving it for adoption?

3. Are there social-support factors which may account for the differences observed between societies in the proportion who continue the pregnancy?

4. When it is stated that "liberalization doesn't eliminate illegal abortion," is the law in question a partial modification (which could not be expected to fully eliminate illegal abortions), or a more far-reaching liberalization?

5. If the law ostensibly makes abortion legally available on request, and if some illegal abortion seems to persist, is there reason to believe that some women may prefer the "private sector" for reasons of cost, ease, dignity, or confidentiality?

6. If mortality and morbidity data are the primary clues as to the changing level of illegal incidence, are there other events which occur concurrently with changes in abortion policy which may also affect mortality and morbidity levels?

7. Is a substantial decrease or increase in illegal abortion sequelae concealed by the fact that spontaneous abortions constitute the greatest proportion of all non-legal abortions?

Table 10.5 Non-Legal Abortion Morbidity: Hospital Admissions Before and After Restriction of Abortion Laws

Country	Year of restriction	Year of admissions	Number of admissions
Czechoslovakia	1962	1958	27,700
		1963	29,400
		1967	24,400
Romania	1966	1959	16,686
		1967	104,000 "spontaneous"
			351 "illegally induced"

Source: Tietze, C. (1970). Abortion Laws and Abortion Practices in Europe. Advances in Planned Parenthood. Proceedings of the 4th Meeting of the AAPPP, 1969.

Text References for Part X

1. Abortion Law Reform Association (1972). Evidence to Committee of Inquiry into the Working of the 1967 Abortion Act. Wheathampstead: ALRA.

2. David, H. (1971). Observations on Abortion and Family Planning in the Soviet Union: Notes on a 1970 Visit to Moscow. Citing Sadvokasova, E. A. (1969). *Socio-hygienic Aspects of the Control of the Size of the Family*. Moscow: Meditsina Publishing House.

3. *Medical World News* (1974). Better Statistics for Babies in Brooklyn. MWN, January 4, 38F.

4. Mikolás, M. (1973). The Effect of the Legalization of Abortion on Public Health and Some of its Social Concomitants in Hungary. *Demográfia*, 16:1, 7-113.

5. Viel, B. (1970). El Aborto Inducido. The Demographic Explosion. Mexico City: Editorial Pax-Mexico, Libreria Carlos Cesarman. (In Spanish).

ADDENDUM

The following data have just become available and are included here because of their possible significance.

Abortion on request became available in New York State on July 1, 1970. The statistics which follow are from New York City, where a large proportion of the legal abortions have been performed.

	Infant Mortality Rate per 1000 Live Births
1969	24.4
1970	21.6
1971	20.9
1972	20.1
1973	19.7 (provisional)

	Incomplete Abortions (spontaneous and septic admissions to municipal hospitals)
1969	6524
1970	5293
1971	3643
1972	3538
1973	3253

	Births to Teenagers
1969	12,942
1970	12,725
1971	12,725
1972	10,700

	Deaths Associated with Pregnancy
1969	77
1970	68
1971	37
1972	54
1973	37

Source: Personal communication from Jean Pakter,
Director, Bureau of Maternity Services and
Family Planning, Dept. of Health, New York City

Senator HATCH. Our next witness will be Jean Doyle, project director of the Citizen's Lobby.

We have a vote, Jean. We will call on you as soon as I get back from the vote. We will recess until I can get over and vote and come right back.

[Recess taken.]

Senator HATCH. Jean, we are prepared for your testimony. I am sorry you had to wait, but I had to present an amendment on the floor while I was there.

Ms. DOYLE. We would not interfere with that, Senator, not for the world.

Senator HATCH. Thank you. We are happy to have you here, and we will be happy to have your testimony in the record.

STATEMENT OF JEAN DOYLE, PROJECT DIRECTOR, CITIZEN'S LOBBY

Ms. DOYLE. Thank you.

Mr. Chairman, my name is Jean Doyle. I am the executive vice president of the National Right to Life Committee and executive director of the Florida Right to Life Committee. I am here to speak in favor of Senate Joint Resolution 110, and I greatly appreciate the opportunity to do so.

You have already heard marvelous and valuable testimony focusing on the need for Senate Joint Resolution 110. Much of this has been from spokesmen representing the fields of law and medicine. Perhaps I can add still another dimension to the debate. My prolife work has been largely in the fields of organization and education. This puts me in touch on a one-to-one basis with people from all walks of life, but particularly with the young on our high school and college campuses.

For the past 7 years I have served as a resource person for the Orange County high school system in my State of Florida. My work with students has given me insights I wish to share with you, observations on how the abortion ethic has affected the young of our Nation.

Prior to the Supreme Court abortion decision of 1973, abortion on demand was rarely a topic for discussion in our Nation's classrooms. Even though the right to life movement had developed educational programs and materials that are factual and biologically and scientifically correct, we did not experience a demand for the programs until after the Court decision in 1973.

The topic was abortion, and our program generally served to counterbalance those given to the students by local abortion clinic spokesmen. We utilized the popular Time-Life series tracing development in utero. Coupled with postabortion slides, the entire story was told—who is in utero, and what does abortion actually accomplish?

We felt our young people needed all of this information. They needed also to know of existing and newly formed emergency pregnancy services which offered alternatives to abortion. This, of course, reflects the private sector's response to abortion on demand. They were being given life and death options which had never been experienced before by the young people in America, and they needed to make informed decisions. They needed guidance, or perhaps they were to face lifetimes of regret.

Obviously, others agreed, because at the outset students and teachers alike were enthusiastic. One noticeable result of viewing the program was the student's recognition of his own importance as a member of the family of man. I suspect this was at least one reason the lecture met with more than average favor in a local youth detention center. Possibly for some of the inmates it was the first time they had a sense of their own dignity and value.

Each of us was once that talented, gifted child in utero, and as together in class we traced his or her accomplishments before birth, the students were often able to identify with this child. They were able to appreciate the unborn child's attributes, the rudimentary heartbeat in just 18 days after conception, the detectability of that heartbeat and human brainwave activity, the sensitivity to pleasure, to pain, to taste, and sound, the presence of finger prints and footprints, all before the end of the first trimester, when most abortions are being performed.

Another observation: By virtue of being very young themselves, the students also often identified with the unborn child by sensing the unfairness of abortion. Our lectures, by the way, were optional, but few students ever opted to remove themselves from the room.

That, however, was 7 years ago. Subtle changes have been taking place as the years pass. There are more empty seats now, more students opting out of the lecture, sometimes an indication of personal involvement too painful to discuss. The student who is now 16 years old was only 8 when the Supreme Court abortion decision came down. They rarely remember another ethic, and it is becoming increasingly difficult for us to get the facts to them.

Last week I received a notice from the health advisory council located in the vicinity of our own State office. The council was formed to review supplemental materials of human growth and development and family life programs for that county's school board. Hardly unbiased, its members include workers for both Planned Parenthood and the Religious Coalition for Abortion Rights. We were not surprised to discover they found the discussion of abortion unsuitable for high school students.

It is certain then that we will continue to deal more and more with the student who has had an abortion and who is profoundly affected to learn later that a fetus was not just a bit of protoplasm or cells and tissues, as they had been told. That is no more fair than abortion itself.

I am angered by the fact that we are being cut off. I am angered by the fact that in my State every attempt to regulate abortion clinic operation has ended in litigation, and the growing number of negligence suits on file at our county courthouses will bring small comfort to those who have gone under the knife without the protection of society. It seems that the back-alley butcher abortionist has simply moved to Main Street since 1973.

We know what abortion does to the unborn child. It ends his or her life. What does it do to the child's mother, grandmother, father, the medical people involved? What does easy acceptance of abortion on demand do to a society that permits approximately 1.5

million abortions a year, a society that in 1 year alone spent over $50 million tax dollars to abort the children of the poor?

All the votes are not in yet. They will not be for some time. But we are getting some feedback on how our young people are being affected. Metta Ochman, regional director for Suicide Anonymous, testified on behalf of a parental consent ordinance in Cincinnati this year. She told council members that in a 35-month period 5,620 people had sought help. Of that figure, over 4,000 were women, of whom 1,800 had had abortions. She concluded that the highest suicide rate is in the 15- to 24-year age group.

Senator, there is no question that abortion on demand will cease one day for practical purposes of defense, industry, agriculture, and economics. It will be a blot on our history if these are the only reasons we can find to reverse the trend of a nation bent on destroying its own species in the womb.

The casualities are growing both in utero and ex utero. Only the abortion profiteers seem to prosper, as we deplete our Nation of its greatest natural resources and relegate some of our most promising youngsters to suicide statistics as a result.

Senate Joint Resolution 110 can be a force to help stem this unhappy tide. I urge the support of this measure and therefore open a dialog in which the people once more have a voice and an ability to protect their very young. Thank you.

Senator HATCH. Thank you. We appreciate having you with us today and the effort you have put forth.

Our next witness will be Mr. Paul Brown from Life Amendment Political Action Committee.

Paul, we are happy to welcome you to the subcommittee as well.

STATEMENT OF PAUL BROWN, LIFE AMENDMENT POLITICAL ACTION COMMITTEE, ACCOMPANIED BY ROBERT SASSONE, ATTORNEY

Mr. BROWN. Thank you, Senator Hatch.

Dr. Robert Sassone was also scheduled to testify with me, and we are going to do it together.

Senator HATCH. That will be fine.

Mr. SASSONE. I was the only attorney who was an amicus curiae in all of the abortion cases before the U.S. Supreme Court that decided constitutionality. Some think I am an expert on the 14th amendment as it applies to the right to life, and it is from this background that I speak. I oppose Senate Joint Resolution 110, not because it attempts to stop abortion but because I do not believe it will stop abortion on demand.

There is now going on a battle to determine whether or not man has the right to make unpersons of innocent human life for the purpose of killing that innocent human life. The Declaration of Independence says man does not have that right. I fear that Senate Joint Resolution 110 disagrees.

The abortion decisions did not establish abortion on demand by saying that there was in the Constitution a right to abortion. For this reason, I believe Senate Joint Resolution 110 is like a quarterback sending all of his receivers to the right side and then throwing a pass to the left, or like a batter swinging low when the pitch is high.

The first of these problems left untouched by Senate Joint Resolution 110 was caused by the *Vuitch* decision in 1971, which reversed the normal affirmative defense rule and required the prosecution to plead and prove that affirmative defenses, such as necessity for the abortion, did not exist. This, of course, is impossible because of the fifth amendment.

So *Vuitch*, although many people did not recognize it at the time, gave us abortion on demand in 1971, and the problems raised by *Vuitch* are not touched by Senate Joint Resolution 110, for which reason Senate Joint Resolution 110 would still leave us with abortion on demand.

The extended right to privacy of the *Roe* v. *Wade* and *Doe* v. *Bolton* cases also is sufficient to give us abortion on demand. These also are not touched by Senate Joint Resolution 110, so we have got a second independent reason that Senate Joint Resolution 110 would leave us with abortion on demand.

The third aspect of the abortion cases is that they establish by judicial fiat and against the total history of the 14th amendment the nonpersonhood of the unborn. Senate Joint Resolution 110 would ratify the mistake of the abortion decisions by implicitly writing into the Constitution this nonpersonhood of the unborn.

If someone is a person, as the Court pointed out, you do not have the right to kill them; they have got the right to life. Senate Joint Resolution 110 permits the States to either legislate or fail to legislate in the area of abortion, and accordingly the unborn, if Senate Joint Resolution 110 is put into the Constitution, cannot constitutionally be considered to be persons, so they have got to be nonpersons. So I think in this respect Senate Joint Resolution 110 will do harm.

Mr. BROWN. I will take over my part now.

Senator, I would like to thank you for the opportunity to be here today, and I would also ask that all of our comments be included in the record.

Senator HATCH. Without objection, we will put them in the record.

Mr. BROWN. I have long held you in deep respect and appreciate your prolife efforts.

Out of respect to my fellow prolifers, I will not open my remarks by telling you how old, or large, or how big our organization really is. From previous statements of others and from testimony to come, I am certain that many, if the truth were only known, could be charged with perjury.

Our concern with the Catholic bishops' amendment is that it will do nothing more than cause a deeper split within the ranks of the prolife movement, a split over tactics and strategy based upon the false premise outlined in Dr. Sassone's remarks.

Since I run a political action committee, I foresee even greater problems as the 1982 elections come to pass. Confusion will abound regarding exactly who is and who is not prolife. The voters will have problems, because confirmed antilife politicians who vote for this amendment will have a recorded do nothing vote, and those solid prolife politicians who have voted prolife time after time will again be scorned by some as antilife because they could not in principle support this amendment. Our antilife opponents, many of whom are testifying today, are rejoicing over this confusion and will continue to do so if this persists.

The people I represent here today are truly saddened that many of our friends are charging up a steep hill, knowing that they are too weak to reach the top. These people, many of them very sincere, are being led to a big defeat.

Senator, I know and you know that we do not have the votes to pass this amendment. Tallies taken by the National Catholic Reporter and even the lobbyist, the National Right to Life Committee, show us short of our goal. We do not have the two-thirds necessary. In fact, this past Monday the prolife movement's efforts to pass the Ashbrook-Denton amendment to the Treasury bill failed miserably in the Senate. It did not even come up for a vote because of the threat of a fillibuster by one of your fellow Senators.

Senator Hatch, the only thing that LAPAC will do to prevent total confusion among the prolife elected is this: We intend at this time to consider the vote either for or against the Catholic bishops' amendment to be a nonvote. If, however, efforts to push this amendment do not cease, we must reconsider our position.

Finally, I can only offer you what I consider not only good but sincere advice. Regardless of the rhetoric, regardless of the extremely overblown claims of some to deliver the grassroots support to this amendment, regardless of all this, we know that they are wrong, and we caution you that you should not believe them. We know this amendment will not pass, Senator Hatch, but if it did, you should know that the majority of prolife people will work to defeat it every step of the way.

I submit to you an article prepared by Prof. Robert Byrn and concurred in by Prof. Charles E. Rice and Prof. Joseph Witherspoon, all members of the blue ribbon legal advisory committee of the National Right to Life Committee, all men who oppose this Catholic bishops' amendment. Should their valued opinion as longtime experts in the prolife movement be ignored out of hand? We think not. We ask that you include this in the record.

Senator Hatch, on behalf of hundreds of thousands of prolife people across this land, I ask you to withdraw this amendment at this time. I promise you we will return to this very committee as a united movement at such time as we have the proper amendment, not one the politicians can live with but one that babies can live with. We will come to you and seek your leadership and guidance when we are ready, but now is not the time. Please, Senator, withdraw this amendment now for the good of prolife efforts in this Nation.

Thank you for your time.

Senator HATCH. Thank you. We appreciate having your testimony.

[Material follows:]

In Opposition To The "Two Amendment" Strategy

Robert M. Byrn
Professor of Law
Fordham University
School of Law

In an article in the August 24 issue of the National Right to Life News, Jack Willke outlined the two amendment plan currently being urged by some as a new strategy for the pro-life movement. In essence, the plan envisions the proposal and ratification of a constitutional amendment giving Congress and the states concurrent power to regulate abortion (Amendment One), followed by a restrictive federal statute, which would lay the groundwork for a Human Life Amendment (Amendment Two).

I oppose the plan on both philosophic and pragmatic grounds. However, under no circumstances, is my opposition to the plan to be taken as a criticism of its proponents. Their pro-life credentials are impeccable.

Before proceeding further, I would like to emphasize three points:

First: This is a personal statement; I do not speak for any pro-life group or committee.

Second: I have directed the discussion principally toward Amendment One; I do not believe that under the two amendment strategy there will ever be an Amendment Two. (See II. D., *infra*.)

Third: I have not commented on any particular wording. I understand that the wording is tentative. It is the concept that concerns me.

I. The Philosophy.

Amendment One compels a drastic change in the philosophy of the right to life movement. Up to now we have advocated the right of unborn children to the law's protection of their lives, a right equal in law to that of any other person. Thus, we have commonly spoken of the "personhood" of the children and their "unalienable right to live." Amendment One has a different thrust. It vests in legislatures an unalienable right to do with unborn lives what they will. It is not a Right to Life Amendment. It is a Right to Legislate Amendment. The unborn are not persons; they are things.

Proponents of Amendment One would, I assume, argue otherwise. Let us anticipate the arguments.

A. *Amendment One recognizes a power to protect unborn lives, not a power to withhold protection.* On the face of it, this is certainly true. But nothing in the Amendment requires that the power be exercised; nor is any particular degree of protection mandated. Both these matters are left entirely to legislative discretion. A legislature might lawfully enact a criminal abortion statute with maternal health, fetal defect, and rape/incest exceptions. Equally lawful would be a legislative decision to do nothing - to maintain the *status quo* of unrestricted abortion. Were it otherwise, Amendment Two would not be required.

B. *By reversing Roe v. Wade, Amendment One necessarily recognizes the personhood and right to life of the unborn.* Wrong! There are two pivotal holdings in Wade:

1. A woman has a fundamental right to abort.
2. An unborn child is not a person possessed of a fundamental right to live.

Amendment One reverses the first holding but not the second. This is apparent when the Amendment is viewed in the light of the criticisms of *Wade* by legal scholars and the tenor of the Supreme Court dissents in *Wade*.

Critics of Wade fall into two groups. The first group condemns Wade for its denial of personhood to the unborn. This group rejects both of the pivotal holdings in Wade. The second group believes that lawmaking on "moral issues" such as abortion is a purely legislative function with which courts ought not interfere. Thus, the second group objects to the Supreme Court's creation of a fundamental right to abort (because the right restricts legislative discretion), but supports the Court's declaration that the unborn are nonpersons (because personhood signifies fundamental rights and fundamental rights restrict legislative discretion).

In short, the second group is pro-legislature, not pro-life. These critics of Wade believe that legislatures ought to be able to enact any sort of abortion laws they want. Just as these scholars now condemn the Supreme Court for creating a right to abort as a means of striking down a restrictive abortion statute, so too would they oppose a Supreme Court decision recognizing the unborn's right to live as a basis for invalidating a permissive abortion law.

The dissents in Wade are also pro-legislature. They contain no reference to the rights of the unborn. They rely, instead, on the prerogatives of legislatures.

Against this dual background - the pro-legislature dissents in Wade and the pro-legislature criticisms of Wade by influential legal scholars - the pro-legislature thrust of Amendment One can hardly be said to acknowledge, even implicitly, the personhood and rights of the unborn. To the contrary, as a pro-legislature response to Wade, Amendment One can be said to ratify the non-personhood and the rightlessness of the unborn.

Admittedly, Amendment One would raise the post-Wade status of the unborn from things that a legislature may not protect to things that are legislatively protectable. But the unborn would remain things - like whales or landmark buildings (let's protect them!) or like a teeming, pesky species (let's not!), depending upon how a legislature chooses to treat them.

C. Amendment One assures the rights of the unborn by characterizing them as human. But the label helps not at all if the Amendment does not accord the unborn the protection of personhood.

In 1972, the New York Court of Appeals responded to a claim that New York's permissive abortion statute violated the Fourteenth Amendment rights of the unborn by holding that the statute was a valid exercise of legislative discretion, even though the Court also found that the unborn child is a "human" who is "unquestionably alive" and has "an autonomy of development and character," Byrn v. N.Y.C. Health & Hospitals Corp., 31 N.Y.2d 194, 199 (1972). The unborn were human beings - but they were not persons. Earlier a federal court in Wisconsin had gone even further to strike down Wisconsin's restrictive abortion statute because "the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares." Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wisc. 1970). Clearly the attribution of humanity, by itself, assured nothing.

Although they contain different conclusions on whether the woman possesses a constitutional right to abort, nevertheless, from the unborn's perspective, the New York and Wisconsin cases are philosophically indistinguishable. The New York court held that the legislature has the power equally to protect the unborn from abortion or withhold protection (i.e., Amendment One). The Wisconsin Federal

Court held that the legislature has no power to protect the unborn (anticipating Wade). Yet, as Professor John Noonan has pointed out, the underlying jurisprudence is the same: Human beings may be treated as rightless nonpersons [things] if the empowered lawmaker, whether court or legislature, so chooses. J. NOONAN, A PRIVATE CHOICE 13-19 (1979). I agree entirely with Professor Noonan's condemnation of this jurisprudence. (Id. at 18):

> But all rights in our constitutional jurisprudence are premised on humanity. Your rights flow from your human character. None of them have security if it rests with a group of nine men, or a majority of them, to define you out of the human race. No discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman. If the legal order is a universe which can be developed without reference to the natural order, only the will of the makers of the legal order controls the recognition of legal existence.

Majoritarianism - whether legislative or judicial - is always objectionable when the majority is empowered to dispense with fundamental rights. "A government . . . which held the lives . . . of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true it is a despotism of the many, if you choose to call it so, but it is none the less a despotism." Loan Association v. Topekee, 87 U.S. (20 Wall) 655, 662 (1875). Accordingly, "One's right to life . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no election." West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Amendment One would make the right to life of the unborn forever dependent on the outcome of elections. Calling them "human" doesn't help at all.

D. Section Three of Amendment One preserves to the Supreme Court the power to reverse the nonpersonhood aspect of Wade. This may not be true, no matter how the section is worded. Consider the background against which the Amendment would be proposed:

1. If Congress accepts Amendment One, of necessity Congress must also reject the pending Human Life Amendments. Personhood would be rejected in favor of nonpersonhood. Ratification of Amendment One would be an affirmation of the rejection of personhood for the unborn.
2. This conclusion is strengthened when the Amendment is put in the context of a response to Wade. Instead of being pro-life, it is pro-legislature. It embraces the pro-legislature rationale of certain critics of Wade and of the dissents in Wade. Both deny the personhood of the unborn. (See "B." above).
3. The conclusion is further strengthened by the commonality of the jurisprudence underlying Amendment One and Wade - that human beings may be treated by lawmakers as nonpersons. (See "C." above")

Against the background, it can be argued persuasively that the historical fallacy in Wade that "the unborn have never been recognized as persons in the whole sense" would become a constitutional truism under Amendment One. As matters now stand, Wade is vulnerable to attack as an erroneous interpretation of the Constitution. Amendment One would be the Constitution.

No one can assert that Amendment One would certainly bar a future Supreme Court from overturning Wade. I do urge that the Amendment would create substantial, additional hurdles. How could lawyers argue that the unborn are persons under the Constitution when Amendment One has at least accepted, and probably ratified, their current status as nonpersons?

* * * *

In the final analysis, I cannot support Amendment One because it is wrong to make people into things. And it is especially wrong to do so in the Constitution. The great rights recognized and guaranteed by the Constitution represent the minimal code of morality deemed necessary to maintain the ideals of a just society. These rights are "implicit in the concept of ordered liberty . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . [so that] neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 381 U.S. 479, 485 (1937). "The great fundamental guarantees of the Constitution are, after all, moral standards wrapped in legal commands." P. FREUND, ON LAW & JUSTICE 35 (1968). It is true that not all moral principles must become legal commands. It is also true that neither liberty nor justice can exist if the great fundamental guarantee of the law's protection of life is meted out selectively, with entire classes of innocent persons excluded by the simple expedient of reducing them to something less than "persons in the whole sense."

In sum, Amendment One is philosophically, jurisprudentially and morally incompatible with the ethos of the pro-life movement.

II. The Practicalities

Anyone who takes lofty philosophical positions on controversial issues is vulnerable to accusations of impracticality and political naivete. Let us examine the practicalities of the two amendment proposal.

A. *Will pro-life people work for the ratification of Amendment One?* Perhaps they will. I suspect that some, especially the pre-*Wade* activists, will not. They will remember the old, bad days when legislatures were passing permissive abortion laws. A return to those days of raw legislative power is not what the pro-life movement means to them. But perhaps a new generation is willing to settle for less.

B. *Will the Amendment be ratified*? It will, of course, be opposed by the abortifacient/quality-of-life complex. The opposition will be well-financed, media-abetted, and cleverly-contrived. On the other side, the proponents will be under the handicap of urging ratification of an Amendment which protects things (not people) at the expense of people (pregnant women). How does one argue the unalienable rights of the unborn, *qua* persons, as the rationale for a constitutional Amendment, when the Amendment itself leaves those rights to the disposition of legislative majorities?

The Supreme Court, too, might get the message. (The Court is, after all, as much political as judicial.) Following proposal of Amendment One and before ratification, the court could decide to "clarify" its holding in *Wade*. Relying on *Doe v. Bolton*, the Court might opine that *Wade* has been misinterpreted: that, *per Bolton*, a physician contemplating an abortion is required to exercise his best clinical judgment to determine whether the abortion is necessary; since the only judgment a doctor is uniquely competent to make is a medical one, *Bolton* means that a state may ban all abortions other than those deemed by the attending physician to be necessary to the "health" of the pregnant woman.

Of course, we know that health has been interpreted to mean happiness, and the end result of such a decision would be the *status quo*. But the decision would have broad public appeal and would severely diminish chances of ratification of an Amendment which, by its depersonalization of the unborn, itself admits of a "health" exception to a criminal abortion statute.

C. *What kind of legislation might we expect if the Amendment were ratified*? To put it another way: To what extent will Congress protect nonpersons at the expense of the comfort and convenience of women? At the outset let us realize that anti abortion legislation is different from anti abortion-funding legislation. A fiscally conservative, states' rights congressman might well be opposed to federal funding and, at the same time, be in favor of a catalog exceptions to illegal abortion. Further, proponents of Amendment One tell us that only one quarter of the nation agrees with our position that abortion ought never be permitted except possibly to prevent the mother's death. Compromises may be anticipated. Indeed, in the legislative process, compromises are the rule rather than the exception. I take no position here on the Human Life Bill. However, I do note that it was necessary, as a compromise, to omit Equal Protection for the unborn in order to move the bill. Would a rape/incest exception be a compromise in a post-Amendment One statute? Would the woman's health? Would fetal defect? Remember that at the legislative hearings and in the subsequent congressional floor debates, pro-life people will be under the onus of arguing that the unborn are persons when Amendment One says they are not. The likely outcome is a bill with a catalog of exceptions accompanied by a plea that this is the best that can be done. And we will be under enormous pressure to accept the bill.

We will be told that if we oppose the bill, lives which could have been saved will be lost. As with the O'Connor nomination, we will be instructed to be less passionately dedicated to our moral position and more practically attuned to political realities. As with the Human Life Bill (again, without commenting on its merits), it will be urged that leadership of the pro-life movement has passed from the pro-life groups to Washington, and we ought not be so presumptuous as to oppose Washington. Finally, we will be tempted with the bait that, under Amendment One, the states are free to enact more restrictive laws; that Congress is merely setting the floor on abortions. Either we accept what Congress has done or we get nothing at all.

Admittedly, I have not been optimistic. The congressional scenario could be painted in more rosy hues. The first post-Amendment One federal statute could possibly be restrictive enough to be acceptable to the pro-life movement. Except that then we would be no better off (and probably worse off) than we were in the mid 1960's when the abortion movement started up in earnest. A media-enhanced campaign of horror stories (rape, suicide, "backstreet abortions") would engulf the country in aid of the "movement to liberalize our restrictive abortion laws."[*] Will Congress withstand the pressure? I think not. Consider:

1. If it is true that three quarters of the country opposes us, why should Congress stand with us?
2. By that time, our pro-life army will be dispersed. Some will have left in dispair because they regard Amendment One as a betrayal of principle. Others will have drifted away because the federal statute seemed to solve the abortion problem, leaving them free to get their lives back in order (the very argument that some proponents of Amendment One are making against the Human Life Bill).
3. The pro-life movement will have lost its momentum. The educational effort (a large part of many local pro-life programs) will have been hampered by the constitutionalizing of the unborns' status as things - at our urging.

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[*] It will also be urged that the flagrant violations and lack of enforcement of the statute are "making a mockery of the law." (I cannot envision the F.B.I. and local U.S. Attorneys prosecuting abortionists. Indeed, the foreseeable difficulties in Federal enforcement might persuade Congress to drop the provision for federal legistlation in Amendment One and turn it into a pure States' Right Amendment.)

Sophisticated students - an audience we must convince if we are to make in-roads on the other three quarters of the nation - will appreciate the contradiction. Further, with the idealism removed from the movement, the right to life groups will become nothing more than splinter political parties attempting to influence votes by threats of opposition or promises of support - not exactly the mushrooming grass roots movement that we have known up to now.

4. If legislatures gave in to the pressure in the 1960's - when we could argue the rights of the unborn as constitutional persons - why should they resist in the 1980's or 1990's after we have given the argument away? As one who testified before state legislative committees (and served on a gubernatorial abortion commission) and debated the issue frequently during the 1960's, I suggest that we would have less ammunition after the ratification of Amendment One than we had then.

Even if the first post-Amendment One federal statute were acceptable to us, I foresee, after its enactment, a repetition of the 1960's: the recurrence of an era of deteriorating respect for life.

D. But what about Amendment Two (the Human Life Amendment)? While I can at least understand the premises for other arguments made in favor of Amendment One, I can find nothing but naivete in the assumption that Amendment One will lead, at some future time, to a Human Life Amendment. The result, I suggest, would be just the opposite. Amendment One will kill an HLA at least during the lifetime of the youngest of the pro-lifers amongst us. Consider:

1. If the congressional legislation is acceptable to us and we get everything we want, there will be no Amendment Two

movement (or at least not an effective one). If the legislation is unacceptable, then it is unreasonable to assume that a Congress which passed an unacceptable statute will propose a Human Life Amendment. Rather we would have to start all over again, burdened by all the disadvantages that I mentioned in "C" above.

2. Add to those disadvantages the overwhelming burden of pleading to Congress, "We made a mistake with Amendment One; please give us Amendment Two." It is just plain silly to believe that anyone will listen to us. Congress will have had enough of us by that time. Amendments are not proposed willy-nilly. We will get only one bite at the cherry. If we take Amendment One, there won't be an Amendment Two. [As an aside, I would note that the situation is hardly comparable to the post-Civil War era when the 13th, 14th and 15th Amendments were ratified seriatim. We have not won a war, we are still fighting one. But if the situation were comparable, we would be required to reject Amendment One. The 13th Amendment banned slavery; it did not make slavery a congressional/state option. The abolitionists did not fight to win rights for legislatures, and they would have counted the war lost had that been the only result.]

* * * *

In order to accept Amendment One, it must be assumed that the Amendment will be ratified; that a pro-life majority will exist in the Congress in perpetuity, and that this majority will initially give us the statute we want and forever after resist pressure to dilute it. I don't accept it. We can't advocate that people are things; we can't barter our ideals; we can't sabotage our educational efforts; we can't make political deals on human life; we can't lose our dedicated activists and expect to remain effective.

CONCLUSION

The Two Amendment proposal is philosophically flawed and pragmatically inadvisable. I oppose it. I urge the pro-life movement to reject it.

TESTIMONY OF ROBERT L. SASSONE

The Second World War was seen by many of those involved in the war crimes trials as a skirmish in a larger battle to determine whether or not man has the right to make unpersons of innocent human life for the purpose of killing that innocent human life. The Declaration of Independence says man has not that right. The Hatch Amendment disagrees. Even if the previous sentence is incorrect, it is not wise to use a complicated two amendment procedure to try to do over a period of perhaps ten years what might be done in a matter of days by a statute, particularly when the Hatch Amendment would make the human life statute unconstitutional.

The abortion decisions of the early 1970's establishing abortion on demand right to the moment of birth are probably the worst example of judicial distortion of the Constitution since the Dred Scott decision which they so closely resemble. They are also probably the worst Constitutional crisis since the Civil War. The constitutional crisis is caused because in the abortion decisions the U.S. Supreme Court purported to use the Fourteenth Amendment in a way totally contradictory to the intent of the legislators who voted for it and totally opposed to the intent of such legislators relating to the right to life. It is a constitutional crisis because if Congress passes a constitutional amendment saying white and then permits the U.S. Supreme Court to say that that same constitutional amendment is now going to mean black, Congress may as well fold up and go home and give up its powers to an inferior set of courts. The Hatch Amendment is such a surrender by Congress to the U.S. Supreme Court of powers which have traditionally been exercised by Congress and which are given to Congress by the U.S. Constitution, if only Congress will exercise them.

I would like to supplement this testimony with some written material relating to the intent of Congress in passing the Fourteenth Amendment.

The abortion decisions did not establish abortion on demand by saying that there was in the Constitution a right to abortion. For this reason, the Hatch Amendment is like a quarterback sending all of his receivers to the rightside and then throwing a pass to the leftside or a batter swinging low when the pitch is high. The Hatch Amendment leaves totally untouched the problems caused by the abortion decisions of the early 1970's.

The first of these problems left untouched by the Hatch Amendment was caused by the Vuitch Decision which reversed the normal affirmative defense rule and required the prosecution to plead and prove that affirmative defenses such as necessity for the procedure did not exist. This, of course, is impossible because the abortionist need not say what he intended because of the Fifth Amendment.

The Hatch Amendment also leaves untouched the expanded right to privacy of the Roe v. Wade and Doe v. Bolton cases which was also used by the court as justification for abortion on demand.

The third aspect of the abortion cases is that they established by judicial fiat the nonpersonhood of the unborn. The Hatch Amendment would ratify the mistake of the abortion decisions by writing into the Constitution this nonpersonhood of the unborn. This would constitute the surrender by Congress mentioned previously.

As the Supreme Court pointed out, if the unborn is a person, the case for abortion collapses and the unborn must be protected by the right to life. Now under the Hatch Amendment, the Congress and the States may but need not protect the unborn. Since the unborn would be entitled to protection if they were persons, the fact that they are not entitled to protection under the Hatch Amendment establishes them as nonpersons and ratifies the distortion of the Constitution caused by the abortion decisions. Accordingly, the Hatch Amendment would make the Human Life Bill unconstitutional.

Is this saying it too strongly? There is little doubt that those who voted for the Fourteenth Amendment had no intent to prohibit antiabortion laws. The Supreme Court in the abortion decisions said it could not decide when life began. The Congress that voted for the Fourteenth Amendment and the States that ratified it were acting in the climate of an American Medical Association resolution to distribute a book claiming that all doctors in 1865 were unanimous in their belief that human life began at conception. The Congressmen that voted for it and that discussed it after it had passed agreed that person in the Fourteenth Amendment applied to anything bearing the semblance of humanity. The states that ratified it tightened their abortion laws and gradually stamped out abortion in the years just after passage of the Fourteenth Amendment. Many of these tighter abortion laws were passed within one year of ratification of the Fourteenth Amendment by the same state. They listed it as a crime against a person namely the unborn. They were worded so that the mother could be prosecuted. Shortly after voting for the Fourteenth Amendment, the Congress voted to permit the District of Columbia to pass an abortion law which stood up in a court test shortly after the ink dried on the Fourteenth Amendment. I could go on and on, and I will if asked, but I want to finish by telling you what will happen if the Hatch Amendment gets out of committee.

The Right to Life Movement is now split almost 50-50 on the Hatch Amendment. This split will not continue. When knowledge of the defects of the Hatch Amendment spreads, most of the Right to Life Movement is going to oppose the Hatch Amendment and those organizations I am associated with are going to state that a vote for the Hatch Amendment is a proabortion vote. If anything I have just stated is incorrect, please correct me now. If you have doubts or need more details about anything I have just said, I will be happy to answer any questions. Additionally ...

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December 7, 1981

TESTIMONY FOR THE RECORD

Senator Hatch's Subcommittee on
the Constitution

Prepared by:
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Re: Hatch Federalist Proposal

A.L.L. ". . . . . for God, for Life, for the Family, for the Nation"

Three weeks after the Supreme Court's abortion decisions, the Administrative Committee of the National Conference of Catholic Bishops, on Feb. 13, 1973, condemned those decisions and urged "legal and constitutional conformity to the basic truth that the unborn child is a "person" in every sense of the term from conception." The bishops quoted the statement of Pope John XXIII, in his encyclical, Pacem in Terris (para. 9), that "any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. By virtue of this, he has rights and duties of his own, flowing directly and simultaneously from his very nature. These rights are therefore universal, inviolable and inalienable." Noting that the Supreme Court "has stated that the unborn child is not a person in the terms of the Fourteenth Amendment," the bishops said, "we reject this decision of the Court because, as John XXIII says, "if any government does not acknowledge the rights of man or violates them, ... its orders completely lack juridical force."" (Pacem in Terris, para. 61) "We find," said the bishops, "that this majority opinion of the Court is wrong and is entirely contrary to the fundamental principles of morality."

When Cardinals Krol, Manning, Cody and Medeiros testified before Senator Bayh's Subcommittee on Constitutional Amendments on March 7, 1974, they affirmed their uncompromising insistence on full restoration of constitutional protection to the unborn child. Cardinal Medeiros insisted that "The constitutional amendment should clearly establish that from conception onward, the unborn child is a human person in the terms of the Constitution." "The right to life," he noted, "is described in the Declaration of Independence as "unalienable" and as a right with which all men are endowed by the Creator. The constitutional amendment should restore the basic protection for this human right to the unborn, just as it is provided to all other persons in the United States."

When a delegation from the United States Catholic Conference, led by Cardinal Cooke, presented testimony before the House Subcommittee on Civil and Constitutional rights on March 4, 1976, that testimony echoed Cardinal Medeiros by enumerating, among the points "basic to the process of formulating a constitutional amendment," that the amendment should: "Establish that the unborn child is a person under the law in terms of the Constitution from conception on;" and that "The right to life is described in the Declaration of Independence as "unalienable" and as a right with which all men are endowed by the Creator. The amendment should restore the basic constitutional protection for this human right to the unborn child."

This insistence on the restoration of personhood to the unborn child has now been implicitly repudiated by the Catholic bishops. In a memorandum on September 22, 1981, to "all Bishops," Bishop Thomas E. Kelly, General Secretary of the U.S. Catholic Conference, endorsed the proposed constituional amendment introduced by Senator Orrin Hatch (R.-Utah) and noted that the bishops' Administrative Committee described the proposal as a "step forward in the consistent path the bishops have followed since the Supreme Court Decision of January 22, 1973," Bishop Kelly enclosed with his memorandum a legal analysis that correctly noted that the Hatch Amendment "does not directly prohibit or restrict the availability of abortion. Rather, it places the extent of restriction and prohibition entirely in the discretion of the federal and state legislatures." The Hatch Amendment (S.J. Res. 110) provides:

> A right to abortion is not secured by this Constitution. The Congress and the several states shall have the concurrent power to restrict and prohibit abortions: Provided: That a law of a State which is more restrictive than a law of Congress shall govern."

In Roe v. Wade, the 1973 abortion case, the Supreme Court ruled that the woman's right of reproductive privacy includes her right to be free from unduly burdensome interference with her right to kill her baby by abortion. But this holding is premised on the Court's more basic holding that, whether or not the unborn child is a human being, he is not a person at any time prior to birth. If the unborn child were a person, he would possess the right to life and that right to life would necessarily prevail over his mother's inherently lesser right of privacy. The Court recognized this in its comment that if the personhood of the unborn child is established, the pro-abortion case "collapses". [410 U.S. at 156] And the Court indicated that if the unborn child is a person, the state might not be able to permit abortion even where it is claimed to be necessary to save the life of the mother. [410 U.S.at 157, fn. 54] In principle, the right to life of a person cannot be subject to extinction at the discretion of any person or of any legislature, whether Congress or that of a state. To the extent that one's right to life is subject to legislative discretion, he is a non-person. This is why it is accurate to say that the depersonalization of the Jews was the basic principle of the Nazi extermination program, for their lives and those of the other Nazi victims were subject to protection or forfeiture at the discretion of the public authority.

The Hatch Amendment wholly accepts this basic premise of Roe v. Wade, that the unborn child is a non-person. The Amendment subjects his right to life to the total discretion of Congress and state legislatures. It is argued on behalf of the Hatch Amendment that it is not a "states' rights" amendment. But the objection to the states' rights approach is not that Congress rather than the states should have the discretion to protect or not to protect the unborn. It is that the Constitution should not leave such protection up to the discretion of either body, whether Congress or state legislature. The specification in the Amendment that a more restrictive state law prevails does not resolve the problem. For neither Congress nor the states would be under any obligation to protect the life of the unborn child. The rulings of the Supreme Court decree that there is neither a duty nor a power in Congress or the states to protect unborn human life. The Hatch Amendment would alter that rule by restoring only the power to protect such life. The duty to protect unborn life is not restored and the unavoidable meaning of the Hatch Amdnment is that there is no such duty.

William Marshner, a leading pro-life advocate, supports the Hatch Amendment because, among other reasons, he contends that while anti-abortion legislation would be merely permissive under the Hatch Amendment, such legislation would continue to be obligatory under a proper interpretation of the Fourteenth Amendment. He is correct in his conclusion that the Fourteenth Amendment, properly construed, requires protection of unborn life; the Supreme Court's abortion rulings were a misconstruction of that amendment. However, those are the current rulings of the Supreme Court and the Hatch Amendment does nothing to reverse them, as will be discussed further below. Moreover, the Fourteenth Amendment's provisions are generalized protections of life. The Hatch Amendment is a particularized provision specifically governing abortion. It is a rule of construction, that a specific enactment will prevail over an inconsistent earlier general enactment on the same subject. The Hatch Amendment would be a clear declaration that, with respect to abortion which is now not specifically mentioned in the Constitution, Congress and the states have discretion rather than an obligation to protect unborn life.

The first sentence of the Hatch Amendment states that "A right to abortion is not secured by this Constitution." There are several difficulties with this language. As the Supreme Court itself said in the 1977 case of Maher v. Roe, the decision in Roe v. Wade "did not declare an unqualified 'constitutional right to an abortion' . . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." [Maher v. Roe, 432 U.S. 464, 473-74 (1977)] The Hatch Amendment, in declaring that a right to abortion is not secured by the Constitution, does not squarely confront Roe v. Wade because that decision did not hold in such simplistic terms that there was "a right to abortion." In Roe v. Wade, the court upheld the mother's right of reproductive privacy, which is defined by the Court as a fundamental right which can only be infringed upon a showing of a "compelling state interest" to justify that infringement. Even in the third trimester, the unborn child, according to the Court, is a non-person. During that third trimester, the Court ruled that the state could have a compelling state interest to protect "potential life." But, since it would be protection of a non-person rather than a person, the Court ruled that the state's interest in protecting that non-person, even in the third trimester, would not be strong enough to prohibit abortion where it is claimed to be necessary to preserve the mother's "life or health." [410 U.S. at 164] In the companion case of Doe v. Bolton, the court defined the health of the mother to include "psychological as well as physical well-being" and said that "the medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial, and the woman's age relevant to the well-being of the mother." [410 U.S. at 191-92] Despite the Hatch Amendment's conferral of power on Congress and the states "to restrict and prohibit abortions, " the Hatch Amendment's implicit affirmation of the non-personhood of the unborn child raises a serious question as to whether the Congressional and state power to prohibit abortion, at earlier stages as well as in the third trimester, would remain subject to the life and physical and mental health limitations enunciated in Roe v. Wade. The Hatch Amendment does not overturn the preferred status of the general right of reproductive privacy, despite its declaration that a right to abortion is not secured by the Constitution. Since the Supreme Court itself did not say there is "a right to abortion," it is a fair question as to what state interest would be required under the Hatch Amendment so as to prevail over the right of reproductive privacy on behalf of an entity which the Hatch Amendment itself affirms to be a non-person. I do not know the answer to this. But I do know that the statement of the Catholic Bishops' National Committee for a Human Life Amendment that the Hatch Amendment would "reverse the 1973 Roe v. Wade decision," is an oversimplification.

The Hatch Amendment not only accepts the basic non-personhood principle of Roe v. Wade. It aggravates that problem by writing that principle into language of the Constitution itself. It is argued by some that the Hatch Amendment is the first stage of a two-amendment approach; that Hatch will permit the states and Congress to restrict abortion and generate a pro-life climate which will enable us to adopt a second constitutional amendment to restore personhood to the unborn. It is unrealistic, however, to think that we will be able to adopt two amendments on abortion. The first constitutional amendment will be the last one. With the possible (and doubtful) exception of the Thirteenth Amendment, no constitutional amendment has ever been adopted except in response to what was perceived as a pressing need. To adopt a constitutional amendment requires great initiative and momentum. To think that such can be generated on behalf of a second amendment when the abortion problem will have been perceived to have been "solved" by legislation enacted pursuant to the Hatch Amendment, is a fantasy.

On the practical level, the Hatch Amendment would worsen, not improve, the abortion climate in this country. If Congress were to approve the Hatch Amendment, it would probably take at least four years to achieve the necessary 38 state ratifications; indeed, as the deficiencies of the Amendment become widely known, it would be doubtful whether it could ever be ratified. But even if it were finally approved by the states, it would be only after a prolonged period of probably four years or more. To achieve ratification the energies of the right-to-life movement would have to be devoted to the propagation of the basic principle of Roe v. Wade, that the unborn child is a non-person. The movement would be educating the American people to think, not that life is an unalienable gift of God, but that the unborn child is disposable in that his killing can be authorized by legislative majorities.

The effort to gain ratification of Hatch would therefore itself be a corrupting influence in American society. After ratification of Hatch, Congress would be asked to legislate against abortion. But Congress would know that its legislation would be a minimal standard, in that the states would be legislating for the protection of a constitutionally defined non-person. Deals would be made; if any minimal statute were passed by Congress, it would be likely to be riddled with exceptions, e.g., rape, incest, health of the mother, deformity of the child, etc. This minimal standard enacted by Congress would tend to become the norm rather than the minimum. States would tend to include the exceptions provided by Congress. The pressure on Congress and the states to expand the cases in which abortion would be permitted would be relentless. And the only arguements we could make in opposition would be merely pragmatic and tactical. Because we had established in the Hatch Amendment the non-personhood of the unborn child, we could no longer argue that he is entitled to protection. Having conceded that basic issue, the pro-life movement would become a permanent rear guard, fighting a delaying action here, winning an occasional victory there, but always on the defensive and always fighting on the enemy's terms. Some state legislatures would adopt strict and effective prohibitions of abortion. Other states would be wide open abortion centers. And it is fair to conclude that the general tendency would be for abortion to become generally and increasingly permissive.

The problem is compounded because the abortion of the future is likely to be by chemicals or devices which kill the unborn child before or soon after implantation of the fertilized ovum in the wall of the uterus. Can any argument possibly be effective to protect life at that earliest stage except a straightforward affirmation of the inviolable sanctity of all life? But the Hatch Amendment would prevent us from making that arguement. These youngest human beings would stand very little chance in a climate in which all unborn children are conceded to be non-persons whose lives are subject to legislative discretion.

It is argued on behalf of the Hatch Amendment that abortion is a more deeply entrenched social evil than was slavery; that every year more Americans have abortions for the first time or have family members or friends who have had abortions; that such persons develop an interest in justifying and preserving abortion; that this pro-abortion sentiment will continue to grow if we don't reverse the trend by enacting some restrictions on abortion; that the pro-abortion sentiment is too strong for us to adopt a single amendment to prohibit abortion; and that, therefore, although slavery was outlawed by a single amendment, to change the abortion climate and to restore full protection to the unborn will require a longer process and two constitutional amendments. Apart from the unrealism of the hope that we can get two constitutional amendments on abortion, the deeply and increasingly ingrained support for abortion, which I concede, argues against, not for, an approach like the Hatch Amendment. In practical terms, the Hatch Amendment would ensure that legalized abortion, to a greater or lesser degree, would be a permanent part of the American system. Inevitably, Gresham's Law would apply: bad laws and bad attitudes would drive out the good. In the discretionary abortion regime that would be instituted by the Hatch Amendment, the number of people with a vested interest in, or sympathy toward, abortion would grow under constitutional protection in a predictably permissive abortion climate in many, if not most states. We cannot change a pro-abortion attitude by constitutionalizing it.

It must be remembered that the objective of the pro-life movement is not merely to moderate the number of abortions. It is rather to recall this nation to the conviction that life must be protected because it is a gift of God. There can be no compromise on abortion. This is so because God's law in the matter of the protection of innocent life is absolute and we have no authority to abrogate it. The solution to the ingrained pro-abortion sentiment in this nation is not to compromise with it. Rather, it is to confront it and defeat it. Fortunately, we have a clear opportunity to accomplish this in the Helms-Hyde Human Life Bill (S.1741) which has been placed on the Senate calendar by Senator Jesse Helms. This bill would exercise Congress' power to enforce the Fourteenth Amendment to declare that all human beings, from conception, are persons. The Human Life Bill would enable us to argue in state legislatures that the unborn child is a person and must be protected. Political experts are convinced that the Human Life Bill has a good chance of passage in both houses of Congress in early 1982. President Reagan has already announced his support for the concept. If the Human Life Bill is upheld by the Supreme Court, we are back in the business of prohibiting abortion without exceptions. I am convinced that the enactment of the Human Life Bill is within Congress' power to enforce the Fourteenth Amendment. But if the Supreme Court declares it unconstitutional, we will have won a victory nevertheless, because such a decision would be in effect another Dred Scott decision, evoking the memory of the 1857 case in which the Court said that slaves were property rather than persons. Such a decision would provide an impetus for the adoption of a real Human Life Amendment. Either way, the Human Life Bill is a no-lose situation.

In political terms, the Hatch Amendment is going nowhere. Is is worth analyzing here only because it is useful to counter the pretensions of its proponents that it is somehow an authentic Human Life Amendment. Its proponents, including Senator Hatch himself, are sincere. But the Amendment is a sham. Once and for all, it is time to reject the pretension that the "states' rights" approach is a solution to the abortion problem.

A final word is in order on the performance of the Catholic bishops in this matter. It is common to blame the bishops'"bureaucracy" for the fact that the U.S. Catholic Conference, the bishops' National Committee for a Human Life Amendment and other Catholic agencies have persistently opposed pro-life initiatives in Congress since 1973. As Mrs. Randy Engel, executive director of the U.S. Coalition for Life, aptly commented recently, the U.S.C.C. is "a walking disaster. I think the U.S.C.C. is living on borrowed time, and if the bishops don't act, I think that the laity will." (Philadelphia Inquirer, Oct. 18, 1981, p. 18A, col. 1) I agree with the assessment, but I suggest that it is imcumbent on the Catholic bishops of the United States to take responsibility for the errors and excesses of their functionaries. Each bishop can no more escape responsibliity for the obstruction of the pro-life effort by agents of the Catholic Church than he can for the institution by those agents of naturalistic sex education in Catholic schools or their promotion of exotic foreign and defense policies that would endanger the security of the United States. Contrary to the claims of some of its proponents, the Hatch Amendment, with its depersonalization of the unborn child and its constitutional legitimization of legalized abortion, is at war with the authentic teachings of the Catholic Church. As the Declaration on Procured Abortion, issued with the ratification of Pope Paul VI on Nov. 18, 1974, declared, "It must in any case be clearly understood that a Christian can never conform to a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity of abortion. Nor can a Christian take part in a propaganda campaign in favor of such a law, or vote for it." The Hatch Amendment clearly affirms the liceity of abortion whenever a legislative majority approves it. Or, in the words of Pope John Paul II at the Capitol Mall on October 7, 1979, "If a person's right to life is violated at the moment in which he is first conceived in his mother's womb, an indirect blow is struck also at the whole of the moral order, which serves to ensure the inviolable rights of man. Among these goods, life occupies the first place."

It is appropriate here to recall the statement of Karol Cardinal Wojtyla, now Pope John Paul II, in a speech he delivered in New York City in September, 1976: "We are now standing in the face of the greatest historical confrontation humanity has gone through. I do not think that wide circles of the American society or wide circles of the Christian community realize this fully. We are facing the final confrontation between the Church and the anti-Church, between the Gospel and the anti-Gospel." (Wall St. Journal, Nov. 9, 1978) Abortion is not merely a Catholic issue. It is rather an issue of who shall be God: the real God or the State. The advocates of the Hatch Amendment mean well. But it is time for all of us to reflect on the fact that abortion presents an inescapable choice as to whether life is a gift of God or of the State. The choice is clear. Life is a gift of God. And there can be no compromise on abortion.

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December 23, 1981

Senator Orrin Hatch
Chairman
Senate Judiciary Subcommittee on the Constitution
108 Russell Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

It has come to my attention that Mr. Paul Brown of the Life Amendment Political Action Committee, in his testimony submitted to the Subcommittee on the Constitution on December 16, stated the following regarding the number of votes which SJR 110 might receive in the Senate during this Congress: "... the best case that has been made is the analysis of Mr. Douglas Johnson of National Right to Life Committee who predicts somewhere between 57 and 60..."

I have nowhere written (either in private correspondence or for publication) the prediction attributed to me by Mr. Brown. Furthermore, I have never discussed SJR 110, or any other subject, with Mr. Brown; nor have I discussed it with any member of his staff. In discussions with others, I have at times outlined different scenarios and possible circumstances under which I feel SJR 110 might gain the support of varying numbers of senators, and with respect to specific hypothetical situations I have suggested figures below, within, and above the range cited by Mr. Brown. But I have never predicted any figure. Indeed, I believe that any prognostication made at this time would have to rely considerably upon guesswork.

It is rather puzzling that Mr. Brown chose to attribute to me, by name, in a forum of record, a view which I do not hold and have never stated-- and that he did so without taking the simple precautionary step, not to say courtesy, of calling to directly check his information with me.

In order to set the record straight, I ask that this letter be entered into the official hearing record of the subcommittee, following Mr. Brown's testimony.

Respectfully submitted,

Douglas Johnson

Douglas Johnson
Legislative Director

cc: Mr. Paul Brown

Senator HATCH. We have one final witness today, and his name is David O'Steen, director of the Committee for a Pro-life Congress.

Dave, we are very happy to have you with us. We will conclude with your testimony.

I believe I have called everybody who was to testify today.

STATEMENT OF DAVID N. O'STEEN, PH. D., DIRECTOR, COMMITTEE FOR A PRO-LIFE CONGRESS

Dr. O'STEEN. Thank you, Senator.

I am David O'Steen, director of the Committeee for a Pro-life Congress. I am also executive director of Minnesota Citizens Concerned for Life. I would like to thank you for the opportunity to share our feelings here with you today. I would also mention incidentally, like one of the previous witnesses, I am a member of the United Presbyterian Church.

These hearings have established an excellent, comprehensive record which shows clearly the effect of the 1973 *Roe* v. *Wade* and *Doe* v. *Bolton* decisions of the U.S. Supreme Court. We have seen that the practical effect of those decisions has been legally unrestricted abortion and a growing practice of convenience abortion as a means of birth control.

We have also seen how the Court-mandated right to abortion has superseded the right of parents to advise and counsel their daughters, the rights of fathers, and even the rights of women to be guaranteed informed consent and full knowledge of the effects of abortion upon themselves and their unborn offspring.

For the unborn child, we have seen that the practical effect of those decisions and the Court-mandated right to abortion has been that the Congress and the States have no effective power to protect unborn life at any stage of pregnancy.

The scientific evidence presented has been clear: There can be no doubt that the unborn offspring of a human male and a human female is both human and alive. Therefore, the scientific question of what is destroyed in abortion has been answered. We know in fact that more than 12 million individual human beings have been destroyed since 1973. The abortion rate has more than doubled since 1973, and today 1 unborn child dies from abortion every 20 seconds in America.

About 18 are dying while I sit speaking to you, and 17 of them will be perfectly health babies of perfectly healthy mothers—at least 17. Almost always, these human beings are eliminated simply for the convenience of one or more others. Yet the most basic reason for humans to come together to form a society of law rather than live in anarchy is to protect individual human lives from wanton destruction by other individuals.

For all of these reasons, I can support each of the constitutional amendments which are under consideration by this committee. However, at this point in time, I believe Senator Hatch's constitutional amendment, Senate Joint Resolution 110, is of particular merit, because it also specifically addresses another aspect of our current abortion dilemma which is often overlooked but is critical to the issue as it now faces Congress. Incidentally, I would like to express special thanks on behalf of the Committee for a Pro-life

Congress and Minnesota Citizens Concerned for Life for your courage Senator Hatch in introducing this most needed amendment.

This critical aspect of the issue is that it was not the American people, acting through the Democratic process, that deprived our unborn children of protection. The Court's action in 1973 was first and foremost a tragedy for the millions of human innocents who have since perished by abortion, but it was also a tragedy for the Democratic process that has made this Republic great.

By denying to the people the right to act through their elected representatives in order to decide the fundamental question of protection of human life, a very real and damaging blow was struck at the American system.

Senate Joint Resolution 110 would simply state that no right to abortion is secured by our Constitution and that the Congress and the several States have the concurrent power to restrict and prohibit abortion. In the fundamental area of life, it would in effect return self-government to the people of America.

When the power to protect unborn human life is returned to the people and their representatives, I have no doubt that we will see the current nightmare of abortion on demand end, a national standard of protection established, and a very necessary first step taken toward building a truly caring prolife society.

As a mathematician, I have studied with much interest the various public opinion polls on this issue since 1973. I am convinced without doubt that the majority of Americans do not support the current practice of unrestricted abortion, much less the many other abuses that have followed *Roe* v. *Wade* and of which this committee has been made aware.

To those who promote and provide abortions and claim public support, we must ask just what they fear from Senate Joint Resolution 110, which would allow the public to decide. We must ask what they fear in Congress sending this amendment to the States and allowing the people to decide, through the ratification process, whether or not Court-mandated abortion on demand should continue. We all know the answers to these questions. Those who promote abortion fear the American public. They know a majority will act to stop abortion if only given the opportunity.

Finally, should not every Member of Congress, regardless of whether or not they personally favor abortion, vote to give the people of America the chance to decide this issue through the ratification or nonratification of Senate Joint Resolution 110? Our unborn brothers and sisters deserve this chance, and our Democratic ideals demand it.

Senator HATCH. Thank you so much.

We appreciate the testimony of all witnesses here today, as in the past. I think we have had almost 60 witnesses testify before the subcommittee regarding this issue.

We think these hearings have been the most wide-ranging hearings that have been held on this subject, and we feel we have had the very best people on all sides of these issues, and certainly on all sides of the issue of Senate Joint Resolution 110.

We recognize that everybody who has testified has been very sincere and very dedicated to his or her personal beliefs. We have had, it seems to me, the top authorities in the field testify in front of this subcommittee.

With this hearing, which has been a lengthy one, we now bring these hearings to a close. We will proceed with a markup at 2 o'clock today. That will be the markup of the subcommittee.

I want to compliment everybody for their efforts. I cannot say that I have always agreed with every aspect of every piece of testimony, but I will say that for the most part everybody who has testified has contributed significantly. I appreciate the respective differing viewpoints. I think, in particular, this issue deserves a free and open right to public debate, and that is what this amendment will bring about, should it be successful.

We appreciate all concerned, and with that we will recess the subcommittee until further notice.

[Whereupon, at 1:15 p.m., the hearing was recessed, subject to the call of the Chair.]

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